Federal Acquisition Regulatory Council
Proposed Action Memorandum
November 30, 2023
Invoking the Federal Property and Administrative Services Act to ban stay-or-pay contracts for federal contractors

I.   Introduction

Employer-driven debt is a growing problem in the United States, with employers increasingly shifting the financial responsibility for training, equipment, and even profits onto their workers in the form of restrictive debt obligations. One category of employer-driven debt is stay-or-pay contracts, which reduce worker mobility through the threat of financial penalties upon early resignation or termination. These contracts are becoming more prevalent, particularly among low-wage workers. The Administration can take immediate action to prohibit stay-or-pay contracts for its federal contractors through its Federal Property and Administrative Services Act ("FPASA") authority, leading to both cost savings and higher-quality services and products.[1]

II.   Justification

Traditional non-compete agreements prohibit employees who leave their jobs from working elsewhere in a given industry for a certain period of time and within a certain geographic area. Yet as the Biden Administration and state lawmakers crack down on traditional non-compete agreements, employers are increasingly relying on new, nefarious contract provisions: stay-or-pay contracts and closely related Training Repayment Agreement Provisions ("TRAP"), also known as "de facto" noncompetes.

Typically presented as a precondition to employment, stay-or-pay agreements require departing employees to pay their employer liquidated damages, sometimes in the tens of thousands of dollars, if they leave their job within a certain period of time, and can include a host of other financial penalties. TRAPs frame such damages as debt incurred for obligatory and standard on-the-job training. Such agreements can trap workers in jobs they don't want and subject them to crushing debt burdens upon separation. These contracts operate as de facto non-compete agreements,[2] and often seek to achieve the same outcome as traditional non-compete agreements through different means.

Traditional and de facto non-compete agreements are common throughout the American economy. Almost one in five American workers is subject to a non-compete agreement, and about 38% of workers have been subject to noncompete agreements at some point in their careers.[3] TRAPs and other forms of stay-or-pay contracts are becoming more common, particularly among entry-level workers, as a direct response to the increased negative attention to traditional noncompete agreements.[4] In 2022, a study estimated that major employers rely on TRAPs in sectors that collectively employ over a third of all private-sector workers in the

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[1] 40 U.S.C. § 101 et seq.
[2] Zoe Salzman, Liquidated Damages Clauses in Employment Agreements, https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v34/number-2/liquidated-damages-clauses.pdf (comparing liquidated damages clauses to non-compete agreements in their effects of preventing worker mobility).
[3] GAO, Noncompete Agreements: Use if Widespread to Protect Business' Stated Interests, Restricts Job Mobility, and May Affect Wages (May 2023), available at: https://www.gao.gov/assets/gao-23-103785.pdf., *2.
[4] Student Borrower Protection Center, Trapped at Work 4, (July 2022), https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf ("An industry trade association publication has been explicit in encouraging the use of TRAPs as a solution to bans on non-compete agreements, because TRAPs can accomplish the same goal with different terms.").

U.S.[5] While there is no comprehensive data that analyzes the prevalence of stay-or-pay agreements in government contracting, it is likely to parallel national trends, and these agreements have been documented among government subcontractors.[6]

Stay-or-pay agreements work contrary to the FPASA's statutory goals of "economy" and "efficiency."[7] As further explained below, stay-or-pay and TRAP contracts effectively act as noncompete agreements, which can suppress innovation and new business development.[8] This, in turn, reduces competition amongst potential government contractors, potentially raising prices for their goods and services. Alarmingly, the unsurmountable financial debts created by stay-or-pay contracts may also deter employees from reporting safety or efficiency concerns.[9]

III.   Current state

The FPASA authorizes the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle," namely the FPASA's goal of promoting "economy" or "efficiency" in federal procurement.[10]

Past administrations have invoked the FPASA to regulate federal contracting in various ways. In the 1970s, courts held that the FPASA authorized the federal government to require that contractors abide by certain anti-discrimination policies.[11] Other administrations have invoked the FPASA to require federal contractors to comply with certain workplace standards, including wage and price standards,[12] regulations concerning project labor agreements,[13,] and requirements that contractors provide employees notice of their rights to opt out of joining a union or paying mandatory dues outside of representational activities.[14] The federal government has also promulgated FPASA rules requiring contractors to provide disclosures of known violations of federal criminal laws or of the civil False Claims Act,[15] creating business ethics awareness and compliance programs,[16] and mandating the use of the E-verify system to verify employment eligibility of workers.[17] In 2011, the Obama administration used the FPASA to mandate that contractors implement screening systems to prevent employee conflicts of interest.[18] And in 2016, the Obama administration relied on its FPASA authority to require federal contractors to receive paid sick leave.[19]

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[5] *Id.* at 3.

[6] Robin Kaiser-Schatzlein, Pay Thousands to Quit Your Job? Some Employers Say So., The New York Times Magazine (Nov. 20, 2023), available at: https://www.nytimes.com/2023/11/20/magazine/stay-pay-employer-contract.html; Student Borrowers Protection Center, "Unconscionable" Debt-for-Training Scheme Funnels Low-Wage Tech Workers to Fortune 500 Companies; Groundbreaking Class-Action Lawsuit Seeks to Void Predatory Training Repayment Agreement Provisions (April 14, 2023), available at: https://protectborrowers.org/unconscionable-debt-for-training-scheme-funnels-low-wage-tech-workers-to-fortune-500-companies-groundbreaking-class-action-lawsuit-seeks-to-void-predatory-training-repayment-agreement-provisions/.

[7] 40 U.S.C.A. § 101; 40 U.S.C.A. § 121(a).

[8] *See, e.g.,* Mark Lemley and Orly Lobel, Banning Noncompetes Is Good for Innovation, Harvard Business Rev. (Feb. 6, 2023), available at: https://hbr.org/2023/02/banning-noncompetes-is-good-for-innovation.

[9] *See, e.g.,* Dave Jamieson, These Pilts Were Sued for Quitting. They Say It Was Dangerous To Stay., HuffPost (Oct. 6, 2023), available at: https://www.huffpost.com/entry/southern-airways-express-pilots_n_651ee853e4b0bfc227bf9b9d.

[10] 40 U.S.C.A. § 101; 40 U.S.C.A. § 121(a).

[11] *See, e.g., Contractors Ass'n of E. Pa. v. Sec'y of Lab.*, 442 F.2d 159 (3d Cir. 1971).

[12] *See, e.g., Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979).

[13] *See, e.g., Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002)

[14] *See, e.g., UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003)

[15] 48 C.F.R. § 52.203-13(b)(3)(i).

[16] 48 C.F.R. § 52.203-13(c).

[17] 48 C.F.R. § 22.1802.

[18] 48 C.F.R. § 52.203-16.

[19] Executive Order 13706 (September 7, 2015); Establishing Paid Sick Leave for Federal Contractors, 81 FR 67598.

More recently, the Biden Administration has deployed its FPASA authority in two high-profile cases: to impose a vaccine or test mandate on the federal contracting workforce and to raise the minimum wage for federal contractors' employees to $15 an hour in 2022.[20] Challengers have successfully won injunctions against both rules in federal courts—although, as explained below, for reasons that do not apply to this proposal.[21]

IV.   Proposed Action

The Administration should prohibit federal contractors from using traditional or de facto non-compete agreements, including certain stay-or-pay agreements, in any of their employment contracts.

A. *Scope of FPSA authority*

Federal courts have upheld the FPASA directives so long as the government offers good-faith arguments connecting the policy at issue to the statutory goals of "economy" and "efficiency." In *AFL-CIO v. Kahn*, the D.C. Circuit found that an executive order requiring federal contracts, in a bid to slow inflation, to include clauses requiring compliance with wage and price standards fell within the President's power under the FPASA; the court noted that the FPASA's goals of economy and efficiency are broad and found a "sufficiently close nexus" to the statute's goals because, if successful, the program could reduce government procurement prices in the future—even if in the short-run it might boost procurement costs.[22] The court emphasized "the importance to our ruling today of the nexus between the wage and price standards and likely savings to the Government[,]" noting that the decision "does not write a blank check for the President to fill in at his will."[23]

Courts have used *Kahn's* "reasonably close nexus" standard to compare an executive order's purpose with the FPASA's goals of economy and efficiency. For example, in *UAW-Labor Employment and Training Corp v. Chao*, the D.C. Circuit validated even the "attenuated" nexus between FAPASA and an executive order that required all contracts in excess of $100,000 to include a provision obligating contractors to post notices informing employees of their rights not be required to join a union or pay fees.[24] The administration had theorized that "productivity" is enhanced "when workers are better informed of their rights,"[25] a justification the Court validated even if, as it noted, "one can with a straight face advance an argument claiming opposite effects or no effects at all."[26] And, in *Chamber of Commerce v. Napolitano* a federal district court upheld a requirement that contractors ascertain the immigration status of certain new hires using E-verify, finding that a reasonably close nexus exists so long as the "President's explanation for how an Executive Order promotes efficiency and economy [is] reasonable and rational."[27] In this case, the court found that President Bush's conclusion that the E-verify system would result in fewer immigration enforcement actions, fewer undocumented workers — and "therefore generally more efficient and dependable procurement sources" — was sufficient to meet the nexus requirement.[28] The court also held that "[t]here is no requirement …for the President to base his findings on evidence included in a record."[29]

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[20] Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50985 (Sep. 14, 2021); Increasing the Minimum Wage for Federal Contractors, 86 FR 22835 (April 27, 2021); Minimum Wage for Federal Contracts Covered by Executive Order 14026, Notice of Rate Change in Effect as of January 1, 2023, 87 FR 59464. This rule has been subject to litigation, discussed further, infra, Section V.B.

[21] *See*, infra, Section V.

[22] 618 F.2d 784, 792.

[23] *Id*. at 793.

[24] 325 F.3d 360, 366 (D.C. Cir. 2003).

[25] Executive Order 13201, § 1(a), 66 FR. at 11,221.

[26] 325 F.3d 360, 366 (D.C. Cir. 2003).

[27] 648 F. Supp. 2d 726, 738 (D. Md.).

[28] *Id*.

[29] 648 F. Supp. 2d 726, 738 (D. Md. 2009)

While the case law suggests that an array of good-faith arguments can justify upholding a procurement directive under the FPASA, there are some limitations. Most notably, courts have invalidated FPASA directives that conflict with other statutes. In *Chrysler Corp. v. Brown*, the Court considered a challenge to an executive order requiring the public disclosure of information filed with the Office of Federal Contract Compliance Programs ("OFCCP") about contractors' compliance with their anti-discrimination and affirmative action requirements.[30] There, the Court determined that the information at issue fell under the purview of the Trade Secrets Act, 18 U.S.C. §1905, which generally forbids agencies from disclosing certain types of information, including "trade secrets[,]" unless "authorized by law."[31] The Court determined that the OFCCP regulations, even if promulgated under the FPASA, did not count as "authorized by law" for the purposes of the Trade Secrets Act, because nothing in the legislative history of the FPASA suggested that Congress intended to override the Trade Secrets Act preference for keeping sensitive business information confidential.[32] Importantly, however, the Court did not hold in that case that the FPASA somehow prohibits information disclosure generally, or that the regulations were at all invalid under the FPASA[33]—a point that Justice Marshall underscored in his concurrence.[34] Similarly, in *Chamber of Commerce of U.S. v. Reich*, the D.C. Circuit Court invalidated an executive order authorizing the Secretary of Labor to disqualify from federal contracts employers who hire replacement workers during lawful strikes because the National Labor Relations Act ("NLRA") preempted such a use of the FPASA.[35]

There remains some uncertainty about the extent to which FPASA directives can apply to subcontractors. In *Kahn*, for example, the court validated the wage rule under the FPASA even as applied to certain subcontractors.[36] But in another case, *Liberty Mutual Insurance Co. v. Friedman*, the Fourth Circuit invalidated an affirmative action requirement as applied to workers compensation insurance subcontractors, finding Liberty was "not itself a federal contractor and there [was], therefore, no direct connection to federal procurement."[37] Further, the court found "no suggestion that insurers have practiced deliberate exclusion of minority employees," and therefore the supposed increase in cost due to discrimination was "too attenuated."[38]

Recent decisions invalidating President Biden's vaccine mandate and minimum wage rule for contractors are discussed in detail below.[39]

B. *Proposal: prohibit non-compete and certain stay-or-pay agreements among the federal contracting workforce*

Using its FPASA authority, the administration should prohibit the use of noncompetes and certain stay-or-pay agreements by federal contractors. As many other FPASA rules have done, the proposed rule should apply firm-wide, not just to the employment contracts of employees working directly on a federal contract. The rule

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[30] *See generally* 441 U.S. 281 (1979).

[31] 18 U.S.C.A. § 1905 (West).

[32] 441 U.S. 281, 305 (1979).

[33] *Id.* at 309 n.40.

[34] *Id.* at 319. (Marshall, J., dissenting) ("Our conclusion that disclosure pursuant to the OFCCP regulations is not "authorized by law" for purposes of § 1905, however, does not mean *the regulations themselves* are 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right' for purposes of the Administrative Procedure Act"). As Marshall also notes, the OFCCP regulations at issue were arguably not promulgated in compliance with the APA, and so unlawful for additional reasons not relevant to this rulemaking. *Ibid.*

[35] 74 F.3d 1322 (D.C. Cir. 1996).

[36] The EO analyzed in *Kahn* included both contractors and "first-tier subcontractor whose contract exceeds $5 million." *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784, 786 (D.C. Cir. 1979).

[37] 639 F.2d 164, 171 (4th Cir. 1981)

[38] *Id.*

[39] *See*, infra, Section V.

should also apply to subcontractors.[40] Procedurally, the President should first issue an Executive Order to that effect. The Federal Acquisition Regulation (FAR) Council can subsequently begin the rulemaking process to promulgate the ban.

Prohibiting the use of non-compete or stay-or-pay agreements straightforwardly advances the FPASA's statutory goals of economy and efficiency in at least two ways.

First, non-compete and stay-or-pay agreements stymie competition and can therefore suppress innovation and artificially inflate costs for the government. As the FTC demonstrated in proposing its own prohibition on noncompetes,[41] the harmful effects of these exploitative employment contracts include: reducing new business formation by depriving new entrants of essential start-up talent;[42] reducing innovation;[43] and reducing workplace productivity due to job-employee mismatch.[44] Stay-or-pay agreements, in many instances, have the effect of non-compete agreements, since employees may choose to stay with an employer out of fear of the insurmountable debt burden that will attach upon their departure. Eliminating non-compete and stay-or-pay agreements will therefore enable more competition for services and products, which should help reduce prices and improve quality.

Second, eliminating stay-or-pay contracts may increase the likelihood that employees will raise safety and other concerns. Many stay-or-pay agreements attach even when an employer terminates a worker's employment, which disincentivizes workers from speaking out about unsafe or unethical workplace conditions. For example, recently, airline pilots at Southern Airways — which includes stay-or-pay provisions in its employment contracts — have reported management pressuring new pilots to fly in poor weather conditions and discouraging employees from reporting maintenance and safety issues.[45] In their counter lawsuits against Southern's stay-or-pay enforcement action, pilots allege that Southern used the training repayment agreements they signed at the beginning of their employment to "intimidate" them into "staying in jobs they are desperate to leave."[46] Without the threat of costly stay-or-pay agreements, workers may feel more comfortable raising safety and other concerns proactively, yielding not just potential cost savings and superior products and services, but also improved worker morale.

These justifications find close analogs in the reasoning that past administrations have used to impose new FPASA obligations that have been upheld in federal court. For example, the pro-competitive and safety benefits of prohibiting traditional and de facto noncompetes echo the reasoning used to justify the Carter administration's wage and price freeze, a bid to stymie rampant inflation.[47] The *Kahn* court held that the order's mere *potential* to secure long-term cost-savings (even if the policy spiked prices in the short-run) satisfied the FPASA's statutory criteria.[48] Importantly, the court did not require the government to somehow empirically prove that its suppositions would bear out; indeed, the D.C. Circuit would elaborate in 2003, in *UAW*, that what it characterized as an "attenuated" FPASA justification — as noted above, that workers better informed as to their statutory rights are more productive — nonetheless met the statutory threshold

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[40] Although, as noted above, there may be some legal risk involved in doing so. *See supra* at 4.

[41] 88 FR 3490.

[42] 88 FR 3491.

[43] 88 FR 3492.

[44] 88 FR 3485.

[45] Dave Jamieson, *These Pilots Were Sued For Quitting. They Say It Was Dangerous To Stay*, Huffington Post (Oct. 6, 2023), available at: https://www.huffpost.com/entry/southern-airways-express-pilots_n_651ee853e4b0bfc227bf9b9d?jle.

[46] *Id.*

[47] 618 F.2d 784, 792.

[48] "Finally, if the voluntary restraint program is effective in slowing inflation in the economy as a whole, the Government will face lower costs in the future than it would have otherwise.47 Such a strategy of seeking the greatest advantage to the Government, both short- and long-term, is entirely consistent with the congressional policies behind the FPASA." *Id.* at 793.

even if "one can with a straight face advance an argument claiming opposite effects or no effects at all."[49] To summarize in the words of yet another FPASA decision, this time upholding an E-verify mandate, all an administration need do is offer an economy and efficiency explanation that is "reasonable and rational."[50] Both justifications outlined above readily meet this standard.

The Obama administration's paid sick leave program for federal contractors, though apparently never challenged in court, offers further administrative precedent. The administration justified imposing sick leave requirements by predicting that a more generous benefits package would improve worker performance and attract talent to the contracting workforce.[51] The E.O. argued that providing sick leave would not only improve the "health and performance" of government contractors but would also "bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees."[52] Maintaining a competitive market for contractors, the E.O. reasoned, would create savings and quality improvement that would lead to improved economy and efficiency in government procurement.[53] Similarly, prohibiting the use of traditional and de facto non-compete agreements would likely boost employee morale and make government contracting jobs more attractive to top-notch prospective employees.

Both safety and competition justifications underpin the proposal's application firm-wide, not just to employees working on a government contract. Safety improvements cannot be achieved without company-wide buy-in, as an unsafe company culture, even if primarily developed on non-government projects, can readily bleed into contracting work. Employees may also move between contract work and non-contract work. Similarly, contractors' employees who do not work directly on a federal contract may nonetheless be well-suited to leave one firm to start or work at another firm that bids on federal contracts; therefore, a firm-wide application will likely foster a more competitive federal contracting sector. The firm-wide application aligns with past FPASA caselaw.[54] For example, in *UAW-Labor Employment and Training Corp. v. Chao*, the D.C. Circuit upheld a directive requiring contractors to post a notice "at all of their facilities" informing employees of their rights not to "join a union or to pay mandatory dues for costs unrelated to representational activities."[55] And in *Chamber of Commerce v. Napolitano* the court upheld the requirement to use E-Verify for all new employees, including those who do not work directly on a federal contract.[56]

Additionally, it is helpful to recall that past administrations have successfully withstood legal challenges to far more sweeping and intrusive federal contracting stipulations than the one proposed here.[57] Above all, in its landmark federal contracting case, *Kahn*, the D.C. Circuit upheld the Carter administration's FPASA order

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[49] 325 F.3d 360, 366–67.

[50] 648 F. Supp. 2d 726, 738

[51] 80 FR 54697.

[52] *Id.*

[53] *Id.*

[54] For example, the *Kahn* court upheld an order that restricted employee wages firm-wide. Kahn at 785-86.

[55] 325 F.3d 360, 362 (2003).

[56] 648 F.Supp.2d 726 (S.D. Md. 2009). The regulation also required employers to use E-Verify to ascertain the immigration status of *existing* employees who worked directly on a federal contract. *Id.* at 731.

[57] This reasoning also weighs against the Texas court's assertion in the minimum wage case that such a use of FPASA would run afoul of the Major Questions Doctrine (MQD). Texas v. Biden, at *19. In assessing the first prong of the MQD test, Professor Thomas Merrill articulates the features of a policy that violates MQD as including: "first, the agency decision under review is a deviation from its settled sphere of action ("novel," "unprecedented", "unheralded"); second, the agency decision has the effect of significantly changing the scope of the agency's authority ("transformative," "radical change," "wholesale restructuring,"); and third, the agency action is a big deal ("sweeping and consequential," "vast economic and political significance")." Thomas W. Merrill, The Major Questions Doctrine: Right Diagnosis, Wrong Remedy, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4437332, *6. Under this framework, as illustrated by the past use of the FPASA, the proposed rule would, in many ways, be far less reaching that past uses and not cause the radical expansion of authority that the MQD purports to impede.

establishing highly prescriptive wage and price standards.[58] The policy required contractors to keep price increases for all products, not just those subject to a federal contract, below 0.5 percent of the company's "recent rate of average price increase"; and it restricted employee wages, again firm-wide, to no more than a seven percent annual increase.[59] Such micromanaging of the core pillar of a firm's business enterprises may well mark the outer bounds of a president's FPASA authority, but in doing so offers a useful benchmark. If the Carter wage and price freeze were valid according to *Kahn*, then so too is a far more modest requirement prohibiting just one type of exploitative contract provision: traditional and de facto noncompetes.

Finally, the proposed FPASA rule here does not suffer from the defects that have led to courts striking down other FPASA impositions. It would neither contravene other federal statutes, as the invalidated FPASA rules in *Chrysler* and *Chamber of Commerce* did.[60] Again, see the subsequent section for more detail on why this proposal should survive the kinds of judicial scrutiny that have jeopardized contracting requirements about Covid-19 vaccines and the minimum wage.

V.   **Risk Analysis**

Two high-profile Biden administration efforts to impose laudable requirements on federal contractors have succumbed to legal challenges. One was the order[61] enjoined by the Fifth, Sixth, and Eleventh Circuits,[62] requiring all federal agencies to include in their new contracts a provision effectively obligating contract recipients to require their employees to wear face masks at work and be vaccinated against COVID-19. Another order increased the hourly minimum wage paid by parties who contract with the Federal Government to $15.00 for those workers working on or in connection with a Federal Government contract.[63] Despite favorable district court rulings in Arizona and Colorado,[64] a court in the Southern District of Texas enjoined the rule's application in three southern states.[65]

Though these adverse decisions may generate concerns about the feasibility of imposing new FPASA requirements in the current judicial climate, there are at least two reasons to think that the proposed action will ultimately fare better. First, the COVID and adverse minimum wage decisions—not reviewed by the Supreme Court—rely on a crabbed reading of the text of the FPASA at odds with longstanding precedent. And as several legal commentators have begun pointing out, the 5th Circuit may have overestimated the Supreme Court's appetite for further disturbing judicial precedent in the field of administrative law.[66] Second, and more importantly, the proposed ban here is distinguishable from the adverse vaccine and minimum wage cases even according to the logic of those decisions.

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[58] 618 F.2d 784 (1979).

[59] *Kahn*, at 785-86.

[60] *See generally* 441 U.S. 281 (1979); 74 F.3d 1322.

[61] Exec. Order 14,042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50,985 (2021), *revoked by* Exec. Order No. 14,099, Moving Beyond COVID–19 Vaccination Requirements for Federal Workers, 88 Fed. Reg. 30891 (2023).

[62] Commonwealth v. Biden, 57 F.4th 545 (6th Cir. 2023); Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022); Georgia v. President of the United States, 46 F.4th 1283 (11th Cir. 2022); *but see* Mayes v. Biden, 67 F.4th 921 (9th Cir. 2023).

[63] Exec. Order No. 14,026, Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 22835 (2021).

[64] Bradford v. U.S. Dep't of Lab., 582 F. Supp. 3d 819 (D. Colo. 2022); Arizona v. Walsh, No. CV-22-00213-PHX-JJT, 2023 WL 120966 (D. Ariz. Jan. 6, 2023).

[65] Texas v. Biden, No. 6:22-CV-00004, 2023 WL 6281319 (S.D. Tex. Sept. 26, 2023).

[66] *See e.g.*, Adam Feldman, Taking the Fifth, Empirical SCOTUS (Oct. 9, 2023), available at: https://empiricalscotus.com/2023/10/09/taking-the-fifth/; Chris Geidner, Supreme Court rejects two lower court rulings to allow Texas execution to proceed, LAW Dork (Oct. 10, 2023), available at: https://www.lawdork.com/p/a-dissenting-fifth-circuit-judge?r=1zaysi; Lydia Wheeler & Kimberly Strawbridge Robinson, Conservative Fifth Circuit Is Stumbling at US Supreme Court, Bloomberg Law (June 26, 2023), available at: https://news.bloomberglaw.com/us-law-week/conservative-fifth-circuit-is-stumbling-at-us-supreme-court.

A. Vaccine Litigation

The Biden Administration cited the FPASA as authority to impose on federal contractors a requirement to "provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract[.]"[67] Although the Ninth Circuit upheld the requirement as a valid use of the FPASA, district court injunctions enjoining the order were upheld in the Fifth, Sixth, and Eleventh Circuits.[68]

The Fifth Circuit, citing the major questions doctrine, found the FPASA did not clearly authorize the President to impose requirements concerning the conduct of the employees of federal contractors, as opposed to regulating the contractors themselves.[69] A bar against noncompetes and certain stay-or-pay agreements would not regulate employee conduct, even indirectly. Hence, this decision is largely irrelevant to the proposed action.

For their part, the Sixth and Eleventh Circuits relied on a crabbed reading of the terms of the FPASA. That Act authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the FPASA.[70] President Biden, like his predecessors, understood "carry[ing] out" the act as encompassing the fulfillment of its explicit purposes, including "provid[ing] the Federal Government with an economical and efficient system for . . . [p]rocuring and supplying property and nonpersonal services, and performing related functions."[71] As implemented by presidents of both parties, "an economical and efficient system" for procurement encompasses the provision of goods and services by federal contractors in an economical and efficient manner. As construed by the Sixth and Eleventh Circuits, however, the FPASA allows presidents to concern themselves only with the economy and efficiency by which the Government enters into contracts,[72] rather than with the conduct of federal contractors.

As detailed in the Ninth Circuit opinion upholding the Biden initiative (and by dissenting judges in the Fifth,[73] Sixth,[74] and Eleventh[75] Circuits), so narrow a reading of the FPASA is inconsistent with precedent and longstanding practice:

> Presidents have used the Procurement Act to require federal contractors to commit to affirmative action programs when racial discrimination was threatening contractors' efficiency; to adhere to wage and price guidelines to help combat inflation in the economy; to ensure compliance with immigration laws; and to attain sick leave parity with non-contracting employers because federal contractors were lagging behind and losing talent.[76]

The legality of these various uses of the FPASA were upheld in a series of cases by the Third, Fifth, and D.C. Circuits, as well as the U.S. District Court for the District of Maryland.[77] Congress, undoubtedly aware of

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[67] Exec. Order 14,042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50,985 (2021), *revoked by* Exec. Order No. 14,099, Moving Beyond COVID–19 Vaccination Requirements for Federal Workers, 88 Fed. Reg. 30891 (2023).

[68] In each case, the Court of Appeals approved lower court injunctions only as they applied to the respective plaintiff parties in each case. No nationwide injunction was issued.

[69] Louisiana v. Biden, 55 F.4th 1017, 1030-1033 (5th Cir. 2022).

[70] 40 U.S.C. § 121(a).

[71] 40 U.S.C. § 101.

[72] Commonwealth v. Biden, 57 F.4th at 552-553; Georgia v. President of the United States, 46 F.4th at 1294.

[73] Louisiana v. Biden, 55 F.4th at 1035 (Graves, J. dissenting).

[74] The panel upholding the final injunction was unanimous. Commonwealth v. Biden, 57 F.4th 545 (6th Cir. 2023). Judge Cole, who was not part of that panel, however, dissented from an earlier decision denying a stay of the injunction pending the appeal. Kentucky v. Biden, 23 F.4th 585, 613 (6th Cir. 2022) (Cole, J., dissenting).

[75] Georgia v. President of the United States, 46 F.4th at 1308 (Anderson, J., dissenting).

[76] Mayes v. Biden, 67 F.4th 921, 938 (9th Cir. 2023).

[77] Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964) (upholding use of the FPASA for imposing racial nondiscrimination requirements); Farkas v. Texas Instrument, Inc., 375 F.2d 629, 632 n.1 (5th Cir. 1967) (same); Am.

supportive decisions issued in the 1960s and 1970s, recodified the Procurement Act without any substantive changes in 1986 and 1996.

In 2001, President George W. Bush issued an Executive Order requiring government contractors and their subcontractors to post notices at their facilities informing their employees of certain labor rights. Congress again recodified the FPASA in 2002, explicitly indicating that the several minor edits then enacted again made "no substantive change in existing law."[78] In 2015, President Obama used the FPASA as authority to require federal contractors to provide paid sick and family care leave. The order was not challenged in court.

These precedents and Congress's repeated re-enactment of the FPASA without disturbing the executive's broad reading of presidential authority support confidence that the adverse COVID-related decisions will not prove persuasive (or, in the case of the Fifth Circuit, relevant), in reviewing an executive order barring contractors from using noncompetes and certain stay-or-pay agreements.[79]

        B.   Minimum Wage Litigation

Courts across the country have weighed in on the President's authority under the FPASA to increase contractors' minimum wage to $15 beginning in 2022, with annual adjustments thereafter. In 2022, the U.S. District Court for the District of Colorado, explaining that the FPASA has been properly used previously to regulate minimum wage for federal contractors, denied two companies' motion for a preliminary injunction to the order.[80] The U.S. District Court for the District of Arizona reached the same conclusion in a challenge brought by five states.[81] More recently, the District Court for the Southern District of Texas enjoined Biden's the minimum wage order as applied in Texas, Louisiana, and Mississippi.[82]

Both the Arizona and Colorado courts applied what has so far been the majority approach to reviewing presidential orders under the FPASA, requiring only that the order be based on "a sufficiently close nexus" between the order's requirements and the FPASA's goals of economy and efficiency in federal contracting.[83] As explained above, an order barring the use of noncompetes and certain stay-or-pay agreements by federal contractors would easily meet that standard.

Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784 (D.C. Cir. 1979) (en banc) (upholding use of the FPASA to require federal contractors to adhere to wage and price controls); Contractors Ass'n of E. Pa. v. Sec'y of Lab., 442 F.2d 159, 170 (3d Cir. 1971) (upholding use of the FPASA to require contractors to adopt affirmative action programs); UAW-Labor Employment & Training Corp. v. Chao, 325 F.3d 360, 362 (D.C. Cir. 2003) (upholding use of the FPASA to require contractors to notify employees of their right not to join a union); Chamber of Commerce v. Napolitano, 648 F. Supp. 2d 726, 738 (D. Md. 2009) (upholding use of the FPASA to require contractors to use E-Verify system to check employees' immigration status).

[78] Pub. L. No. 101-217, § 5(b), 116 Stat. 1062, 1303 (2002).

[79] Prior to the Biden Administration, the uses of the FPASA rejected by federal courts were orders purportedly in conflict with federal labor statutes. The D.C. Circuit, without calling into question any earlier decision, overturned a Clinton order purporting to bar the federal government from contracting with employers who hire permanent replacements during a lawful strike. Chamber of Com. of U.S. v. Reich, 74 F.3d 1322 (D.C. Cir. 1996). The court concluded that the Clinton order was pre-empted by the National Labor Relations Act, which guarantees the right to hire permanent replacements. *Id.* at 1339. Likewise, the U.S. District Court for the Eastern District of Texas enjoined an Obama order that would have required would-be federal contractors to disclose whether actions had been brought against them under a series of labor and civil rights statutes. In an unpublished decision, the court held that the order conflicted with the specific debarment provisions in a number of those statutes. Associated Builders & Contractors of Se. Texas v. Rung, No. 1:16-CV-425, 2016 WL 8188655, at *8 (E.D. Tex. Oct. 24, 2016).

[80] Bradford v. U.S. Dep't of Lab., 582 F. Supp. 3d 819 (D. Colo. 2022). The decision is on appeal.

[81] Arizona v. Walsh, No. CV-22-00213-PHX-JJT, 2023 WL 120966 (D. Ariz. Jan. 6, 2023). The decision is on appeal.

[82] Texas v. Biden, Case No. 6:22-cv-00004 (S.D. Tex. Sep. 26, 2023).

[83] Arizona v. Walsh, No. CV-22-00213-PHX-JJT, 2023 WL 120966, at *6 (D. Ariz. Jan. 6, 2023); Bradford v. U.S. Dep't of Lab., 582 F. Supp. 3d 819, 835 (D. Colo. 2022).

The Texas district court opinion is weak because it is based on the narrow reading of presidential authority under the FPASA that the Sixth and Eleventh Circuits followed in enjoining the Biden COVID-19 orders.[84] As explained above, that reading is unpersuasive.[85]

Moreover, even according to its own (perhaps flawed) interpretation of the FPASA's scope, the proposed ban on traditional and de facto noncompetes should pass muster. The court described the act's goal as "obtain[ing] full and open competition" using "competitive procedures" in fulfilling the Government's procurement requirements.[86] As explained above, that is precisely what the proposed action here would attempt to do.[87]

VI.   Conclusion

The President should use his FPASA authority to prohibit noncompetes and certain stay-or-pay agreements in government contracts. Doing so accords with the FPASA's goal of economy and efficiency in government contracting and aligns with the administration's commitment to bolster market competition.

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[84] Texas v. Biden, No. 6:22-CV-00004, 2023 WL 6281319, at *6-*10 (S.D. Tex. Sept. 26, 2023).

[85] The District Court also misinterpreted the Supreme Court's decision in Chrysler Corp. v. Brown, 441 U.S. 281 (1979). Chrysler, as a party to many government contracts, was required to comply with executive orders barring race and sex discrimination by government contractors. Department of Labor regulations issued pursuant to those orders required Chrysler to submit annual affirmative action and employer information reports to the Office of Contract Compliance Programs. These regulations contemplated public disclosures of information submitted to OFCCP if OFCCP determined such disclosures would be consistent with the public interest, even though that information might be exempt from mandatory disclosure as a statutory matter under the Freedom of Information Act. When a third party requested disclosure of information that had been submitted by Chrysler, Chrysler sued to enjoin the disclosure. The Court held that neither FOIA, nor the Trade Secrets Act created a private cause of action to sue for the prevention of public disclosure of the commercial or financial information that a private party had submitted to the government. The Court further held, however, that the APA did create a cause of action to challenge a particular disclosure decision as "not in accordance by law," and Chrysler was entitled to show that the disclosure would, indeed, be a violation of the Trade Secrets Act. 18 U.S.C. § 1905. That Act bars the disclosure of various kinds of commercial information to the extent "not authorized by law." With regard to the nondiscrimination executive orders, the Court held that the orders would not provide legal authority to permit disclosures otherwise barred by the Trade Secrets Act because, even if those orders were properly based on the FPASA, the FPASA did not authorize disclosure practices that would otherwise run afoul of the Trade Secrets Act. 441 U.S. at 306. The Court did not hold that the executive orders exceeded the President's FPASA authority. Texas v. Biden, No. 6:22-CV-00004, 2023 WL 6281319, at *8 (S.D. Tex. Sept. 26, 2023)

[86] Texas v. Biden, at *9.

[87] Even if the decision should be upheld by the Fifth Circuit, it is worth noting, as several legal commentators have begun pointing out, that the Fifth Circuit appears to have overestimated the Supreme Court's appetite for disturbing judicial precedent, especially in the field of administrative law. Adam Feldman, *Taking the Fifth*, EMPIRICAL SCOTUS (Oct. 9, 2023), https://empiricalscotus.com/2023/10/09/taking-the-fifth/; Chris Geidner, *Supreme Court rejects two lower court rulings to allow Texas execution to proceed*, LAW DORK (Oct. 10, 2023), https://www.lawdork.com/p/a-dissenting-fifth-circuit-judge?r=1zaysi; Lydia Wheeler & Kimberly Strawbridge Robinson, *Conservative Fifth Circuit Is Stumbling at US Supreme Court*, BLOOMBERG LAW (June 26, 2023), available at: https://news.bloomberglaw.com/us-law-week/conservative-fifth-circuit-is-stumbling-at-us-supreme-court.