ORAL ARGUMENT NOT YET SCHEDULED
No. 23-1263
(Consolidated with No. 23-1261)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RMS OF GEORGIA, LLC D/B/A CHOICE REFRIGERANTS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.,

Respondents,

AIR-CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE ET AL.,

Respondent-Intervenors.

On Petition for Review of Final Rule, 88 Fed. Reg. 46,836 (July 20, 2023)

BRIEF OF AMICUS CURIAE AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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Dated: January 12, 2024

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Under Circuit Rule 28(a)(1), the undersigned counsel certifies:

A. Parties and *Amici*

The petitioner in No. 23-1263 is RMS of Georgia, LLC d/b/a Choice Refrigerants ("Choice"). The petitioners in No. 23-1261, which has been consolidated with No. 23-1263, are IGas Holdings, Inc.; IGas USA, Inc.; BMP USA, Inc.; BMP International Inc.; L.M. Supply, Inc.; Cool Master U.S.A., LLC; Assured Comfort A/C, Inc.; Scales N Stuff, Inc.; Golden G Imports LLC; RAMJ Enterprises Inc.; and JPRP International, Inc.

The respondents in the consolidated case are the U.S. Environmental Protection Agency and Michael S. Regan, in his official capacity as Administrator of the U.S. Environmental Protection Agency.

Intervenors for respondents are the Air-Conditioning, Heating, and Refrigeration Institute and the Alliance for Responsible Atmospheric Policy.

Amicus curiae Americans for Prosperity Foundation is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

B. Rulings Under Review

Phasedown of Hydrofluorocarbons: Allowance Allocation Methodology for 2024 and Later Years, Final Rule, 88 Fed. Reg. 46,836 (July 20, 2023).

C. Related Cases

This Court has consolidated this case with *IGas Holdings, Inc. et al.*, *v. EPA*, No. 23-1261. *Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA*, No. 21-1251 (D.C. Cir.), and *RMS of Georgia v. EPA*, No. 1:23-cv-04516-vmc (N.D. Ga.), are related cases, as described by the Brief for Petitioner Choice.

/s/ Michael Pepson

CERTIFICATE UNDER CIRCUIT RULE 29(D)

Under Circuit Rule 29(d), undersigned counsel for Americans for Prosperity Foundation ("AFPF") states that to AFPF's knowledge, AFPF is the only *amicus curiae* supporting Petitioner Choice.

AFPF's brief focuses on the extent to which the American Innovation and Manufacturing Act of 2020's delegation of sweeping discretion to the EPA to make the critical policy choices involved in allocating allowances is consistent with Article I's Vesting Clause, as an originalist matter. The brief also explores whether the delegation at issue here can be sustained under the modern nondelegation doctrine. More broadly, AFPF's brief discusses the values protected by and practical importance of the Constitution's bar against delegations of Congress's exclusive legislative power to other entities, as well as the negative societal consequences that have flowed from a body of modern jurisprudence that has effectively allowed Congress to transfer Article I legislative power to administrative bodies.

/s/ Michael Pepson

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae Americans for Prosperity Foundation ("AFPF") is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Under D.C. Circuit Rule 26.1(b), AFPF further states that it is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas are the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts.

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Hydrofluorocarbon ..... HFC

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas are the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts.

Here, AFPF writes to highlight the separation of powers issues that underlie this case, which presents a familiar question: which branch of government is responsible for making public policy and how? Under the Constitution, it is not this Court's role to set public policy. Nor is it the job of unelected federal bureaucrats. Indeed, the Constitution categorically bars administrative bodies from exercising legislative power. Instead, the Constitution exclusively vests the democratically elected, politically accountable branches—Congress and the President—with resolving policy questions through the deliberately arduous legislative process, subject to constitutional limits on federal power.

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[1] Under FRAP 29(a)(4)(E), *amicus curiae* states that no counsel for a party other than AFPF authored this brief in whole or in part, and no counsel or party other than AFPF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. This brief is accompanied by a motion for leave to file.

SUMMARY OF ARGUMENT

This case is not about what constitutes sound public policy. The questions whether the American Innovation and Manufacturing Act of 2020's ("AIM Act") cap-and-trade phasedown of hydrofluorocarbons ("HFCs") is wise policy and how the Environmental Protection Agency ("EPA") should allocate allowances are not before this Court. Those policy questions are beside the point. "The question here is not whether something should be done; it is who has the authority to do it." *Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023). "That is what this suit is about. Power." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

In this country, all governmental power must flow from its proper source: We the People. Our system of government relies on the consent of the governed, memorialized in the Constitution, which exclusively tasks the People's elected representatives with making policy choices. And under the Constitution, the political branches may only do so through duly enacted legislation that survives bicameralism and presentment, a deliberately difficult process designed to ensure such laws reflect broad political consensus. Toward this end, the Constitution flatly prohibits Congress from transferring any of its legislative power to other entities. U.S. Const. art. I, § 1. Instead, such matters "must be entirely regulated by the legislature itself[.]" *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

Here, Congress has done that which the Constitution prohibits by transferring the power to make legislative policy choices to unelected administrators. A single sentence in the AIM Act grants EPA the power to choose which businesses receive allowances to produce or consume HFCs, and in what amount. This allows EPA to decide the fates of affected businesses however it wants, for whatever reason it wants. As an originalist matter, the AIM Act violates Article I's Vesting Clause because it grants EPA the power to make generally applicable policy choices that legally bind private parties. Even under the Supreme Court's modern light-touch nondelegation doctrine—which strays from the Constitution's original public meaning—this delegation is unlawful because it is devoid of *any* principle, let alone an *intelligible* principle, to bound EPA's discretion or for courts to use to ascertain whether EPA has obeyed Congress's will.

It should not be allowed to stand. "The administrative degradation of consensual lawmaking is eating away at our government's legitimacy." Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083, 1108 (2023). There is no way to sweep this constitutional disorder under the rug. And it is long past time for the judiciary to "reshoulder the burden of ensuring that Congress itself make the critical policy decisions," *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 687 (1980) (Rehnquist, C.J., concurring in judgment), by "hewing" the nondelegation

doctrine "from the ice," Antonin Scalia, A Note on the Benzene Case, Reg., July/Aug. 1980, at 28.

For the foregoing reasons, this Court should vacate the 2024 Framework Rule and hold that the AIM Act violates Article I's Vesting Clause.

ARGUMENT

I. The AIM Act Grants EPA Boundless Discretion to Make Critical Policy Choices Shaping an Entire National Industry.

"The AIM Act directs the EPA to 'phas[e] down the production [and consumption] of regulated substances . . . through an allowance allocation and trading program.'" *Heating, Air Conditioning & Refrigeration Distributors Int'l ("HARDI") v. EPA*, 71 F.4th 59, 64 (D.C. Cir. 2023) (quoting 42 U.S.C. § 7675(e)(3)(A)–(B)). "An allowance is like a license; without one, 'no person shall . . . produce' or 'consume' HFCs."[2] *Id.* at 62 (quoting 42 U.S.C. § 7675(e)(2)(A)). "By placing a cap on allowances, Congress created a kind of 'zero-sum' game for the HFC industry. Any gain in permits that one firm gets must be offset by a loss to another firm and vice versa." *RMS of Ga., LLC v. EPA*, 64 F.4th 1368, 1374 (11th Cir. 2023). The statute tasks EPA with creating and designing the "allowance

[2] Violations of AIM Act regulations carry substantial civil, administrative, and even criminal consequences, including imprisonment. *See* 42 U.S.C. § 7675(k)(1)(C) (incorporating Clean Air Act's penalty provisions); *id.* § 7413(a)–(d) (civil, criminal, and administrative penalties for violations).

allocation and trading program." 42 U.S.C. § 7675(e)(3). This gives EPA great power, effectively allowing EPA to decide which businesses survive.

Certain provisions in the AIM Act resemble "a math equation" or otherwise give EPA "detailed instructions." *HARDI*, 71 F.4th at 66–67. Congress, however, punted the critical policy choice of *who* should receive the allowances necessary to produce or consume regulated HFCs to unelected Executive officials, providing literally no guidance whatsoever as to how they are supposed to do this. *See* 42 U.S.C. § 7675(e)(3) ("[T]he Administrator shall issue a final rule—(A) phasing down the production of regulated substances in the United States through an allowance allocation and trading program in accordance with this section; and (B) phasing down the consumption of regulated substances in the United States through an allowance allocation and trading program in accordance with the schedule under paragraph (2)(C)[.]"). As EPA itself acknowledged: "In contrast to the significant detail provided in the AIM Act on how to establish production and consumption baselines and the required set percentage reductions in specific years from that baseline, the AIM Act provides EPA considerable discretion in determining how to establish the allowance program and how to allocate allowances in that program."[3] 86 Fed. Reg. 55,116, 55,142 (Oct. 5, 2021). That is an understatement.

[3] Elsewhere, EPA has put it more plainly: "There is no congressional guideline on EPA's discretion." Oral Arg. at 1:12:40–46, *Heating, Air Conditioning &*

In practical terms, what this means is that EPA has unfettered power to choose, if it wants, to allocate allowances entirely to domestic producers, thereby shutting importers out of the market, or vice versa. Likewise, EPA can choose between favoring small or large businesses, established companies or new market participants. In short, EPA has unbounded discretion to choose between the various stakeholders that produce or consume HFCs in allocating allowances. There is nothing in the statute itself that bounds EPA's discretion to refuse to allocate *any* allowances to disfavored entities. Nor does the statute constrain EPA's power to subsidize entire categories of favored market participants. *That* is legislative power to make policy choices impacting core private property and economic liberty rights. *Cf. INS v. Chadha,* 462 U.S. 919, 952 (1983) (government actions that "alter[] the legal rights, duties, and relations of persons, . . . all outside the Legislative Branch" are "legislative").

In sum, "Congress pointed to a problem that needed fixing and more or less told the Executive to go forth and figure it out." *United States v. Nichols*, 784 F.3d 666, 674 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc). "This is delegation running riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring). And it is unconstitutional.

Refrigeration Distrib. Int'l v. EPA, No. 21-1251 (D.C. Cir. Nov. 18, 2022), https://www.cadc.uscourts.gov/recordings/recordings2022.nsf/E12A5215E85A925F852588FE00472FDE/$file/21-1251.mp3.

II. The AIM Act Unconstitutionally Transfers Legislative Power to EPA.

A. The Separation of Powers Protects Liberty.

"[T]he Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights." *Nat'l Labor Relations Bd. v. Canning*, 573 U.S. 513, 571 (2014). Indeed, "[o]f all 'principle[s] in our Constitution,' none is 'more sacred than . . . that which separates the legislative, executive and judicial powers.'" *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 769 (6th Cir. 2023) (Nalbandian, J., dissenting) (quoting *Myers v. United States*, 272 U.S. 52, 116 (1926)).

"The Constitution sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2216 (2020) (Thomas, J., concurring) (citations omitted). "[T]he legislature makes, the executive executes, and the judiciary construes the law[.]" *Wayman*, 23 U.S. (10 Wheat.) at 46. "That is the equilibrium the Constitution demands. And when one branch impermissibly delegates its powers to another, that balance is broken." *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 673 (6th Cir. 2021) (Thapar, J., concurring). "The allocation of powers . . . is absolute[.]" *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 69 (2015) (Thomas, J., concurring).

"The purpose of the separation and equilibration of powers" required by the Constitution is "not merely to assure effective government but to preserve individual freedom."[4] *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting). As Madison explained: "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." The Federalist No. 47 (Madison); *see also Talk America, Inc. v. Michigan Bell Telephone Co*., 564 U.S. 50, 68 (2011) (Scalia, J., concurring) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty . . . ." (quoting Montesquieu, Spirit of the Laws bk. XI, ch. 6, pp. 151–52 (O. Piest ed., T. Nugent transl. 1949)); *In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013) (same).

This separation "might seem inconvenient and inefficient to those who wish to maximize government's coercive power." *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). But "[t]o the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J.,

[4] Indeed, "[t]he primary protection of individual liberty in our constitutional system comes from . . . the separation of the power to legislate from the power to enforce from the power to adjudicate." Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1915 (2014).

concurring in the judgment); *see Chadha,* 462 U.S. at 959. History has confirmed that the Framers were right.

B. The Constitution Bars Congress From Transferring Legislative Power to Other Entities.

Congress may not duck the Constitution's accountability checkpoints by divesting itself of its legislative responsibilities. *See NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022) (per curiam) (Gorsuch, J., concurring); *Ass'n of Am. R.R.*, 575 U.S. at 61 (Alito, J., concurring). The Constitution bars Congress from transferring "powers which are strictly and exclusively legislative" to other entities. *Wayman*, 23 U.S. (10 Wheat.) at 42; *see Loving v. United States,* 517 U.S. 748, 758 (1996).

Article I's text makes this pellucidly clear: "All legislative Powers herein granted shall be vested in a Congress, which shall consist of a Senate and House of Representatives."[5] U.S. Const. art. I, § 1. "This text permits no delegation of those powers[.]" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The Constitution's structure reenforces this point. *See* Hamburger, 91 Geo. Wash. L. Rev. at 1175–76. Indeed, "it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy v.*

[5] "The vesting of this power in a multimember legislature reflects a fundamental commitment to republican government and the representation of diverse interests in the lawmaking process." Naomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress,* 90 N.Y. U. L. Rev. 1463, 1465 (2015).

United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

C. As an Originalist Matter, Section 7675(e)(3) Violates Article I's Vesting Clause.

"Strictly speaking, there is *no* acceptable delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 419–20 (1989) (Scalia, J., dissenting) (emphasis in original). This raises the question what is "legislative power" that Congress may not delegate. "When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons[.]" *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting); *see Ass'n of Am. R.R.*, 575 U.S. at 76 (Thomas, J., concurring in the judgment); *Consumers' Rsch. v. FCC*, 88 F.4th 917, 929–30 (11th Cir. 2023) (Newsom, J., concurring in judgment). *Cf.* Philip Hamburger, Is Administrative Law Unlawful? 84 (2014) ("In general, the natural dividing line between legislative and nonlegislative power was between rules that bound subjects and those that did not."). "[L]egislative power most basically involves an exercise of will in ordaining legally binding rules. This power to will binding rules is the natural core of legislative power." Hamburger, 91 Geo. Wash. L. Rev. at 1113. Among other things, that

includes the power to "make the policy decisions when regulating private conduct[.]" *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

By that measure, 42 U.S.C. § 7675(e)(3) allows unelected ministers at EPA to exercise legislative power and is thus unconstitutional. That is because it grants EPA free-floating power to make controlling policy decisions inherent in any zero-sum regime dismantling an entire U.S. industry with significant effects on a host of other sectors of the national economy. Those fundamental policy choices are no mere details or fill-in-the-blank factfinding exercises.[6] *Cf. Gundy*, 139 S. Ct. at 2135–37 (Gorsuch, J., dissenting). That should be the end of the analysis.

But the Supreme Court's delegation precedent has strayed from the Constitution's original public meaning, as scholars and jurists alike have observed. *See, e.g.*, *id.* at 2139 (Gorsuch, J., dissenting); *Whitman*, 531 U.S. at 487 (Thomas, J., concurring); *Ass'n of Am. R.R.*, 575 U.S. at 76 (Thomas, J., concurring in the judgment); *Consumers' Rsch.*, 88 F.4th at 928 (Newsom, J., concurring in judgment); *id.* at 938 (Lagoa, J., concurring); Hamburger, 91 Geo. Wash. L. Rev. at

[6] To be sure, "[t]he line has not been exactly drawn" between "important subjects, which must be entirely regulated by the legislature itself" and matters of "less interest" that Congress can delegate to others "to fill up the details." *Wayman*, 23 U.S. (10 Wheat.) at 43. "But the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution." *Ass'n of Am. R.R.*, 575 U.S. at 61 (Alito, J., concurring); *see id.* at 86 (Thomas, J., concurring). *Cf.* The Federalist 78 (Hamilton) (Courts' "duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.").

1095 ("[T]he current nondelegation doctrine has no originalist foundation."); *see Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring); *Allstates*, 79 F.4th at 788 n.17 (Nalbandian, J., dissenting); *see also Rettig*, 993 F.3d at 417–18 (Ho, J., dissenting from denial of rehearing en banc). "[T]h[e] mutated version of the 'intelligible principle' remark" in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), that forms the basis of the "intelligible principle" test "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked."[7] *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting).

Making matters worse, this judicially created doctrine has opened the floodgates for Congress to shirk its duty to make policy choices—even and especially politically difficult and important ones—by transferring its legislative power to administrative bodies. *See Whitman*, 531 U.S. at 487 (Thomas, J., concurring); *Consumers' Rsch.*, 88 F.4th at 932 (Newsom, J., concurring in judgment). "The nondelegation doctrine purports to hold the line against congressional delegation but actually lets Congress delegate legislative power to agencies," "serv[ing] as little more than an open gate for the delegation of legislative power—even if the sign above the gate declares the opposite." Hamburger, 91 Geo. Wash. L. Rev. at 1091; *see also* Douglas H. Ginsburg and Steven Menashi, *Our*

[7] Instead, the Constitution "speaks in much simpler terms: '*All* legislative Powers herein granted shall be vested in a Congress.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring) (quoting U.S. Const. art. 1, § 1).

Illiberal Administrative Law, 10 NYU J.L. & Liberty, 475, 491–92 (2016). "This is a classic case in which a gap exists between constitutional meaning and the judicial standards for enforcement." Rao, 90 N.Y.U. L. Rev. at 1508.

As Justice Thomas has observed in a related context: "As in other areas of our jurisprudence concerning administrative agencies, we seem to be straying further and further from the Constitution without so much as pausing to ask why." *Michigan v. EPA*, 576 U.S. 743, 763 (2015) (Thomas, J., concurring) (citation omitted); *see also Ass'n of Am. R.R.*, 575 U.S. at 86 (Thomas, J., concurring) ("[O]ur mistake lies in assuming that *any* degree of policy judgment is permissible when it comes to establishing generally applicable rules governing private conduct." (emphasis in original)). *Amicus* respectively believes that this fundamental question warrants careful consideration in resolving Choice's claims.[8]

D. Section 7675(e)(3) Lacks an Intelligible Principle.

Even "[u]nder the Supreme Court's light-touch nondelegation doctrine," *Guedes v. Bureau of Alcohol*, 66 F.4th 1019, 1031 (D.C. Cir. 2023) (Walker, J., dissenting from denial of rehearing en banc), the delegation at issue here fails to pass constitutional muster.

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[8] As Paul Larkin has suggested, there may well be "multiple nonexclusive" nondelegation principles that, if enforced, would "force Congress to do its job, to prevent the President from doing Congress's work, and to avoid taking on that responsibility themselves." Paul Larkin, *Revitalizing the Nondelegation Doctrine*, 23 Federalist Soc'y Rev. 238, 263 (2022).

Under the Supreme Court's modern test, "Congress must 'lay down by legislative act an intelligible principle'" when it "confers decisionmaking authority upon agencies[.]" *Whitman*, 531 U.S. at 472 (citation omitted). To be sure, the Court has said "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[9] *Id.* at 475. *But cf.* Hamburger, 91 Geo. Wash. L. Rev. at 1098–1105 (arguing importance of delegated power is not key benchmark). But in all cases, delegations must contain standards that "are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the" agency "has conformed to those standards." *Yakus v. United States*, 321 U.S. 414, 426 (1944). And "[t]he legislature must make clear the 'general policy' to be pursued and 'the boundaries of this delegated authority.'" *Altagracia Sanchez v. Office of the State Superintendent of Educ.*, 45 F.4th 388, 401 (D.C. Cir. 2022) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

The intelligible-principle regime thus "requires a court to analyze a statute for two things: (1) a fact-finding or situation that provokes Executive action or (2) standards that sufficiently guide Executive discretion—keeping in mind that the amount of detail governing Executive discretion must correspond to the breadth of delegated power. If neither of these exist, under Supreme Court precedent, there is

[9] There may be cases where "the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative[.]'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

no intelligible principle. Rather, that law would be an unconstitutional grant of legislative power under Article I." *Allstates*, 79 F.4th at 776 (Nalbandian, J., dissenting); *see also Panama Ref. Co. v. Ryan,* 293 U.S. 388, 415 (1935). *Cf. Gundy,* 139 S. Ct. at 2141 (Gorsuch, J., dissenting). Neither condition is met here.

First, EPA's power under 42 U.S.C. § 7675(e)(3) to allocate allowances however it deems fit to whoever it wants is not contingent on fact finding or the existence of any particular situation. Instead, EPA "is free to select as [it] chooses . . . and then to act without making any finding[s]," *Panama Ref. Co.*, 293 U.S. at 432, as the agency "roam[s] at will" "in that wide field of legislative possibilities," *Schechter*, 295 U.S. at 538.

Second, 42 U.S.C. § 7675(e)(3) provides literally *no* guidance on what standards EPA should use to allocate the vast majority of all allowances for U.S. industry.[10] "Congress has declared no policy, has established no standard, has laid down no rule." *Panama Ref. Co.*, 293 U.S. at 430. Section § 7675(e)(3) "provide[s]

[10] The AIM Act does specify that some allowances must be granted on a priority basis to six types of HFC users. *See* 42 U.S.C. § 7675(e)(4)(B)(iv); *HARDI*, 71 F.4th at 63. But those six temporarily prioritized uses apparently account for less than 3 percent of regulated HFC consumption. *See* 87 Fed. Reg. 61,314, 61,316–17 (Oct. 11, 2022); Choice Br. 3 & n.2. That Congress provided guidance for what amounts to less than 3 percent of the allowances only underscores Congress's conspicuous failure to do so for the other *97 percent.* Tellingly, too, Congress has shown that it *does* know how to provide guidance and make the critical policy choices for allocating allowances in other phasedown programs. *See, e.g.*, 42 U.S.C. § 7671c(a).

literally no guidance for the exercise of discretion," *Whitman*, 531 U.S. at 474, by EPA to decide *who* should receive those allowances and what share.

This "absence of standards" makes it "impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed[.]" *Yakus*, 321 U.S. at 426. For example, there is no way for a court reviewing EPA's allowance allocations to employ the arbitrary and capricious test to determine whether EPA "has relied on factors which Congress has not intended it to consider," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), as Congress has not provided any.[11] For that matter, the statute lacks a declaration of policy, statement of legislative purpose, or even findings for the agency to "rummage[]" around in for an intelligible principle. *See Nichols*, 784 F.3d at 674 (Gorsuch, J., dissenting from denial of rehearing en banc).

While the Supreme Court's current precedent indicates this lack of guidance might be acceptable for small-bore matters like "defin[ing] 'country elevators,'" *Whitman*, 531 U.S. at 475, the policy question of how to dismantle a domestic industry is not that. Instead, "[t]hat is a 'quintessential legislative' choice and must

[11] Any novel suggestion that the Administrative Procedure Act's ("APA") general prohibition against arbitrary agency decisionmaking somehow substitutes for an intelligible principle and cures the nondelegation violation should be rejected. Such an argument has no basis in this Court's or the Supreme Court's precedent and certainly no basis in the Constitution. Nor may EPA rely on 42 U.S.C. § 7675(e)(4)(B)(ii)'s discretionary petition process to supply an intelligible principle. It does nothing to constrain EPA's powers under 42 U.S.C. § 7675(e)(3).

be made by the elected representatives of the people, not by nonelected officials in the Executive Branch." *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 547 (1981) (Rehnquist, C.J., dissenting).

"If the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution." *Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022), *cert. granted* 143 S. Ct. 2688 (2023). *Cf. United States v. Pheasant*, No. 21-cr-24, 2023 U.S. Dist. LEXIS 72572, at *22 (D. Nev. Apr. 26, 2023) (unpublished) (finding nondelegation violation where statute failed to cabin rulemaking authority), *appeal filed* No. 23-991 (9th Cir.). Such is the case here. And any suggestion that Congress's decision to provide detailed instructions in other provisions of the AIM Act regarding other aspects of the cap-and-trade phasedown somehow cures Congress's failure to provide *any* instructions as to how EPA decides *who* receives the allowances and in what quantity should be rejected. That Congress provided adequate guidance on *some* policy choices in a statutory scheme does not allow it to abdicate its duty to make *all* legislative policy choices.

Any effort by EPA to save the statute by proposing a limiting construction or promising to behave responsibly should also be rejected. EPA "cannot choose its own intelligible principle." *State of W.Va. v. Dep't of the Treasury*, 59 F.4th 1124, 1148 (11th Cir. 2023). "After all, the agency cannot change Congress's grant of broad discretion." *HARDI*, 71 F.4th at 65. And the Supreme Court "ha[s] never

suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." *Whitman*, 531 U.S. at 472. The same holds true for this Court. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020); *Whitman*, 531 U.S. at 473. Nor can constitutional avoidance rescue Congress's constitutionally flawed handiwork. *See Seila Law*, 140 S. Ct. at 2207 ("Constitutional avoidance is not a license to rewrite Congress's work to say whatever the Constitution needs it to say in a given situation."); *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018).

III. Policy Arguments Against Requiring Congress to Do Its Job Are Misplaced and Cannot Justify Ignoring the Constitution's Demands.

The sky will not fall if this Court enforces Article I's Vesting Clause. *See Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting). As Judge Thapar has suggested elsewhere, common strawman critiques advanced by proponents of the administrative state—"Congress is incapable of acting quickly in response to emergencies" and "modern society is too complex to be run by legislators"—are constitutionally irrelevant and, in any event, lack merit on their own terms. *See Tiger Lily,* 5 F.4th at 674–75 (Thapar, J., concurring); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477, 499 (2010) ("One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts."). Congress has shown that it is perfectly capable of making the policy choices associated with allowances

for analogous phasedown regimes by enacting legislation, as the Constitution requires it to do. *See, e.g.,* 42 U.S.C. § 7671c(a); *id.* § 7651c(e); *id.* § 7651d. And Congress is free to fix the AIM Act's constitutional problems, if it wishes to do so. *See Oklahoma v. United States*, 62 F.4th 221, 225 (6th Cir. 2023) ("The Constitution anticipates, though it does not require, constructive exchanges between Congress and the federal courts.").

On the other side of the ledger, the benefits of putting Congress back in the driver's seat of setting public policy—where the Constitution puts it—are immense. *See* Scalia, *supra*, at 28. Unconstitutional "[d]elegations have weakened accountable government in both political branches, allowing agencies to initiate policy and congressmen to serve as shadow administrators. This brings things too far out of alignment with the vesting of legislative and executive powers in separate branches." Rao, 90 N.Y. U. L. Rev. at 1508. This "drives a wedge between the personal interests of legislators and the institutional interests of Congress, undermining the collective legislative process established to promote the public good." *Id.* at 1477. More broadly, "[b]y shifting responsibility to a less accountable branch, Congress protects itself from political censure—and deprives the people of the say the framers intended them to have." *Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring).

On top of this, unconstitutional delegations of legislative power to putative agency experts undermines rational decisionmaking—the supposed justification for

these delegations—as these administrators often labor under confirmation, specialization, and size biases. *See* Hamburger, 91 Geo. Wash. L. Rev. at 1187–92.

Finally, delegation of legislative power to administrative bodies contributes to political polarization. *See* John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 83 Ohio St. L.J. 5, 7 (2022) ("Delegation by Congress probably has the most pervasive polarizing effects."). "The breadth of centralized legislative power" housed within the Executive branch today "displaces much state politics. It also reaches deep into private institutions and life." Hamburger, 91 Geo. Wash. L. Rev. at 1195. This "not only nationalizes American politics but also politicizes American life," turning Presidential elections into "door-die battles" in which "[a]n almost irresistible incentive exists to suppress opponents and their views—abandoning all traditions of cooperation, tolerance, and freedom of speech." *Id.*; *see also* Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 Notre Dame L. Rev. 821, 855 (2019).

Enforcing Article I's Vesting Clause on a case-by-case basis could ameliorate some of these awful effects. The time has come to do so.

CONCLUSION

For the above reasons, this Court should vacate the 2024 Framework Rule and hold that 42 U.S.C. § 7675(e)(3) violates Article I of the Constitution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of FRAP 29(a)(5) and FRAP 32(a)(7)(B) because it contains 4,950 words. This brief also complies with the typeface and type-style requirements of FRAP 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font.

Dated: January 12, 2024

/s/ Michael Pepson

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2024, I electronically filed the above Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Petitioner with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Pepson