NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-1263

(Consolidated with 23-1261)

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

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

and

MICHAEL S. REGAN, ADMINISTRATOR,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondents,

and

AIR-CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE AND ALLIANCE FOR RESPONSIBLE ATMOSPHERIC POLICY,

Respondent-Intervenors.

PETITIONER'S OPENING BRIEF

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January 5, 2024

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, petitioner RMS of Georgia, LLC d/b/a Choice Refrigerants, through undersigned counsel, hereby certifies the following as to parties, rulings, and related proceedings in this case:

Parties, Intervenors, and Amici

A. Petitioners

RMS of Georgia, LLC d/b/a Choice Refrigerants ("Choice") (23-1263); 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. (23-1261)

B. Respondents

U.S. Environmental Protection Agency and Michael S. Regan, EPA Administrator

C. Intervenors for Petitioners

None

D. Intervenors for Respondents

Air-Conditioning, Heating, and Refrigeration Institute and Alliance for Responsible Atmospheric Policy

E. *Amicus Curiae*

Americans for Prosperity in Support of Petitioner Choice

Ruling Under Review

U.S. Environmental Protection Agency ("EPA") Rule entitled *Phasedown of Hydrofluorocarbons: Allowance Allocation Methodology for 2024 and Later Years*, 88 Fed. Reg. 46,836 (July 20, 2023) ("2024 Framework Rule") implementing the American Innovation and Manufacturing Act of 2020 ("AIM Act").

Related Cases

In 2021, related to an earlier EPA rule, Choice filed a petition in the United States Court of Appeals for the District of Columbia Circuit challenging, among other things, the improper exercise of legislative power by EPA under the AIM Act. *See* Final Br. for Pet'r RMS of Georgia, LLC at 21–28, *Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA* ("*HARDI*"), No. 21-1251 (D.C. Cir. July 22, 2022), Doc. 1956091. The Court found that the constitutional legislative power issue was not administratively exhausted and did not reach the merits of that claim. *HARDI*, 71 F.4th 59, 65 (D.C. Cir. 2023).

Pursuant to federal question jurisdiction, Choice has filed a case in the Northern District of Georgia challenging Congress's improper transfer of legislative power in the AIM Act as a violation of the Vesting Clause in Article I of the Constitution. *See* JAxxxx [Complaint, *RMS of Georgia v. EPA*, No. 1:23-cv-04516-vmc (N.D. Ga. Oct. 4, 2023)].

Additionally, this Court consolidated this case with *IGas Holdings, Inc. et al.*, *v. EPA*, No. 23-1261 (D.C. Cir. Oct. 17, 2023), on September 18, 2023. *See* JAxxxx [Doc. No. 2017348]. The consolidated case challenges the 2024 Framework Rule but does not address the EPA's unconstitutional use of legislative power at issue here.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioner RMS of Georgia, LLC d/b/a Choice Refrigerants states that it is a limited liability company which is not owned in whole or in part by a parent corporation or a publicly traded company and which does not issue stock.

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INTRODUCTION

EPA's 2024 Framework Rule constitutes an unconstitutional exercise of legislative power by the Executive Branch. In the American Innovation and Manufacturing Act of 2020 ("AIM Act"), 42 U.S.C. § 7675, specifically in subsection (e)(3) (Addm. 5), Congress gave EPA the power to decide what entities would be allowed to continue their hydrofluorocarbon ("HFC") businesses and what market share each entity would be given in proportion to the rest of the market. Despite the profound re-ordering of this multi-billion-dollar industry sector, Congress provided no standards, no factors, no guides, and no constraints as to how EPA was to make such crucial determinations. Indeed, EPA admits that "Congress left it to the discretion of EPA to allocate" the allowances available to entities such as Petitioner RMS of Georgia, LLC d/b/a Choice Refrigerants ("Choice"). JAxxxx–xx [RTC 91–92]. In granting this unconstrained authority to enable or greatly reduce market share, Congress transferred legislative power to unaccountable bureaucrats, which EPA used to establish a code or legal "framework" that negatively affected Choice.

EPA, however, is constitutionally precluded from exercising legislative power. To prevent unconstitutional transfers of legislative power, courts make sure that Congress has provided standards that constrain agency discretion to issue general laws that impinge on liberty or alter legal relations. The Supreme Court has

held that where a statute does not prescribe rules of conduct for ordering liberty, but instead authorizes the Executive Branch to make such codes, there is an unconstitutional transfer of legislative power. Such is the case here.

JURISDICTION

Under § 307 of the Clean Air Act, 42 U.S.C. §§ 7607(b)(1), and subsection 7675(k)(1)(C) of the AIM Act (Addm. 10) which makes Clean Air Act § 307 applicable to "any rule, rulemaking, or regulation" promulgated under the AIM Act, this Court has jurisdiction to review EPA's 2024 Framework Rule implementing the AIM Act.

This appeal is timely because the 2024 Framework Rule was published on July 20, 2023, and Choice filed its petition 56 days later, on September 14, 2023. *See* JAxxxx [*Phasedown of Hydrofluorocarbons: Allowance Allocation Methodology for 2024 and Later Years*, 88 Fed. Reg. 46,836 (July 20, 2023) ("2024 Framework Rule") (codified at 40 C.F.R. pt. 84)]; JAxxxx [*Petition*, Doc. No. 2017301]; *see* 42 U.S.C. § 7607(b)(1) (providing 60 days to file direct appeal). Choice has adhered to the Court's scheduling order issued December 18, 2023. *See* JAxxxx [Doc. No. 2031956].

STATEMENT OF ISSUES

1. Whether the 2024 Framework Rule is not in accordance with law or constitutional power because EPA exercised legislative power when it established

the standards for determining which entities would or would not be allocated the allowances required to participate in the ongoing HFC market. EPA exercised this power allegedly pursuant to subsection (e)(3) of the AIM Act, 42 U.S.C. § 7675 (e)(3) (Addm. 5), which unconstitutionally transfers legislative power to EPA.

STATEMENT OF THE CASE AND BACKGROUND

Choice is an innovative, small American business that for more than 15 years, has imported, produced, and sold refrigerants in the U.S. refrigerant market. JAxxxx–xx [Dec. 19, 2022 Ltr. at 1–2]. Choice was one of the first EPA-certified refrigerant reclaimers in the United States. *Id*. at xxxx [Ltr. at 2]. Choice's flagship product is a patented, proprietary HFC blend which is an environmentally preferrable substitute for older, ozone-layer-depleting refrigerants. *Id*. at xxxx [Ltr. at 3]. Choice's products are subject to the AIM Act and cannot be produced or imported without EPA-issued allowances.

I. THE AIM ACT

On December 27, 2020, Congress passed the AIM Act as part of an omnibus budget measure. Pub. L. 116-260, div. S, § 103, Dec. 27, 2020, 134 Stat. 2255, codified at 42 U.S.C. § 7675. The Act has no policy statement, simply its title. *See* 42 U.S.C. § 7675(a) (Addm. 2). Generally, the Act establishes a cap-and-trade program to phase down HFC production and use in the United States. The Act provides a list of HFC products, referred to as "regulated substances," that are

subject to the Act while giving EPA the ability to adjust the list subject to particular processes and standards. *Id*. § 7675(c) (Addm. 2–3).

The AIM Act dictates in detail how EPA should calculate the "baseline" for effecting the phasedown, to the point of providing specific weights or "exchange values" for each product, leaving EPA to find related facts and providing discretion and requirements for changing the weight of certain variables. *Id*. § 7675(e)(1)(B)–(D) (Addm. 3–4). The phasedown occurs in five steps. *Id*. § 7675(e)(2)(C) (Addm. 4). In the first phase, covering years 2022 and 2023, HFC production and consumption was limited to 90% of the baseline. *Id*. For the phase impacted by the 2024 Framework Rule, 2024–28, production and consumption are capped at 60% of the baseline. *Id*. The phasedown ends in 2036, with use to be only 15% of the baseline—meaning HFC use will have been effectively phased out, having been reduced by 85%. *Id*.[1]

The phasedown is to be accomplished by way of a diminishing supply of "allowances." *Id*. § 7675(e)(2)(A)–(D) (Addm. 4). An "allowance" is "a limited authorization for the production or consumption of a regulated substance." *Id.*

[1] The Act also provides requirements, standards, and procedures for things such as accelerating the phasedown, regulating any process (*i.e.*, installation, service, repair, or disposal of HFC-containing equipment), phasedowns within sectors of use, and international cooperation. *Id*. § 7675(f)–(j) (Addm. 6–9).

§ 7675(b)(2) (Addm. 2). Practically speaking, allowances are a right to participate in the U.S. refrigerant market as controlled by EPA. The AIM Act provides that certain essential applications/uses are to receive a five-year priority for allowances and provides certain standards for EPA to add to, adjust, or extend such priorities. *Id*. § 7675(e)(4) (Addm. 5–6). These temporarily prioritized applications account for less than 3% of the HFCs consumed in the United States.[2]

Unlike the detail provided in some parts of the statute, the AIM Act provides EPA absolutely no guidance or standards for allocating the allowances that control the U.S. market. The Act merely states:

> The 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 [timetable set by Congress].

Id. § 7675(e)(3) (Addm. 5). Thus, while the Act provides certain standards for dates, of phase down milestones, which chemicals are to be regulated, and certain other details of the allowance program, it does not provide standards for the most critical

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[2] See 42 U.S.C. § 7675(e)(4)(B)(iv) (Addm. 5); Notice, *Phasedown of Hydrofluorocarbons: Notice of 2023 Allowance Allocations for Production and Consumption of Regulated Substances Under the American Innovation and Manufacturing Act of 2020*, 87 Fed. Reg. 61,314, 61,316–17 (Oct. 11, 2022) ("2023 Allocation Notice") (application-specific allowances account for 5,426,319.9 consumption allowances out of 273,498,315 total consumption allowances).

question of who should and should not be issued allowances, why, or in what proportion to others in the U.S. Market. *Id.* § 7675 (Addm. 1–10). Because participation in the U.S. refrigerant market is now completely controlled through the AIM Act allowance program, the power to decide who gets allowances is essentially the power to dictate market share and allocation of the market itself. By taking advantage of the absence of any congressional guidance regarding allocation of allowances, and instead making such unfettered decisions itself, EPA exercised legislative power under subsection (e)(3).

II. EPA'S RULES AND ALLOWANCES

EPA has taken various steps to implement the AIM Act including the promulgation of "framework" rules and the issuance of allowances through Federal Register notices. In 2021, EPA finalized a rule describing its framework or standards for making allocations of allowances for the first phase of the cap-and-trade program. *See Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act*, 86 Fed. Reg. 27,150; 27,166; 27,178 (proposed May 19, 2021) (to be codified at 40. C.F.R. pt. 84), ("2021 Proposed Framework") (Addm. 12, 14, 19); *Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act*, 86 Fed.

Reg. 55,116, 55,118 (Oct. 5, 2021) ("2022–23 Framework Rule") (codified at 40 C.F.R. pt. 84) (Addm. 23, 24).

Because its initial framework covered only the first two-year phase of the cap-and-trade program, EPA subsequently proposed and finalized the 2024 Framework Rule establishing the standards for issuing allowances for the second step of the phasedown covering years 2024–28. *See* JAxxxx, xx [*Phasedown of Hydrofluorocarbons: Allowance Allocation Methodology for 2024 and Later Years*, 87 Fed. Reg. 66,372, 66,379 (Nov. 3, 2022) (to be codified at 40 C.F.R. pt. 84) ("2024 Proposed Framework")]; JAxxxx [2024 Framework Rule, 88 Fed. Reg. at 46,853].

In order to hand out allowances under its framework rules, EPA issued annual notices announcing the number of the allowances that the agency was providing pursuant to the Framework Rules it had established. *See, e.g.*, Notice, *Phasedown of Hydrofluorocarbons: Notice of 2024 Allowance Allocations for Production and Consumption of Regulated Substances Under the American Innovation and Manufacturing Act of 2020*, 88 Fed. Reg. 72,060 (Oct. 19, 2023) ("2024 Allocation Notice"); *see also* 2023 Allocation Notice, 87 Fed. Reg. at 61,316–17; Notice, *Phasedown of Hydrofluorocarbons: Notice of 2022 Allowance Allocations for Production and Consumption of Regulated Substances Under the American*

Innovation and Manufacturing Act of 2020, 86 Fed. Reg. 55,841, 55,842 (Oct. 7, 2021) ("2022 Allocation Notice").

A. Previous Framework

In its earlier rulemaking statements, EPA recognized that its power to choose allowance recipients was uncircumscribed. *See* 2021 Proposed Framework, 86 Fed. Reg. at 27,150; 27,166; 27,178 (noting EPA's "considerable" and "significant" discretion in assigning allowances) (Addm. 12, 14, 19). Faced with the absence of any standards in the AIM Act itself, rather than base the allocation framework on criteria and standards chosen by Congress, EPA invented its own standards. EPA stated:

> [C]onsiderations for determining who should receive allowances in this initial rulemaking would include providing as seamless a transition as possible to a regime where allowances are needed to produce and import HFCs, promoting equity, timeliness of implementation, and availability of robust data.

86 Fed. Reg. at 27,169 (Addm. 16). Other than perhaps timeliness of implementation, these standards are not found in the AIM Act itself, nor does the timeliness factor identified by EPA play a role in identifying allowance recipients.

In the course of proposing allocations under the AIM Act, EPA acknowledged that Congress was presumed to know the law and would have been familiar with how EPA previously went about phasing out ozone-depleting substances under the Clean Air Act, which perhaps could provide standards for allocating allowances. Yet

EPA felt it was free to depart from the Clean Air Act and develop its own approach for the AIM Act's cap-and-trade program. *See* 86 Fed. Reg. at 27,154 (stating that "Congress is generally presumed to legislate with an awareness of the existing law that is pertinent to enacted legislation," and noting the "similarities [of] the text, structure, and function" in the AIM Act and the EPA "program phasing out ozone-depleting substances," but concluding that EPA was permitted to "build on its experience" to adopt a different approach) (Addm. 13).[3]

In deciding how to allocate allowances, EPA proposed five different allocation schemes for determining HFC allowance recipients, suggesting that the schemes may change over time. *See id*. at 27,203 (Addm. 20). First, EPA proposed to allocate "allowances based on past production and consumption from a set period of years and only adjusting allowance holders to reflect transfers between companies." *Id*. Second, EPA proposed to allocate "allowances based on a reevaluation of the most recent years of production and consumption data as reported to EPA (*e.g.*, three years)." *Id*. Third, EPA considered allocating "allowances based on past production and consumption, but requiring a fee for every allowance

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[3] EPA recognized that in the prior cap-and-trade phaseout under Clean Air Act "Title VI, EPA allocated baseline allowances and annual year allowances derived from … *company-specific* baselines." 86 Fed. Reg. at 27,168 (Addm. 15) (emphasis added) (footnote omitted). Here, however, EPA proposed and ultimately implemented "a different approach for allowances," to allow for greater agency "flexibility." *Id*.

provided for production or import of HFCs." *Id*. Fourth, EPA suggested it might "[e]stablish[] an auction system for the total set, or some subset, of generally available allowances."[4] *Id*. Fifth, EPA sought input as to "[a] combination of the above approaches, such as phasing in the use of an auction or fee over time." *Id*. None of the schemes proposed by EPA—nor the concept that allocation scheme could change over time—appears in the AIM Act.

After rejecting the ozone-depleting substances statute and regulations as standards and proposing five alternative sets of standards, EPA ultimately selected its first proposal. EPA chose to give 2022–23 general pool allowance allocations to companies that historically had imported HFCs based on their three highest years of production or consumption between 2011 and 2019, but only for companies still in business in 2020. JAxxxx [87 Fed. Reg. 66,377].[5]

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[4] Allowances in the "general pool" are those not set aside for by EPA for priority applications or for new market entrants, as discussed below. *See* JAxxxx [2024 Framework Rule, 88 Fed. Reg. at 46,837] (referring to the "general pool" and "new market entrant pool").

[5] EPA also decided to set aside a pool of allowances to those "that may have had particular challenges entering the HFC import market due to systemic racism, market-access barriers, or other challenges particularly faced by small disadvantaged businesses such as minority- and woman-owned small businesses." 86 Fed. Reg. at 27,177 (Addm. 18). EPA similarly acknowledged that these set-asides deviated from its prior ozone-depleting substances program. *See id*. at 27,176. Nor is such a set-aside referenced in the AIM Act (Addm. 17).

Having decided to grant allowances based on historic activity in the years 2011 through 2019, EPA then determined that import activity would be judged solely based on what company reported the imports under the Greenhouse Gas Reporting Program ("GHGRP"). EPA had invented GHGRP a decade before the AIM Act was passed and the GHGRP was not mentioned in the AIM Act. 2022–23 Framework Rule at 55,144–45 (Addm. 28–29). Nor is the GHGRP authorized by any congressional legislation.

Finally, for purposes of enforcing its newly constituted allowance system, EPA claimed the ability to "retire, revoke, or withhold allowances as well as potentially ban a company from receiving future allowances as administrative consequences[,]" a power not conveyed in the Act. 86 Fed. Reg. at 55,169 (Addm. 30).

B. The Rule at Issue: 2024 Framework Rule

Because the 2022–23 Framework Rule covered only the first step in the AIM Act phasedown, EPA proposed a second framework rule, the 2024 Proposed Framework, to cover the second phasedown step for years 2024 through 2028. *See* JAxxxx [87 Fed. Reg. at 66,372]. EPA explained in its proposal that it was required "to establish the methodology for allocating [HFC] production and consumption allowances for the calendar years of 2024 through 2028," *id*., because the prior

Framework Rule "did not establish any allocation methodology for further years." JAxxxx [87 Fed. Reg. at 66,376].

In its new proposal, EPA reiterated that it believes itself free to adjust the allocation standards and methodology for various years of the AIM Act phases. *Id*.[6] In a nod to the "standards" for allocation it had identified for the prior framework, EPA again articulated some of the legislative goals it had itself selected: a seamless transition during phasedown, timely implementation, and using robust data. *See id*. EPA noted, however, that unlike the prior framework, EPA was not proposing to establish a new pool of set-aside allowances pursuant to a "promoting equity" standard. JAxxxx [*Id*. n.16]. EPA also identified other policy factors it claimed that it "has been considering" when evaluating possible allocation standards. JAxxxx [87 Fed. Reg. at 66,379]. Such factors included ease of implementation, consistency with the statute, "facilitating an efficient market, … transparency and certainty[,] … distributional effects," changing markets, unexpended allowances, supply issues, "small business implications … minimizing fraud[,] … and other

[6] In the 2024 Proposed Framework, EPA was suggesting using only one set of standards during 2024–28 but solicited comment as to whether it should revisit standards and methodology immediately before or after each phase change rather than in conjunction with the phases. *Id*. (suggesting the method could change in 2028 or 2030 instead of 2029, when the next phase starts).

factors." *Id*. EPA did not claim that these factors are found or based in the AIM Act, and thus they appear to be EPA-created.

For the 2024 framework, EPA proposed to again base allowances on an entity's "three highest years" of use between 2011 and 2019, but now with adjustments for the new entrants from the prior set-asides. JAxxxx [87 Fed. Reg. at 66,377]. Consistent with its previous statements that it was free to establish a new framework periodically, EPA acknowledged that it had again considered "fee-based or auctioned" allocations. JAxxxx [87 Fed. Reg. at 66,379]. EPA further disclosed that for the new framework it considered using allocations to "incentivize certain behavior." JAxxxx [87 Fed. Reg. at 66,380].

Choice submitted comments on the 2024 Proposed Framework addressing several topics, including serious concerns that the AIM Act unconstitutionally transferred legislative power to EPA. JAxxxx–xx [Dec. 19, 2022 Ltr. at 15–18]. In its response to comments, EPA refuted Choice's assertion, claiming that the delegation in the AIM Act is narrower than other delegations upheld by the Supreme Court, that the AIM Act establishes priorities for certain applications, and that it was appropriate for Congress to leave allocations to EPA discretion so long as EPA acted reasonably, particularly because companies are free to buy allocations from other entities. JAxxxx–xx [RTC at 90–92].

On July 20, 2023, EPA finalized its 2024 Framework Rule. *See* JAxxxx [88 Fed. Reg. 46,836].

C. Allocations to Choice

When EPA ultimately announced how many allowances it was handing out to various companies in its 2024 Framework, Choice received fewer allowances than its pre-AIM Act market share warranted. *See* 2024 Allocation Notice, 88 Fed. Reg. at 72,063. As a result of EPA's approach to distributing allowances, Choice estimates that it received about 30% fewer allowances than if EPA had chosen a system that reflected actual market share (even after considering the AIM Act's step-by-step phasedown schedule).

The shortfall of allowances to Choice was a function of EPA making unfettered decisions as to what companies should receive allowances. Numerous allowances properly attributable to Choice's products were instead improperly granted to a company that had arranged for Choice's imports, even though the products were shipped directly from overseas to Choice's manufacturing facility in Alpharetta, Georgia. EPA also gave a considerable number of allowances attributable to imports of Choice's patented products to a foreign company that had infringed Choice's patent by illegally importing shipments "pirated" refrigerants. *See* JAxxxx–xx, xx–xx [Dec. 19, 2022 Ltr. at 2–5, 7–11]. There are no standards in the AIM Act that guide EPA as to how allowances should be allocated in these

situations, or any other situation, yet EPA took it upon itself to invent standards for its determination to give allowances to these other companies rather than to Choice.

Because Choice's business and market share are unlawfully limited by the 2024 Framework Rule, Choice timely filed its petition for review of the 2024 Framework Rule on September 14, 2023. Petition, Doc. No. 2017301. On September 18, 2023, Choice's case was consolidated with a separate, unrelated challenge brought by IGas Holdings, Inc. and others. Consolidation Order, Doc. No. 2017348.

SUMMARY OF THE ARGUMENT

Congress is constitutionally prohibited from transferring, and EPA is constitutionally prohibited from exercising, legislative power.

The AIM Act, however, transferred legislative power to EPA to determine which market participants would be granted the liberty of remaining in the HFC industry, which entities could not continue, and whether or to what extent their market share would be reduced. EPA unconstitutionally exercised that legislative power when it developed the standards in the 2024 Framework Rule for distributing, withholding, or revoking market participation rights to or from businesses already in the market.

EPA does not deny that it exercised legislative power. Rather, EPA evades the question and argues that whatever government power it flexed, the delegation from Congress was constitutionally permissible so long as it was accompanied by a

statement of general policy, a mere "intelligible principle." But that has never been true; and even so, the AIM Act contains no such relevant principle.

In every case where the Supreme Court has upheld a statute against an alleged transfer of legislative power, the statute not only provided a "general policy" to guide the implementing agency, but also provided standards that the agency had to apply in carrying out the will of Congress. These standards, not mere policy goals, have supplied the "intelligible principle" which *constrains* agency action, which sets the appropriate boundaries for agency authority, and which prevents the exercise of delegated authority from also being a transfer of legislative power. Further, the standards and constraints that exist in a statute must apply to the specific discretionary power granted; the mere existence of broad policy objectives or elsewhere-applicable standards in one part of a statute cannot save an unconstitutional grant of legislative power in another section of the statute. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 416–17 (1935) (holding subsection of statute unconstitutional despite statute's "declaration of policy" declaring national emergency and listing several "polic[ies] of Congress").

Here, the AIM Act contains standards for items such as the rate of phasing down HFC usage, how to set a baseline, and how to identify essential uses of HFC products, but the statute contains no standards for the most critical task of identifying which market participants, such as Choice, should receive the allowances needed to

continue in the refrigerants business and what participants will have what market share. Because the AIM Act leaves EPA free to set the standards for who stays in business, and who withers away, the statute enables EPA to legislate.

EPA admits that the AIM Act granted it discretion as to how to allocate allowances and claims that it may do so as long as it acts in a reasonable manner, reasonably explained. This statement is an admission that Congress failed to speak to the issue, as well as an invocation of *Chevron*. But even "reasonable" action by EPA cannot remedy unconstitutional grants or exercises of legislative power.

Allowing Congress to delegate such unfettered power to re-order industrial markets would essentially appoint EPA as a market czar. This is especially concerning in light of EPA's penchant for using cap-and-trade schemes to control industrial activity, a concern that the Supreme Court has voiced in several key cases.

EPA's 2024 Framework Rule and the subsection of the AIM Act upon which it is based is unconstitutional.

STANDING

Choice has been injured by EPA's 2024 Framework Rule and has standing. "Article III standing requires that a petitioner show an 'injury in fact,' a 'causal connection' between the injury and the challenged conduct, and a likelihood 'that the injury will be redressed by a favorable decision.'" *Am. Fuel & Petrochemical Mfrs. v. EPA*, 3 F.4th 373, 379 (D.C. Cir. 2021) (quoting *Lujan v. Defs. of Wildlife*,

504 U.S. 555, 560–61 (1992)). Choice's products are regulated, and its market activity limited by the 2024 Framework Rule, reducing Choice's business. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) ("Economic harm to a business clearly constitutes an injury-in-fact. And the amount is irrelevant. A dollar of economic harm is still an injury-in-fact for standing purposes.") (internal citation omitted). Choice's harm is directly linked to EPA's 2024 Framework Rule and can be redressed by this Court reversing EPA's unconstitutional action.

STANDARD OF REVIEW

The Court may reverse EPA's 2024 Framework Rule or any action of the Administrator if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if it is "contrary to constitutional right, power, privilege or immunity." 42 U.S.C. § 7607(d)(9)(A)–(B); 42 U.S.C. § 7675(k)(1)(C) (Addm. 10). The Constitution "permits no delegation of" legislative power, and whether a statute transfers "legislative power is a question for the courts… ." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–73 (2001). The constitutionality of the AIM Act is reviewed *de novo*. *See Woodhull Freedom Found. v. United States*, 72 F.4th 1286, 1297 (D.C. Cir. 2023) ("Questions of statutory interpretation and constitutional law are likewise reviewed *de novo*.") (internal citation omitted); *United States v. Bronstein*, 849 F.3d 1101, 1106 (D.C. Cir. 2017) (reviewing a statute for unconstitutional vagueness *de novo*).

ARGUMENT

I. THE EXECUTIVE BRANCH, INCLUDING EPA, IS CONSTITUTIONALLY PRECLUDED FROM LEGISLATING

The Executive Branch of the United States government, including EPA, is constitutionally precluded from exercising legislative power. Before addressing the 2024 Framework Rule specifically, it is important to briefly reiterate this primary and presumably undisputed legal principle. Regardless of how doctrines are denominated or what tests are applied, this separation-of-powers requirement remains inviolate in our Constitutional republic.

Through the Constitution, the People of this Nation transferred enumerated and limited sovereign powers to the federal government. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2333 (2020) (Thomas, J., concurring). The Constitution, by design, vested separate and largely exclusive powers, specifically legislative, executive, and judicial powers, in separate branches of the United States government. *See* U.S. CONST. art. I, § 1 (legislative), art. II (executive), § 1, art. III, § 1 (judicial). This separation of powers not only protects one branch of government from another, but "[t]he structural principles secured by the separation of powers protect the individual as well." *DOT v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 55 (2015) (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)).

The Constitution gives Congress, and Congress alone, the power to legislate. U.S. CONST. art. I, § 1. The power to legislate is the power to make general,

prospective, binding rules that limit liberty. *See* Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 84–85, 129 n. a (2014); Philip Hamburger, *Nondelegation Blues*, 91. GEO. WASH. L. REV. 1083, 1113 (2023)[7]; *I.N.S. v. Chadha*, 462 U.S. 919, 952 (1983) (referring to legislative action as that which "had the purpose and effect of altering the legal rights, duties, and relations of persons"). Legislating involves more than the selection of a policy. *See Opp Cotton Mills v. Adm'r of Wage and Hour Div*., 312 U.S. 126, 145 (1941) ("The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct."); *id*. at 144 (where a statute sets up standards for the guidance of the administrative agency "such that Congress, the courts[,] and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function").

The Constitution makes clear that legislative power cannot be shared or transferred; it states: "*All* legislative Powers herein granted *shall be vested* in a Congress of the United States … ." U.S. CONST., art. I, §1 (emphases added). Of the three Vesting Clauses, only the clause that confers legislative power refers to "all" power of that type. *See* U.S. CONST. art. I, § 1 ("All legislative Powers … ."), art. II ("The executive Power … ."), § 1, art. III, § 1 ("The judicial Power … .").

[7] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3990247

Additionally, the Vesting Clauses not only transfer the People's separate powers but say where each power "shall" and thus *must* be located. The phrase "shall be vested" reinforces that "the Constitution's vesting of powers is not just an initial distribution[,]" it is a permanent placement. *See* Hamburger, *Nondelegation Blues*, *supra* p. 20, at 1174; *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (accompanying the assignment of legislative power to Congress, "is a bar on its further delegation").

Nor has there been any equivocation in the Supreme Court's statements that legislative power belongs exclusively to Congress. *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("That [C]ongress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."); *see also Wayman v. Southard*, 23 U.S. 1, 20 (1825) ("It will not be contended that Congress can delegate … powers which are strictly and exclusively legislative."); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928) ("it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch"). Moreover, when an agency provides legislative standards that Congress omitted, the selection of such standards is "*itself* … an exercise of the forbidden legislative authority." *Whitman*, 531 U.S. at 473.

II. THE AIM ACT TRANSFERS LEGISLATIVE POWER TO EPA

In establishing new standards for who may receive the HFC allowances created under the AIM Act, EPA is legislating. Quite simply, EPA is deciding which businesses may continue in the market, and what their market share will be. Indeed, EPA does not deny that it is exercising legislative power, rather it conspicuously avoids characterizing the power and authority granted to it as legislative or executive. EPA simply argues that the delegation at issue, whatever it may be, is narrower than other delegations upheld by the Supreme Court. JAxxxx [RTC at 90]. But a "narrow" grant of legislative power is still unconstitutional. Nor is a grant of authority something less than a divestment of legislative power merely because it is accompanied by a statement of policy or by standards that do not constrain the power granted. EPA's assertions to the contrary are belied by examination of the court opinions it relies upon and the statutes they evaluated.

A. EPA Does Not Deny That It Is Legislating Under AIM Act Subsection (e)(3)

EPA does not deny that it is legislating. EPA merely asserts that the delegation at issue here is narrower than others upheld by the Supreme Court. *See* JAxxxx–xx [RTC 90–91]. Nowhere, however, does EPA even consider what it means to legislate. EPA adopts a strategy of silence as to what type of government power it claims to have exercised when it established the policies and standards for allocating HFCs. EPA admits "Congress left it to the discretion of the EPA to allocate the

[general] … allowances in a manner both reasonable and reasonably explained." *Id.* at xxxx–xx [RTC at 91–92] (citing 86 Fed. Reg. at 55,142). But EPA does not say why this discretion is not the very power to create a legislative code that Article I of the Constitution vests in Congress. Rather than deny that it is legislating, EPA characterizes the creation of criteria for granting allowances as a "fact-intensive technical judgment." *Id.* at xxxx [RTC at 92]. But EPA does not and cannot establish how consideration of facts and application of judgment prevents its exercise of power from being legislative; EPA is free to apply "fact-intensive technical judgment" when enforcing legislative standards, but not to develop such standards.

Moreover, EPA's attempt to minimize the scope of power it exercises when it picks winners and losers for allowances does not save its constitutional infirmity and is counterfactual. For a small business such as Choice, government allocation decisions can make or break the company. EPA has suggested that Choice could simply buy allocations in the market. JAxxxx [RTC at 92]. Yet, when EPA grants allowances to some companies, those that are forced to buy the allowances from others are at a competitive disadvantage. Further, EPA previously acknowledged that "smaller entities with less available capital may not be able to bear initial costs of purchasing allowances … ." JAxxxx [87 Fed. Reg. at 66,379].

The Concern regarding transfer of legislative power is especially acute in the case of cap-and-trade schemes, which give executive agencies sweeping powers to

re-order industrial markets. The AIM Act would essentially appoint EPA as a market czar for the U.S. refrigerant market, a concern the Supreme Court has voiced in several key cases such as *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

The power Congress granted EPA to establish the general prospective policies, standards, and rules to determine who it would authorize to participate in the domestic HFC market was legislative. Congress cannot constitutionally divest—and EPA cannot constitutionally exercise—such legislative power.

B. Subsection (e)(3) of the AIM Act Does Not Supply Standards to Constrain EPA's Discretion to Impinge Choice's Liberty or Rights

The AIM Act lacks necessary standards needed to prevent EPA from legislating. The Supreme Court has repeatedly evaluated whether Congress has completed the task of legislating before leaving fact-finding or administration of a statute to the Executive Branch. Despite EPA's claim to the contrary, it is not sufficient for a statute to merely provide general policy and a topic to be regulated. Rather, statutes such as the AIM Act must provide standards or rules of decision for an agency to implement. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Opp Cotton Mills v. Adm'r of Wage and Hour Div.*, 312 U.S. 126 (1941); *Yakus v. United States*, 321 U.S. 414 (1944).

For example, in *Panama Refining*, lack of constraining standards caused the Court to hold unconstitutional the subsection of the National Industrial Recovery

Act that permitted the president to regulate transportation of "hot oil." 293 U.S. at 430–32. In so holding, the Court distinguished other cases where delegations of authority to the Executive Branch had been permissible. *Id*. at 421–30. In such cases, Congress had established not only *policies*, but *specific standards or rules of conduct*; leaving the executive to develop "subordinate" rules or to find facts needed to apply the legislative rule. *Id*. at 421; *see also id*. at 422–26. The Court struck the subsection in *Panama Refining* because, while the general statute contained at least a dozen policy statements with respect to the statute writ large, "Congress has declared no policy, has established no standard, has laid down no rule," that constrained the *specific* power and discretion to regulate the transport of "hot oil." *Id*. at 430 (emphasis added). The Court explained that to prevent "a pure delegation of legislative power," Congress must establish the "rules of decision." *Id*. at 432.

In *Schechter Poultry*, the Supreme Court elaborated on the requirements for legislation. The Court observed that Congress must "itself establish[] the standards of legal obligation, thus performing its essential legislative function." *Schechter Poultry*, 295 U.S. at 530. In that case, it was the "failure to enact such standards" for wage and hour labor practices that amounted to an "attempt[] to transfer [the legislative] function to others." *Id*. According to the Court, a statute that "does not undertake to prescribe rules of conduct," but instead "authorizes the making of codes to prescribe" such rules is "an unconstitutional delegation of legislative power." *Id*.

at 541–42; *see also Currin v. Wallace*, 306 U.S. 1, 18 (1939) (statute upheld where Congress both "defines the policy" and "establishes standards."); *accord Opp Cotton Mills*, 312 U.S. at 145 ("The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct.").

When evaluated under these controlling principles, EPA has unconstitutionally exercised legislative power under the AIM Act's subsection (e)(3) by itself determining rules of conduct for qualification for HFC allowances. As in *Panama Refining* and *Schechter Poultry*, "Congress has declared no policy, has established no standard, has laid down no rule," in the AIM Act as to which entities conducting business in the HFC market should or should not receive allowances, why, or in what proportion. *See* 42 U.S.C. § 7675 (Addm. 1–10). There is nothing to guide EPA in its exercise of governmental power to limit liberty. The AIM Act did "not undertake to prescribe rules of conduct" for issuing or withholding allowances, but rather "authorizes the making of codes" by EPA. EPA's exercise of that power is thus contrary to law and contrary to constitutional constraints on EPA's power.

EPA dismisses the Supreme Court's binding precedent, describing these cases as rare and decrepit, overcome by more modern precedent. JAxxxx–xx [RTC 90–92]. Yet *Panama Refining* and *Schechter Poultry* have never been overturned. And even in the Court's more modern analysis, the existence of rules, standards, and

factors have been required in order to constrain the Executive Branch's exercise of statutory power. For example, in *Mistretta v. United States*, 488 U.S. 361 (1989), the Supreme Court rejected the claim that Congress had delegated too much discretion to the United States Sentencing Commission. *Id*. at 371. In doing so, however, the Court carefully examined the statute at issue and noted that in establishing sentencing ranges the Commission was constrained by the three stated goals of the statute, four identified purposes for sentencing, prior existing statutorily established maximum sentences, limitations on the range of sentences, seven factors to consider in grading offenses, 11 factors to consider when classifying defendants, guidance for the types of crimes that should be sentenced near the maximum, and exemplar mitigating and aggravating factors. *Id*. at 374–377. The Court concluded that while there was discretion left to the Commission, Congress had "legislated a full hierarchy" for establishing sentencing ranges. *Id*. at 377.

Not so here. There is nothing in the AIM Act—no policy, no standard, and no rule—that Congress directed EPA to consider when establishing what companies or individuals would receive HFC allowances. *See* 42 U.S.C. § 7675(e) (Addm. 3–6).

C. EPA Errs as to What Satisfies the Requirement for an "Intelligible Principle"

EPA created the 2024 Framework Rule on the mistaken assumption that it was free to create a legal code so long as Congress provided policy guidance through an "intelligible principle." JAxxxx [RTC at 90] (asserting delegation of power is

constitutionally permissible so long as "Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority.'") (quoting *Gundy*, 139 S. Ct. at 2129). EPA's argument, however, rests on selectively excerpted phrases and disregards the full text, analysis, and holdings of the Supreme Court cases from which the phrases were plucked.

1. The Intelligible Principle Standard

As an initial matter, the term "intelligible principle" warrants attention. In *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928), the Supreme Court stated, "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." 276 U.S. at 409.

"Intelligible" means "capable of being understood or comprehended." *Intelligible*, MERRIAM-WEBSTER DICTIONARY (2023).[8] This part of the phrase is unproblematic. "Principle," however, is not synonymous with "policy." "Principle," means, among other things, a "settled rule or law of action or conduct[.]" *Principle*, WEBSTER'S NEW MODERN ENGLISH DICTIONARY (1922); *see Principle*, MERRIAM-WEBSTER DICTIONARY (2023)[9] ("*comprehensive* and fundamental law, doctrine, or assumption; a rule or code of conduct … .") (emphasis added).

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[8] https://www.merriam-webster.com/dictionary/intelligible

[9] https://www.merriam-webster.com/dictionary/principle

In examining the statute in *J.W. Hampton*, the Court found it "perfectly clear and perfectly intelligible" that the statute was meant to impose custom duties that would equal the difference in cost between producing and selling a foreign item in the United States and the cost of producing and selling the item domestically to "enable domestic producers to compete on terms of equality with foreign producers … ." *Id*. at 404. The statute thus set the policy and plan, a standard of equality, and left the executive to find and apply facts to various situations as they may change over time. *Id*. at 404–05. Moreover, the "intelligible principle" was not a mere guide or consideration, but something to which the executive was bound to *conform*. *Id*. at 409; *id*. at 405 (noting Congress "describe[ed] with clearness what its policy and plan was and then authoriz[ed] a member of the executive branch to carry out the policy and plan [and to] … conform the duties to the standard underlying that policy and plan."). Congress set the policy, the method, *and* the standard, while the executive found and applied facts to meet the congressionally established standard.

Extracting a sentence from *Gundy*, EPA posits that requiring only a "general policy" and boundaries of authority is a "related formulation" of the "intelligible principle" test. JAxxxx [RTC 90] (quoting *Gundy*, 139 S. Ct. at 2129.) The *Gundy* opinion, however, quoted from *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946), dealing with Public Utility Holding Company Act of 1935. *Id*. at 95. In

that case the plaintiffs challenged a statute prohibiting "unduly or unnecessar[il]y complicate[d]" corporate structures and "unfairly or inequitably distribute[d] voting power among security holders." *Id*. at 104 (internal quotation marks and citation omitted). The Supreme Court found that for "those familiar with corporate realities[,]" the challenged phrases held meaning "standing alone." *Id*. Importantly, however, the phrases did not stand on their own. After surveying the statute, the Court found that the legislation itself provided "a veritable code of rules" "for the Commission to follow in giving effect to the standards" in the statute. *Id*. at 105. It was thus the "standards," which the Court found sufficiently definite, that supplied the "boundaries of … delegated authority," when the Court said that a delineated policy and the "boundaries of delegated authority" prevent a transfer of legislative power. *Id*. As to the power to grant and withhold allowances, the AIM Act has no such standards and thus enables executive exercise of legislative power.

2. EPA Errs When It Suggests the "Intelligible Principle" Requirement No Longer Requires Congress to Set Standards as Well as Policy.

Heedless of the robust analysis and full holding of the cases relied upon in *Gundy*, EPA claims that a "delegation by Congress is constitutional so long as Congress has set out an 'intelligible principle' to guide the exercise of authority," and cites *Gundy* as support. In *Gundy*, however, the Supreme Court recognized that Congress must lay down "an intelligible principle to which the [delegate] is directed

to *conform*." *Gundy*, 139 S. Ct. at 2123 (emphasis added). The Court further noted that in reviewing a statute for improper transfer of legislative power, it was looking for "constitutionally adequate 'limits on the EPA's discretion'" and "sufficiently 'definite' standards." *Id*. (quoting *Whitman*, 531 U.S. at 473; *Am. Power & Light Co.*, 329 U.S. at 104–05).

The question in *Gundy* was whether a statute provided a standard to constrain the Attorney General in prescribing rules for the retroactive registration of certain sex offenders. *Id*. 2122–23. Interpreting the statute, the Court found the constraining standard—offenders were to be required to register as soon as it was feasible. *Id*. at 2123, 2125, 2129. Despite its quotable text about a principle to "guide" the exercise of discretion, *Gundy* did not involve a mere guiding statement of general policy, but rather it read the statute to require the Attorney General to act as soon as feasible.

In the AIM Act, by contrast, there is no standard to apply to determine what companies should be allowed to continue in the HFC market. *See* 42 U.S.C. § 7675 (Addm. 1–10). The AIM Act does not provide, for example, for market share to be maintained but proportionately reduced in volume, as Congress had previously directed when phasing out ozone-depleting substances under the Clean Air Act. *Cf.* 42 U.S.C. § 7671c(a). The AIM Act does not direct EPA to decide what companies should receive allowances based on typical legislative factors such as reliance expectations of market participants, economic effect on the HFC market, or

sufficient supply to consumers. *See* 42 U.S.C. § 7675 (Addm. 1–10). The AIM Act does not reflect any legislative consideration of factors such as time in business, percentage of business, geographic priorities, or any other standards by which allowances could be distributed. *See id.* Nor does the AIM Act provide any priorities, incentives, or disincentives based on safety records, compliance records, or other lawful or unlawful conduct. *See id.*

At bottom, the AIM Act offers no feasibility standard, no fairness standard, no financial standard, nothing. *See id*. Without such standards, instead of elected representatives making hard decisions about whose business opportunities should be reduced disproportionately or even eliminated, Congress abdicated its responsibility and passed the problem to an unaccountable administrative agency. *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) ("legislators will face rational incentives to pass problems to the executive branch"); *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (abdication is "not part of the constitutional design").

This is not merely an academic concern. By failing to provide any standard to guide EPA's decision regarding what entities should receive allowances, Congress left EPA to make poor choices that harm small business. As discussed, the injury in this case was caused when EPA decided to give allowances to companies that happened to report historic HFC imports for years 2011–2019 into EPA's

greenhouse gas reporting system, even if a different company actually received and used the imports in a manufacturing process in the U.S. refrigerant market. In this case EPA, acting in absence of any statutory standard, gave credit for historic imports to a company that had arranged for imports to Choice's manufacturing facility in Alpharetta rather than giving the associated allowances to Choice. Especially galling was that many of these imports were Choice's patented product, which the other company had no legal right to import except with Choice's permission. Doing so was like giving the deed to a newly purchased residential property to the real estate agent rather than to the homeowner. Moreover, EPA's decision to use a decade-old climate change program as a measure of eligibility for allowances made no sense given that the AIM Act nowhere mentions climate change or EPA's existing reporting program.[10]

EPA made a similarly poor decision to give some of Choice's allowances to a company that had illegally imported an infringing "pirated" version of Choice's

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[10] Although EPA has attempted to describe the AIM Act as directed at greenhouse gases, 86 Fed. Reg. at 55,116 ("[t]his Act mandates the phasedown of hydrofluorocarbons, which are highly potent greenhouse gases") (Addm. 23), the statute itself never mentions greenhouse gases or climate change—for good reason. The political divisiveness of climate change prevented Congress from reaching consensus on any policy explicitly directed at climate change—instead the law (as evident in the title "Innovation and Manufacturing") focused on the economic benefits to certain U.S. chemical manufacturers of fostering innovation in the chemicals industry.

proprietary product, rather than give the associated allowances to Choice as the patent owner—notwithstanding that the Department of Commerce had determined that the other party's conduct had violated U.S. trade laws. Choice had informed EPA of the infringement prior to the decision, however without any legislative standard having been established by Congress, the agency was free to make any decision that it cared to, including infringing Choice's liberty to continue in the refrigerant market based on its actual historic market share. One could hardly imagine that any member of Congress would have condoned giving AIM Act allowances to intellectual property pirates. Choice is not challenging the merits of EPA's decision in this proceeding, but the fact that the AIM Act would arguably give EPA unconstrained latitude to make such absurd decisions illustrates the absence of any underlying legislative standard that could be deemed an adequate intelligible principle mandating conformance.

In the other cases relied upon by the EPA, the Court also required standards and constraints, not mere articulations of policy goals. EPA cites *Mistretta* for the assertion that Congress may "delegate power under broad standards." JAxxxx. [RTC at 90]. But as discussed above, the statute at issue in *Mistretta* provided dozens of constraining goals, purposes, factors, limitations, and guidance, along with incorporating other statutes.

EPA's Response to Comments implies that it believes the Supreme Court will uphold delegations of law-making authority governed by bare and vague standards such as a direction to regulate "excessive profits," "fair and equitable prices," or in the "public interest, convenience, or necessity," JAxxxx [RTC 90–91], but review of the cited cases and the underlying statutes proves otherwise.

Lichter v. United States, 334 U.S. 742, 785–86 (1948), dealt with excessive wartime profits. The Court noted that the Renegotiation Act had been amended, and prior to the amendment at issue, Congress had been presented with a War Department Directive that set the "Principles, Policy and Procedure" for renegotiating excessive profits. *See id*. at 772–74, 777. Interpreting the statute in light of the war power at issue, the administrative practices reported to Congress, the otherwise adequate nature of the term "excessive profits," and previous statutes dealing with excessive profit or income, the Court found that sufficient standards accompanied the delegation of power. *Id*. at 778, 783–84. Further, the statute provided guidance such as evaluating profits once they could be determined with "reasonable certainty," and instructing that such evaluation consider any unreasonable compensation paid and "excessive and unreasonable" cost reserves. *Id*. at 777. Congress did not, therefore, merely authorize the recoupment of "excessive profits" without related constraining factors and standards. The AIM Act has none of these constraining guideposts.

Nor did the Court in *Yakus v. United States*, 321 U.S. 414 (1944), merely approve the fixing of "fair and equitable" commodity prices as EPA implies. Like *Lichter*, *Yakus* involved review of an emergency wartime price control. There the Court noted that the Act declared its purposes or policy objectives *and*, together with an amending statute, provided the standards to be used in fixing maximum prices. *Id*. at 420–21. The statutory standards required reference to prices prevailing on specific dates with further standards for when deviations may be appropriate. It was the standards, not the policy and not the subject matter, that "define[d] the boundaries within which prices having [the purpose of furthering the policy] must be fixed." *Id*. At 423. The Act was thus a sufficient exercise of legislative power because it "stated the legislative objective, … prescribed the method of achieving that objective … *and* … laid down standards to guide the administrative determination" of when to exercise price-fixing power and the prices that could be set. *Id*. (emphasis added). The Court reiterated that the essence of the legislative function was not only the determination of policy, but its "formulation and promulgation as a defined and binding rule of conduct." *Id*. at 424.

Finally, the Court did not uphold a regulation promulgated under no limitations other than advancing "public interest, convenience, or necessity" in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), as EPA suggests. *See* JAxxxx [RTC 90]. *National Broadcasting* addressed Federal Communications

Commission ("FCC") regulations concerning "chain" or network broadcasting. FCC determined that contracts associated with network obligations unduly restricted the operations of a radio licensee, interfering with the ability to select programing for its specific local audience. *Id*. at 194–209. While the Court identified "public interest, convenience, or necessity" as the "touchstone" criteria, *id*. at 216, the statute provided much more.

As particularly relevant to that case, Congress mandated that the Commission should "generally encourage the larger and more effective use of radio." *Id*. at 215–19. The Court returned over and over to this statutory mandate and FCC's finding that contractual restrictions on content prevented licensees from the fullest and best use of their federally licensed facilities to the detriment of the local public listeners. *Id*. at 216–17, 224. Less relevant there but important when evaluating the necessity for standards to constrain discretion, the statute at issue also expressly forbade interference between stations, discrimination, profanity, and foreign and certain other forms of ownership, among other things; required a fair, efficient, and equitable distribution of radio services among states and communities; and established information, such as financial and technical qualifications, relevant to evaluating applicants. *Id*. at 215; *see* Communications Act of 1934, Pub. L. No. 73-416, 48. Stat. 1064, 1070, 1081–86.

Taken together and reviewed more than superficially, these cases refute rather than support EPA's claim that the Supreme Court approves congressional delegations of law-making authority based on no more than vague policy platitudes. Under Supreme Court precedent, delegations of law-making power must be accompanied by constraining standards, or else the agency is legislating.

Comparing this case to the controlling precedents, the delegation in the AIM Act is standardless in the same way as the delegation of power to prohibit interstate transport of "hot oil" that the Supreme Court found unconstitutional in *Panama Refining*, where the Court observed that Congress "has declared no policy, has established no standard, has laid down no rule" as to the specific power granted. 293 U.S. at 415, 418, 430.

D. The Policies and Standards in the AIM Act Do Not Constrain the EPA Power Challenged Here

Like the Executive Branch argued in *Panama Refining*, here EPA claims that appropriate limitations are found in AIM Act standards and guidance that are not directly related to the law-making power granted. JAxxxx [RTC at 91]. But, as in *Panama Refining*, standards that do not constrain the particular challenged transfer of power cannot save the transfer from being unconstitutional. *See Panama Refining*, 293 U.S. at 415–16 (noting section of statute dealing with "subject-matter" of oil regulation contained restrictions but provided no limitation on authority to regulate transportation of "hot oil"), *id.* at 416–18 (noting that broader statute's "general

outline of policy" provided nothing as to the question of when to prohibit transportation of "hot oil"); *id*. at 419 (finding nothing in the statutes "can be deemed to prescribe any limitation on the grant of authority in" the challenged subsection of the Act).

In support of its argument, EPA notes that Congress defined the phase-down schedule for allowances. JAxxxx [RTC at 91]. But nowhere has EPA claimed that this schedule determines *who* should receive allowances. EPA also points out that Congress mandated the use of a cap-and-trade scheme. *Id*. But again, there is no indication how that relates to selecting allowance recipients—indeed, the choice of allowance recipients is perhaps the most essential design element of any cap-and-trade program, yet Congress made no mention of it. As *Yakus* made clear, Congress must do more; it must state the legislative objective, prescribe the method of achieving that objective, *and* lay down standards to guide the exercise of the power granted sufficient for a court to adjudicate whether the executive has followed the instructions of Congress. *Yakus*, 321 U.S. at 424, 426.

EPA next points to Congress's identification of essential HFC applications/uses and related mandatory allocations for such uses as evidence of controlling standards. JAxxxx [RTC at 91]. Congress provided that EPA could identify "essential uses" which would enable granted allowances to be restricted to use in certain applications. 42 U.S.C. § 7675(e)(4)(B) (Addm. 5–6). Standards for

identifying an "essential use" included "technical achievability, commercial demands, affordability for residential and small business consumers, safety," and insufficient supply. *Id*. § 7675(e)(4)(B)(i) (Addm. 5). Congress itself then identified six such applications and temporarily required allowances sufficient to supply these six uses. *Id*. § 7675(e)(4)(B)(iv) (Addm. 5).

EPA equates the priority for *uses* with a "policy decision of *who* must receive first priority in receiving allowances." JAxxxx [RTC at 91] (emphasis added). But EPA does not explain how or why *use* priorities relate to *recipient* priorities. The alleged connection is particularly curious given EPA's 2021 determination that allocations could be granted to new market entrants, 86 Fed. Reg. at 55,144 (Addm. 28), and its position that the ability to buy allowances makes initial allocations less important, JAxxxx [RTC at 92]. Additionally, EPA does not identify any way in which the standards for essential applications, such as affordability or safety, played a role in its decision as to how to allocate allowances. The standards EPA identifies for applications/uses are simply not standards that EPA employed to identify allowance recipients.

EPA also asserts that by establishing "enough parameters of the allowance program" and "direct[ing] the priority allocation [uses]," Congress "decid[ed] the 'general policy' for the *program*." JAxxxx [RTC at 91] (emphasis added). Choice, however, does not challenge the entire "program," but only challenges the power

granted to EPA to allocate business opportunities among existing market participants.

In any event "'general policy' for the program," does not save any specific subsection of the statute from unconstitutionally transferring legislative power. By comparison, the National Industrial Recovery Act and the "program" it established were guided by a dozen policy statements. Still, the Supreme Court struck certain subsections of that Act as unconstitutional in *Panama Refining* and *Schechter Poultry*.

Finally getting specifically to the allocation of HFC allowances, EPA confesses that "Congress left it to the discretion of EPA to allocate" allowances "in a manner both reasonable and reasonably explained." JAxxxx–xx [RTC at 91–92]. In other words, there was no statutory constraint on how EPA exercised its discretion to grant businesses the liberty, or at least to some degree, to remain in business.

Notably, EPA's admission that it was left discretion to allocate allowances in a reasonable manner is, in essence, an admission that Congress did not supply standards. More than that, it is an implied invocation of *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), seeking this Court's deference to EPA's fleshing out missing statutory language. Of late, the government has been loath to invoke *Chevron*, and EPA was careful in the 2024 rulemaking never to mention *Chevron* or explain what role that doctrine played in EPA's evaluation and

exercise of its authority. EPA's reasoning, however, can be found in earlier rulemaking. There, though in a different context, EPA noted that when a "statute does not address" an issue, the "the Agency is left to interpret the statute in a reasonable manner." 2022–23 Framework Rule at 55,131 (Addm. 25) (citing *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). EPA further stated, "Where Congress has not directly spoken to an issue or has left ambiguity in the statute, that silence or ambiguity creates an assumption that 'Congress implicitly delegated to the agency the power to make policy choices that represent a reasonable accommodation of conflicting policies that are committed to the agency's care by the statute." *Id*. at 55,132 (Addm. 26) (quoting *Nat'l Ass'n of Mfrs. v. DOI*, 134 F.3d 1095, 1106 (D.C. Cir. 1998)).

By arguing that Congress left allocation of allowances to EPA, particularly where EPA does offer any competing statutory policies it is reconciling, EPA implicitly admits that Congress was silent on the topic, leaving the policy choice to EPA. *See id*. ("The 'power of an administrative agency to administer a congressionally created … program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'") (quoting *Chevron*, 467 U.S. at 843–44); *id*. at 55,142 ("the AIM Act provides EPA considerable discretion in determining how to establish the allowance program and how to allocate allowances in that program.") (Addm. 27).

Moreover, as explained below, even if EPA chose to act reasonably in filling the gap (i.e., absence of standards) left by Congress, that exercise of self-discipline is itself unconstitutional and cannot save an otherwise unconstitutional transfer of legislative power.

III. EPA "REASONABLENESS" CANNOT CURE AN IMPROPER DIVESTMENT OF LEGISLATIVE POWER

The Supreme Court has made clear that EPA cannot cure an improper divesting of legislative power by supplying constraining standards not provided by Congress. *See Whitman*, 531 U.S. at 472–73.

In *American Trucking Associations, Inc. v. EPA*,[11] the case from which *Whitman* originated, the D.C. Circuit had found that sections 108 and 109 of the Clean Air Act were "unconstitutional delegations of legislative power." 175 F.3d at 1034. Specifically, this Court found in *American Trucking Associations* that there was no applicable intelligible principle in the statute and that EPA had not supplied one. *Id*. The Court then remanded to EPA to either identify an intelligible principle that it would select, or to report back to Congress that no such principle was available.

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[11] 175 F.3d 1027 (D.C. Cir. 1999), *rev'd sub nom*. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

On certiorari review, however, the Supreme Court found that remand to the agency to cure an unconstitutional divesting of legislative power was wholly unacceptable. The high court noted that it had "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. Rather, when an unconstitutional transfer of legislative power existed, an agency's "very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority." *Id*. at 473.

Under the reasoning of *Whitman*, action by EPA to select the standards for governing liberty that it promulgated in the 2024 Framework Rule was contrary to constitutional right and power. The "very choice" of potential allocation schemes was an improper executive agency action exercising legislative power. *Id*. As a product of EPA's unconstitutional exercise of power, the 2024 Framework Rule must be reversed.

CONCLUSION

The AIM Act does not supply EPA with guidance, standards, or constraints when it impliedly directs EPA in subsection (e)(3) to select which existing businesses will receive allowances now needed to participate in the HFC market and the number of allowances permitted per market actor. To this extent the AIM Act

divests legislative power to EPA in violation of Article I, § 1 of the United States Constitution and subsection (e)(3) is therefore unconstitutional.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of this Court's December 18, 2023 order because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e), this response contains 9,902 words.

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this response has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

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January 5, 2024

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petitioner's Opening Brief has been served via the Court's Electronic Case Filing system upon all registered counsel this 5th day of January 2024.

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