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.

[INITIAL] REPLY BRIEF OF PETITIONER CHOICE REFRIGERANTS

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INTRODUCTION

EPA unconstitutionally exercised legislative power to make decisions allocating the burdens of the AIM Act's cap-and-trade program that disproportionately cost Choice hard-earned market share. EPA belittles Choice's injury, likening Choice's objections to complaining about someone else's incomplete deli order[1] and ignoring the liberty interests at stake. EPA's conduct presents the type of problems the Founders foresaw and endeavored to prevent by requiring that legislative power be vested in Congress.

EPA errs in asserting that whatever it does to further a general policy with broad guidelines set by Congress qualifies as executive power. EPA errs in arguing that setting standards for whose liberty to suppress could be anything other than an exercise of legislative power. EPA errs not just about the nature, but about the scope of power it wielded—the context and structure of the AIM Act did not limit the relevant power EPA exercised. And, as a matter of simple math, EPA errs in claiming that policy choices made by Congress, rather than those made by EPA, caused Choice's harm.

Most importantly, EPA errs when it argues that the AIM Act provides an adequate intelligible principle. The intelligible principle that EPA posits does not

[1] *See* EPA Br. at 49–50.

constrain its power to choose which market participants will have their liberty limited. And EPA's lack of consistency in identifying the principles at issue, and its need to *post hoc* tailor the principle to its conduct, demonstrate that the principle EPA advocates is not derived from the Act.

EPA unconstitutionally exercised legislative power; Choice's petition should be granted.

ARGUMENT

I. EPA EXERCISED LEGISLATIVE POWER WHEN IT SET THE STANDARDS THAT LIMITED CHOICE'S LIBERTY

As demonstrated in Choice's opening brief, the AIM Act creates government control over refrigerants through an "allowance" program and vests EPA with the power to allocate initial market share. EPA used that power to disproportionally diminish Choice's business. EPA denies that it exercised legislative power but offers a method of distinguishing legislative and executive power that is inconsistent with the Constitution and precedent. Deciding the burden the government will impose to meet its objectives and who will bear that burden requires legislative power. EPA exercised this legislative power impermissibly granted in the Act.

A. EPA Errs in Describing the Distinction Between Legislative and Executive Power

The crux of EPA's defense is that to fully exercise its legislative power, Congress need only "set[] forth its policy and guidelines for [an] agency's actions."

EPA Br. at 47–48. According to EPA, once that is done, whatever may follow "is a traditional executive exercise in implementing Congress's will." *Id.* at 27, 48.

The Constitution, however, does not say that general or important policies shall be made by Congress; it states, "All legislative Powers herein granted shall be vested in a Congress …." U.S. CONST. ART. I, § 1. And the Supreme Court has stated that "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice[.]" *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646–47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987)); *accord Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) ("it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign the responsibility of adopting legislation to realize its goals") (citation omitted).

EPA claims that "defining concepts like 'legislative power' is at bottom a line-drawing exercise, and one which the Supreme Court has consistently held is 'not demanding.'" EPA Br. at 51 (quoting *Gundy*, 139 S. Ct. at 2129). But the Court has said nearly the opposite. The Court stated, for example, that "the precise boundary" of constitutional powers "is a subject of delicate and difficult inquiry[.]" *Wayman v. Southard*, 23 U.S. 1, 46 (1825). If setting a general policy and broad guidelines

marked the end of legislative power and the beginning of executive power, the Supreme Court would happily have drawn that bright line centuries ago.

The Supreme Court has, however, identified important boundary markers between legislative and executive power. For example, the "legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 694 (1892) (internal quotation and citation omitted). Here, EPA wielded lawmaking power.

B. Setting Standards for Whose Liberty to Suppress Requires Legislative Power

The power to choose which class of people will have its liberty limited in pursuit of an alleged greater good requires legislative power. *See Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 76 (2015) (Thomas, J., concurring) ("If a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free.").

This nation was founded with the understanding that governments are instituted to secure the liberty and rights of the governed. *See* DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). A government obtains legitimacy from the consent of the governed, *id.*, and the scope of that consent is found in the Constitution. The Constitution, in turn, "promises that only the people's elected

representatives may adopt new federal laws restricting liberty." *Gundy*, 139 U.S. at 2131 (Gorsuch, J., dissenting).[2]

The Constitution made the exercise of legislative power difficult because it involves the power to interfere with liberty. "The Framers viewed the legislative power as a special threat to individual liberty, so they divided that power to ensure that 'differences of opinion' and the 'jarrings of parties' would 'promote deliberation and circumspection' and 'check excesses in the majority.'" *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020) (quoting THE FEDERALIST NO. 70, at 475 (A. Hamilton) (J. Cooke ed. 1961)).[3]

Prior to the AIM Act, Choice conducted its refrigerants business as an exercise of liberty. Liberty includes "the right of the citizen to b[e] free in the enjoyment of all his faculties; … to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer v. Louisiana*,

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[2]The contention that the power to legislate is the power to make general, prospective binding rules that limit liberty is not, as EPA claims, Choice's "invention." EPA Br. at 46–47. *See Ass'n of Am. R.R.s*, 575 U.S. at 76 (Thomas, J., concurring) ("[T]he core of the legislative power … is the power to make 'law' in the Blackstonian sense of generally applicable rules of private conduct."); *INS v. Chada*, 462 U.S. 919, 952 (1983) (legislative action has "the purpose and effect of altering legal rights, duties and relations of persons").

[3] The notice-and-comment rulemaking that EPA lauds, *see* EPA Br. at 24–25, 43, 50, is not a constitutionally sufficient replacement for the legislative process.

165 U.S. 578, 589 (1897); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty denotes "the right of the individual … to engage in any of the common occupations of life"). It required legislative power to determine the standards for whether and to what extent Choice would be stripped of its liberty.

C. EPA Exercised Legislative Power to Set Standards for Granting AIM Act Allowances and Withholding Liberty

Congress's exercise of *some* legislative power in the AIM Act does not foreclose that Congress unconstitutionally vested *other* legislative power in EPA. EPA asserts that Congress made "the" policy choices underlying the Act, EPA Br. at 13, 24, 27, 31, 33, 48, and that EPA simply exercised discretion[4] to fill up details. EPA Br. at 13, 27, 33–35. While Congress made *some* policy choices in the Act, it abdicated its duty to decide whose rights and liberty would be burdened in the interest of drastically diminishing the hydrofluorocarbon market.

Legislating government programs involves multiple policy choices. The core decisions are whether to implement the program, how to do so, and who will pay the cost or bear the burden. These "details" must be supplied by Congress, not the executive. *See* James Madison, *The Report of 1800*, NATIONAL ARCHIVES (Jan. 7,

[4] EPA frequently refers to "discretion" rather than power. *E.g.*, EPA Br. at 47. Discretion is the power to make a choice. *Discretion*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Freedom in the exercise of judgment; the power of free decision-making.").

1800)[5] ("Details … are essential to the nature and character of a law[.] … [I]t must be enquired whether it contains such details, definitions, and rules, as []pertain to the true character of a law[,] especially a law by which personal liberty is invaded[.]").

In the AIM Act, Congress decided to eliminate most of the hydrofluorocarbon market and provided some guidance for one of the two remaining essential legislative decisions. Congress chose to use a cap-and-trade program, set the cap, and prohibited operating outside the cap-and-trade scheme. 42 U.S.C. § 7675(e)(1) (establishing baseline); *id.* at § 7675(e)(2) (prohibiting market activity without allowances). But Congress gave no guidance concerning the ultimate question on which the other elements and the allowance program depends—who in the market would be deprived of the allowances necessary to continue their pre-existing business (and who would receive allowances). *Id*. § 7675(e)(3). The question here is whether filling that specific policy gap required legislative power. It did.

II. EPA UNDERSTATES ITS POWER AND OVERSTATES STATUTORY LIMITATIONS

In addition to misconstruing the *type* of power, EPA misrepresents the *scope* of power it exercised. EPA erroneously claims that it had discretion over "certain" allowances, that its power was limited by the context and structure of the Act, and that Congress, not EPA, is responsible for the harm Choice suffered.

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[5] https://founders.archives.gov/documents/Madison/01-17-02-0202

EPA's motive for minimizing its power is plain—EPA argues that "given the limited nature of the discretion granted, the amount of guidance the Constitution requires Congress must provide is likewise limited." EPA Br. at 39. EPA characterizes its discretion as "narrow" at least nine times. EPA Br. at 13, 27, 31–34, 38–39, 46. But as EPA previously admitted, the statute left it with "considerable," not "narrow," discretion. *See* 86 Fed. Reg. at 55,142 ("In contrast to the significant detail provided … on how to establish" baselines and the speed and depth of phases "the AIM Act provides EPA considerable discretion in determining … how to allocate allowances[.]").

A. EPA's Discretion Was Not Limited to "Certain" Allowances in an Insignificant Market

EPA mis-frames the extent of power vested in it. EPA Br. at 15. EPA was not given discretion over "certain" AIM Act allowances, it was given nearly unbounded discretion in distributing *all* allowances (*i.e.*, market share). Further, the "certain" allowances in the general pool, over which EPA admits its power, constitute approximately 98% of the market.

Contrary to EPA's argument, Congress's prioritization of "mandatory" hydrofluorocarbon *uses* does not translate to a prioritization of *entities* to receive associated allowances. EPA claims that "Congress … provided detailed guidance on mandatory allocations to specific applications." *Id*. at 32, 34, 37, 39–40. EPA then argues that the designation of priority *uses* limited EPA in granting allowances. *Id.*

at 32, 34, 39, 50. EPA thus frames the issue as whether it acted unconstitutionally in determining how to allocate "certain" allowances. *Id*. at 18.

But nothing from the Act's prioritization of *uses* translates to a prioritization of *users*. Choice Br. at 50–51. EPA's brief provides no answer beyond *ipse dixit*. When proposing its Framework Rule, EPA acknowledged that the "Act does *not* specify who should be issued these [application-specific] allocations." 86 Fed. Reg. at 27,173 (emphasis added). EPA could have granted special allowances to importers, producers, end users, or others. Indeed, the allowances go to end-users who must then "convey" the allowances to producers and importers. *See* JAxxxx [40 C.F.R. § 84.21]. EPA also could have chosen, as it did for general allowances, to set aside allowances for new market entrants. EPA identifies nothing in the requirement that it provide allowances sufficient to satisfy certain uses as a limitation on who receives them. Indeed, EPA, not Congress, chose to create the defined term "application-specific allowances." EPA Br. at 19 (citing 86 Fed. Reg. at 55,142); *see* 86 Fed. Reg. at 27,166–67. Congress's prioritization of uses did not limit EPA's discretion to distribute allowances.

Even accepting EPA's argument, the "slice of discretion that Congress left for EPA," EPA Br. at 27, is the power to distribute 98% of the hydrofluorocarbon market share. *See* 87 Fed. Reg. at 61,316–17 (application-specific allowances account for 5,426,319.9 of 273,498,315 consumption allowances).

EPA further suggests that the Court should be unconcerned about Congress's transfer of legislative power because the "phasedown concerns one group of chemicals supplied by an extremely narrow sector of the economy[.]" EPA Br. at 35. This argument has legal and factual flaws.

First, the Constitution designed the legislative process to protect minority interests, such as small businesses, from majority interests, such as large chemical companies or trade associations with armies of lobbyists that lobbied for the AIM Act. *See Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting) (footnote omitted) ("Because … majorities can threaten minority rights, the framers insisted on a legislature composed of different bodies[.]").

Second, hydrofluorocarbons are widely used for refrigeration and air conditioning in homes, commercial buildings, industrial operations, cars, and refrigerated transport, for foam products, for aerosols, and for other purposes. 86 Fed. Reg. at 27,155. The U.S. refrigerant market was valued at $5.02 billion annually in 2022.[6] Hydrofluorocarbon use is so widespread that EPA estimated the net benefit from the Act to be $272.7 billion. JAxxxx [RIA Addendum at 17]. Hundreds of billions of dollars in benefits do not arise by phasing down an unimportant product.

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[6] *See U.S. Refrigerants Market Size, Share & COVID-19 Impact Analysis*, FORTUNE BUSINESS INSIGHTS (Apr. 8, 2024), https://www.fortunebusinessinsights.com/the-u-s-refrigerants-market-109085. EPA's economic analysis, EPA Br. at 35, focuses only on the cost of substituting other refrigerants for HFCs.

Controlling the market share for a critical commodity is not a narrow delegation of details.

B. EPA's Discretion Is Not Limited by the AIM Act's Context and Structure

The context and structure of the AIM Act do not narrow EPA's discretion as EPA and its allies suggest. EPA Br. at 13, 24, 38–39, 44, 46. While the Act provides guidance around the cap in the cap-and-trade program, nothing in the Act influences how allowances must be distributed and, correspondingly, why certain companies should be favored over others.

1. The Context, Structure, and Purpose of the AIM Act Did Not Limit Distribution of Allowances

EPA claims that the "statutory context" of the Act provides "direction," EPA Br. at 40, but EPA's conclusion is a *non sequitur*, and its claim differs from those made during rulemaking. As noted, Congress established a baseline, prohibited activity without allowances, and directed EPA to distribute allowances. From this EPA concludes that Congress directed EPA "to allocate … allowances among persons that have produced or imported hydrofluorocarbons or intend to do so[.]" EPA Br. at 41. How EPA arrives at this conclusion is a mystery. Moreover, during rulemaking, EPA interpreted the statute as *not* limiting allowances to "persons that have produced or imported hydrofluorocarbons or intend to do so." For example, EPA sought comment on the use of auctions as a means of distributing allowances,

stating it could "permit entities to purchase allowances for the purposes of retiring them[.]" 86 Fed. Reg. at 27,204. EPA thus saw nothing in the AIM Act's "context" limiting distribution to producers and importers.

Nor do EPA's arguments about the allegedly limiting principles in the structure or purpose of the Act fare better. EPA asserts that, "[c]onsistent with the AIM Act's structure, EPA's driving concern … was how to best reflect the market and ensure allowances holders would be those that could and would use allowances to meet near-term needs[.]" EPA Br. at 42. EPA's brief leaves unexplained, however, how any part of the Act's "structure" leads to such a restriction. EPA's argument seems to rely on a presumption that it had to issue allowances for actual use, but that is inconsistent with EPA's assertion that it could auction allowances for retirement. *See* 86 Fed. Reg. at 27,204. EPA's claim also cannot be reconciled with its prior assertion that it could use its "significant authority" to design the allowance system "to retire, revoke, or withhold allowances at" its discretion. 86 Fed. Reg. at 27,185. Further, while EPA refers to the Act's "purpose," EPA Br. at 32, 38–39, the AIM Act does not explicitly identify its purpose, and EPA fails to explain how any discernible purpose in the Act dictates who should receive allowances.

2. The AIM Act Allowance Scheme Was Not Limited by a Prior Statutory Regime

EPA and its allies suggest that certain similarities between the AIM Act and a separate statutory regime for phasing out ozone-depleting substances ("ODS")

impacted EPA's discretion. EPA Br. at 66; NRDC Br. at 13; Intervenors' Br. at 16–17; *see also* NRDC Br. at 22–23 (citing *Hearing on H.R. 5544 Before the H. Subcomm. on Env't & Climate Change*, 116th Cong. (2020)). Indeed, during rulemaking EPA recognized that there is a presumption that Congress legislates "with an awareness of the existing law that is pertinent to enacted legislation." 86 Fed. Reg. at 55,123.

There are at least three problems with this argument. The first and most insidious is that none of the comparisons EPA and its allies make to the ODS regime relate to the question of whose liberty will be limited. EPA, Intervenors, and NRDC studiously avoid the reality that Choice's liberty to conduct its business is at stake; they instead deride Choice for wanting its proportionate historic market share.

The second problem is that EPA considers itself free to deviate from ODS when it comes to distributing AIM Act allowances. EPA stated that while it was "reasonable" to "build on its experience phasing out [ODS]" given the "similarities in the text, structure, and function" of the statutes, EPA also recognized that the AIM Act "requirements diverge from the text and framework of" the ODS statute. 86 Fed. Reg. at 27,154; *see* Intervenors' Br. at 33. Indeed, the ODS program specified that allowances should be distributed to historic market participants based on "the quantity of the substance produced by the person concerned in the baseline year[.]" 42 U.S.C. § 7671c(a). The AIM Act contains no similar language.

Third, Congress expressly incorporated certain procedural provisions of the Clean Air Act (of which the ODS program is part) into the AIM Act, *see* 42 U.S.C. § 7675(k)(1)(C), but declined to refer to any substantive provisions either of the Clean Air Act or ODS program. This declination negates any inference that the ODS program limits the distribution of AIM Act allowances.

EPA believed that the difference between the ODS scheme and the AIM Act allowed it to, for example, unilaterally set aside allowances for *new* market entrants. *See* 86 Fed. Reg. at 27,176 ("EPA acknowledges that creating a set aside pool for new market entrants would deviate from historic regulatory practice").[7] EPA also noted its power to "consider[] whether a different approach is warranted for determining allocations under the AIM Act" versus under the ODS scheme due to the difference between a phaseout and phasedown. *Id*. at 27,203.

While EPA itself initially *chose* to consider past market share in the distribution of *some* of the allowances for the first few phases of the AIM Act, similar to considerations in the ODS, EPA has been clear that it may abandon this system in the future. 86 Fed. Reg. at 55,144; JAxxxx [88 Fed. Reg. at 46,841–42]. EPA made its initial choice due to factors such as "timeliness of implementation."

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[7] *See also* 86 Fed. Reg. at 27,168 ("EPA is proposing to take a different approach … under the AIM Act"); *id*. at 27,171 n.47 (noting difference in treatment of essential uses).

86 Fed. Reg. 55,144. EPA noted that "the cumulative efforts and resources that would be necessary to build, test, and successfully administer and implement an auction system" on time "are not feasible" even for a subset of allowances. *Id*. at 55,159. Hence, practical considerations drove EPA's choice; it does not reflect a statutory mandate as EPA and NRDC suggest. EPA Br. at 42–43; NRDC Br. at 25–27. Moreover, the partial similarity of EPA's legislative choice to a prior statutory program cannot redeem the unconstitutional nature of the power it exercised. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–73 (2001) (agency cannot cure unconstitutional statute).

C. EPA's Decisions, Not Congress's, Harmed Choice

As further misdirection regarding the scope of its power, EPA claims Congress, not EPA, caused Choice's harm. EPA Br. at 32, 36. Simple math and logic prove otherwise.

Mathematically, even once the phasedown is finished, Choice could still operate at its pre-Act volumes. At the lowest step of the phasedown, approximately 45 million consumption allowances, the type used by Choice, would be available. *See* JAxxxx [88 Fed. Reg. at 46,836–37] (baseline for consumption allowances is 302,538,316 MTEVe [302,538,316 x 0.15 = 45,380,747.4]). Choice was allocated only 1,063,455 allowances. EPA Br. at 36 (allowance for 2024, at 60% phase). In 2036, at the last step of the phasedown, Choice could operate at 100% of its pre-

AIM Act volume (at approximately 2 million allowances) with ample room for others' application-specific allowances and still leave tens of millions of allowances for distribution. So, EPA's policy choices, not Congress's, caused Choice's harm.[8]

Had EPA made different choices, Choice could have maintained (or even expanded) its market position. For example, if EPA had not taken allowances away from existing market participants to facilitate new market entrants, had it decided to attribute credit for imports differently, had it decided not to award allowances to foreign-owned companies violating United States laws, or to grant fewer allowances to the large chemical companies that already produce hydrofluorocarbon substitutes and lobbied for the AIM Act, Choice may have received more allowances.[9]

Amicus NRDC asserts that the harm EPA caused Choice cannot be redressed.[10] NRDC Br. at 15. But the harm is competitive, an uneven playing field that cut Choice's market share disproportionately. While not the relief Choice seeks,

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[8] Choice does not seek to be exempted from the Act's effects; it seeks only to maintain its proportional pre-Act market share.

[9] EPA's suggestion that Choice is not harmed because allocations are tradeable ignores reality. EPA Br. at 39. As EPA noted during rulemaking, "smaller entities with less available capital may not be able to bear the initial costs of purchasing allowances[.]" JAxxxx [87 Fed. Reg. at 66,379]. Nor does the Constitution allow infringements of liberty merely because the effects can be bought out.

[10] This Court previously considered Choice's similar constitutional challenge to EPA's 2021 Framework Rule. *Heating, Air Conditioning & Refrig. Distrib. Int'l v. EPA*, 71 F.4th 59 (2023) ("*HARDI*"). The Court found the issue was not exhausted but implicitly accepted Choice's standing. *Id*.

if allowances were no longer distributed at all as NRDC suggests, all participants would be in the same position, forced to rely on existing refrigerant stocks, reclaimed products, or substitutes. In fact, as an EPA-certified hydrofluorocarbon reclaimer,[11] Choice may even be advantaged.

Further, NRDC misrepresents the relief Choice seeks and relies on an unstated severance analysis that would lead to an implausible result. NRDC claims that Choice requests "vacating EPA's allocation of allowances[.]" NRDC Br. at 15. Notably, NRDC does not cite Choice's brief for this (mis)characterization. Choice stated that its injury "can be redressed by this Court reversing EPA's unconstitutional action," Choice Br. at 29, and that subsection (e)(3) of the AIM Act is unconstitutional. *Id*. at 14. If Choice prevails, the Court would determine, contrary to NRDC's position, that subsection (e)(3) is not severable from certain other portions of subsection (e) of the Act.

The AIM Act allocation scheme consists of interrelated subparts. Subsection (e)(1) establishes the baseline/cap, subsection (e)(2) requires allowances for consumption/import activities, making the cap meaningful, and subsection (e)(3) gives EPA power to decide who gets allowances. *See* 42 U.S.C. § 7675(e). Further, subsection (e)(4)(B)(iv) *requires the issuance of allowances* sufficient for essential

[11] Choice Br. at 14 (citing JAxxxx [Dec. 19, 2022 Ltr. at 2]).

uses and mandatory allocations. *Id*. EPA must issue allowances, and its allocation authority is structurally inseparable from other cap-and-trade provisions in the Act. *See Seila Law*, 140 S. Ct. at 2209 (conducting severance analysis, evaluating whether statutory provisions could function independently). NRDC's suggestion that the allocation provision could be severed, resulting in an immediate prohibition on all regulated products, is inconsistent with Congress's goal of a partial phasedown over time. *See* 42 U.S.C. § 7675(e)(3); § 7675 (e)(4)(B)(iv)(I); § 7675(f). Moreover, without subsection (e) the Act would still provide innovation incentives. *See* 42 U.S.C. §§ 7675 (d), (h), (i).

III. EPA'S EXERCISE OF LEGISLATIVE POWER UNDER THE AIM ACT WAS NOT CONSTRAINED BY AN ADEQUATE INTELLIGIBLE PRINCIPLE

The Supreme Court has outlined what constitutes an intelligible principle, and the AIM Act fails that test. The principle EPA offers for the first time in its briefing is based in part on EPA's own conduct, not the Act, and differs from EPA's prior claims, underscoring the lack of an intelligible principle in the statute.

A. The Intelligible Principle EPA Identifies Fails to Fulfill the Purpose Demanded by Courts

What EPA offers as an "intelligible principle" fails to satisfy the purpose demanded by courts. According to EPA, Congress need not set standards to prevent agencies from legislating, rather it must only supply the agency with "boundaries" or guidelines. EPA Br. at 29. EPA asserts in its brief that the intelligible principle

here is that EPA must "allocate … allowances among persons that have produced or imported hydrofluorocarbons or intend to do so[.]" EPA Br. at 41. But these invented boundaries fail to constrain the power granted and so fail to prevent the unconstitutional transfer of legislative power.

As set forth in Choice's opening brief, an adequate intelligible principle provides standards or rules of decision, allows the judiciary to evaluate whether the executive has remained within its statutory authority, and enables the public to identify whom to hold accountable for government action. *See* Choice Br. at 35–38, 40–43, 47. EPA ignores these requirements and merely attempts to compare the breadth of discretion it exercised under the AIM Act to discretion granted in other statutes. EPA Br. at 29–31. As explained above, however, it is the *type* of discretion that matters, not just the breadth. Moreover, most of the cases EPA relies upon are distinguishable because the allegedly broad discretion granted in those cases was meaningfully constrained. *See* Choice Br. at 38 (*Mistretta* Court found Congress "legislated a full hierarchy"); *id*. at 40 (statutory policy, plan, and standard expounded in *J.W. Hampton*); *id*. at 40–41 (*American Power & Light* Court found "a veritable code of rules" for agency, *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)); *id*. at 46–48 (addressing *Lichter v. United States*, 334 U.S. 742, 785–86 (1948), *Yakus v. United States*, 321 U.S. 414 (1944), and *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943)).

In the other cases that EPA cites, EPA Br. at 30, the executive already had some constitutional authority, such as military justice or management of federal property,[12] or an agency was regulating against an extensive legal background of subject matter law that served as a guide and constraint on the executive.[13] Regulation of commerce and allocation of market share, however, are not areas of constitutional *executive* authority. Nor does establishing government power to allocate market share in existing markets have a generally accepted legal background. As noted, even in the ODS context, Congress was more careful to provide some indication of who should get allowances, and in any event, EPA rejected the ODS background as a guiding principle for allocations here.

Justice Gorsuch recently explained that,

> "[t]o determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And

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[12] *See Loving v. United States*, 517 U.S. 748, 772–74 (1996) (noting President's authority over military justice, stating "[h]ad the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President," petitioner's nondelegation argument "might have more weight"); *United States v. Grimaud*, 220 U.S. 506 (1911) (dealing with proprietary management of forest land).

[13] *See Fahey v. Mallonee*, 332 U.S. 245, 252 (1947) (regulations dealt with problems "as old as banking enterprise" and "precedents have crystallized into well-known and generally acceptable standards"); *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 621 (1944) (Reed, J., dissenting) (noting "reasonable return" is discernible from daily transactions and "fair value" "had been worked out in fairness to investor and consumer" by cases predating the statute).

> most importantly, did Congress, and not the Executive Branch, make the policy judgments?

Gundy, 139 U.S. at 2141 (Gorsuch, J., dissenting). As relevant to distributing allowances, the AIM Act fails all three: EPA is doing far more than finding facts, the Act does not establish criteria to measure against, and the Act leaves EPA with the entirety of the policy question as to who shall bear the burden for the AIM Act.

B. Even EPA Cannot Consistently Identify an "Intelligible Principle" in the AIM Act, Rather It Makes up Its Own Principles

EPA itself cannot (or chooses not to) consistently identify an intelligible principle for allocation in the AIM Act.

As noted, its briefing in this case is the first time EPA has explicitly advanced the alleged principle that it was to "allocate … allowances among persons that have produced or imported hydrofluorocarbons or intend to do so[.]" EPA Br. at 41. Previously, EPA stated that its directive was merely to "allocate … allowances in a manner both reasonable and reasonably explained." Final Br. for Resp. at 58, *HARDI v. EPA*, No. 21-1251 (D.C. Cir. July 21, 2022), Doc. No. 1955962 (Addm. 29); *see also* Tr. of Oral Arg. at 59–60, *HARDI v. EPA*, No. 21-1251 (D.C. Cir. Nov. 18, 2022) (Addm. 43–44) ("there is no congressional guideline on EPA's discretion"). In its response to rulemaking comments, EPA reiterated that it need only distribute

allowances "reasonably," JAxxxx [RTC at 92],[14] it did not claim a limitation like distributing allowances to existing or prospective producers and importers.

Tellingly, EPA created at least part of its claimed intelligible principle to reconcile its argument here with its prior conduct. Specifically, EPA claims that it is directed to allocate allowances among those who "intend" to produce or import hydrofluorocarbons. EPA Br. at 41. But nothing in the Act indicates that Congress wanted to facilitate new market entrants who "intend" to produce or import. *See* 42 U.S.C. § 7675. Rather, EPA itself thought it "may be appropriate to continue to facilitate participation by new market entrants," and especially for those impacted by "challenges particularly faced by small disadvantaged businesses[.]" 86 Fed. Reg. at 27,176–77. None of these considerations are suggested in the AIM Act. This litigation-driven add-on rationale may explain why EPA presents the principle one way in its statement of the issues and another way later in its brief. *Compare* EPA Br. at 15 *with id.* at 41.

In 2021, EPA decided to distribute allowances based on considerations like "as seamless a transition as possible" to an allowance-bound scheme, "promoting

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[14] As explained in Choice's opening brief, EPA's "reasonable manner, reasonably explained," formulation invokes *Chevron*. Choice Br. at 28, 52–53. The existing *Chevron* doctrine may not survive the current Supreme Court term, so EPA takes a different approach this year, claiming that it is merely filling up the details, rather than filling a gap. EPA Br. at 33–34, 48–50.

equity, timeliness of implementation, and availability of robust data." 86 Fed. Reg. at 55,144. It was for those reasons, identified by the EPA—not Congress—that EPA chose "to issue allowances to active HFC producers and importers operating in 2020" while providing a set-aside for new entrants. *Id*. In the 2024 Framework Rule, EPA relied on similar considerations but excluded "promoting equity." JAxxxx [88 Fed. Reg. 46,842]. Yet, EPA does not now identify these as the relevant intelligible principles.

If even EPA cannot or will not consistently identify the allegedly controlling AIM Act principle for distributing and withholding allowances, such purported principle is not intelligible.

CONCLUSION

For the reasons above and those in Choice's opening brief, Choice's petition should be granted.

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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 5,478 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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May 10, 2024

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petitioner's Reply Brief has been served via the Court's Electronic Case Filing system upon all registered counsel this 10th day of May 2024.

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