

No. 25-1079

In the
Supreme Court of the United States

RMS OF GEORGIA, LLC, d/b/a Choice Refrigerants,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Two centuries ago, this Court held that Congress may not “delegate ... powers which are strictly and exclusively legislative.” *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825). Over the past 100 years, however, this Court has allowed that fundamental principle to wither, settling on an increasingly lax and impotent test for identifying unconstitutional delegations that has produced a null set for 90 years running. This case provides an excellent vehicle to reinvigorate that test or refashion the doctrine anew, as the American Innovation and Manufacturing Act (“AIM Act”) is the rare statute that provides literally no direction cabining an agency’s discretion to remake a multibillion-dollar industry. The Act authorizes the Environmental Protection Agency (“EPA”) to freely choose how many hydrofluorocarbon (“HFC”) allowances each private company in the refrigerant industry should receive, while providing zero guidance on how EPA should allocate those business-critical allowances. Choice’s petition asks a simple question: May Congress empower an agency to reorder a multibillion-dollar market while providing no guiding principles on how to do so? If the answer to that question under this Court’s current test is not “no,” then it is time for a new test.

Despite insisting that EPA’s unbridled discretion to allocate allowances is not as boundless as the Act’s text plainly indicates, respondents notably cannot even agree on what intelligible principle supposedly constrains the agency’s discretion. As it did below, the government claims that it is enough that Congress chose to phase down HFCs through a cap-and-trade

framework, even though the Act undisputedly does not guide EPA on how to allocate allowances. That position was soundly rejected by the D.C. Circuit, however, and Intervenor-Respondents¹ have abandoned it, instead embracing the D.C. Circuit's strained effort to write into the Act an intelligible principle that Congress omitted, and one EPA itself does not see. But the D.C. Circuit's decision to pick up the legislative pen and transplant a principle from an entirely different statutory scheme just adds an Article III violation to the glaring Article I problem. It also powerfully illustrates the lengths to which courts go to avoid calling out Congress for failing to do its job, and the consequent need for this Court's intervention to revive or revise a critical doctrine.

Respondents offer a smattering of arguments urging this Court to deny review—from questioning Choice's motives to suggesting that the AIM Act somehow implicates Article II's treaty power. None of those red herrings should distract from what this petition offers: a chance for this Court to finally make clear that Article I's Vesting Clause provides at least *some* judicially enforceable constraint on Congress' ability to abdicate its constitutional duty to decide hard legislative questions itself and be accountable to the People for those choices.

¹ This reply refers to Intervenor-Respondents' brief as "Int.Resp.Br." Two trade associations submitted an amicus brief supporting respondents, which this reply refers to as "HARDI.Amici.Br."

I. The AIM Act Stretches Congress' Power To Delegate Far Beyond Its Breaking Point.

1. While Congress can undoubtedly grant executive agencies some discretion to implement and enforce federal laws, under this Court's precedents it must identify at least some "principle to which the ... body authorized ... is directed to conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). That principle must "provide[] sufficient standards to enable both 'the courts and the public [to] ascertain whether the agency' has followed the law." *FCC v. Consumers' Rsch.*, 606 U.S. 656, 673 (2025). This, of course, is hardly a demanding standard. But nor is it meant to be an empty gesture. At a minimum, it requires that Congress may not "fail[] to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 n.7.

The AIM Act cannot clear even that low bar. The Act requires EPA to phase down HFC production and directs it to establish a cap-and-trade program and allocate HFC allowances to private companies. But Congress then granted EPA unfettered discretion on how to allocate the vast majority of those allowances, and "provided literally no guidance for the exercise of [that] discretion." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001). The Act simply commands EPA to "phas[e] down the production of [HFCs] in the United States through an allowance allocation and trading program in accordance with this section." 42 U.S.C. §7675(e)(3)(A). That is it. There are no standards, policies, or boundaries confining EPA's discretion—not even a principle like act in the "public

interest,” or do what is “fair and equitable.” *See Gundy v. United States*, 588 U.S. 128, 146 (2019). The Act empowers EPA to select which companies may participate in the refrigerant industry and which may not, with devastating consequences for disqualified companies. Worse, EPA can make those selections based entirely on whatever policy preferences it prefers—whether that be preserving orderly markets, advancing social justice, furthering environmental priorities, or bare revenue raising. Such unguided decisionmaking cannot survive the intelligible-principle test—nor any test faithfully enforcing Article I’s Vesting Clause.

2. Respondents resist that conclusion, insisting that Congress *did* supply the requisite guidance. EPA.Br.10; Int.Resp.Br.19. But they cannot even agree on what intelligible principle Congress supposedly supplied.

While the government purports to embrace the D.C. Circuit’s opinion, it does so only by misrepresenting what the court held. The D.C. Circuit interpreted the Act to *require* EPA to allocate allowances based on historical market share, not merely to “take account” of the “pre-enactment marketplace.” EPA.Br.12. The government has never endorsed that reading, and it does not do so now. To the contrary, the government agrees that Congress gave EPA near-complete discretion “in establishing the method of allocation within the cap-and-trade program.” EPA.Br.9. As it must, since EPA has openly touted its “considerable” and “significant discretion in ... establish[ing] an allowance allocation,” and it has proposed allocation methods as

varied as charging “a fee for every allowance provided”; prioritizing allowances for *new* market entry from “minority- and woman owned small businesses”; or auctioning off allowances to be retired. *See* 86 Fed. Reg. 27,150, 27,177-78, 27,203 (May 19, 2021). The government thus concedes that, under the AIM Act, EPA can allocate allowances however it wants. EPA could allocate them only to existing companies or only to new entrants; only to companies that comply with its policy preferences on ancillary issues like racism or sexism, or only to companies that will pay EPA the most for them.

The government does not embrace the D.C. Circuit’s flawed effort to read a historical-market-share principle into the Act. Instead, it contends that the Act satisfies the intelligible-principle test because Congress provided guidance on issues *other than* how to allocate allowances—*i.e.*, identifying the relevant HFC compounds, setting an overall baseline and reduction schedule, and directing EPA to use a cap-and-trade framework. EPA.Br.8-10. The D.C. Circuit rejected this argument—and Intervenor-Respondents abandoned it—for good reason: That Congress decided generally to phase down HFCs does not excuse its failure to provide any guidance on how HFC allowances should be allocated. That is no “narrow technical issue.” *Contra* EPA.Br.13. Allocating allowances is the single most important policy question governing the phasedown regime.

For many individual businesses, like Choice, their survival depends on retaining their hard-earned share of the HFC market. If they cannot continue producing or consuming enough HFCs, that imperils their

“general right to engage in a lawful business.” *Frost v. Corp. Comm’n of Okla.*, 278 U.S. 515, 534 (1929). The allocation of HFC allowances also has broader implications for the entire multibillion-dollar refrigerants industry, whose products are used in homes, commercial buildings, industrial operations, cars, and more. By giving EPA boundless discretion to “restructure” the refrigerants industry, *West Virginia v. EPA*, 597 U.S. 697, 724 (2022), the AIM Act unconstitutionally delegates to EPA the power to determine the rights—and even continued existence—of private businesses.

Respondents ask this Court to excuse EPA’s unbounded allocation authority because the AIM Act directs that, for the first five years, EPA “may” allocate allowances for certain “essential uses” under certain conditions, 42 U.S.C. §7675(e)(4)(B)(i), and must allocate some allowances for the continued production of a short list of specialized products, *id.* §7675(e)(4)(B)(iv). EPA.Br.11; Int.Resp.Br.10. But that marginal guidance—which, as to the first part, is not even binding—covers only a sliver of the HFC market. According to EPA’s own data, in 2023, those two categories combined constituted just 2% of total HFC allowances. *See* 87 Fed. Reg. 61,314, 61,316-17 (Oct. 11, 2022). While respondents quibble with the exact percentages, *see* Int.Resp.Br.9, they do not deny that the Act fails to provide any meaningful guidance on how EPA should allocate the vast majority of allowances among the many companies whose uses or products do not fit into any enumerated category. That crucial task remains within EPA’s unguided discretion. *Gundy*, 588 U.S. at 136 (the nondelegation

inquiry is specific to each “task [a statute] delegates and what instructions it provides”).

In sum, no sensible nondelegation doctrine would permit Congress to abdicate its constitutional duty and leave decisions over who may operate in a critical industry to the policy preferences of an agency that is “not elected by the people and [is] not accountable to the people for [its] policy decisions.” *Consumers’ Rsch.*, 606 U.S. at 708 (Kavanaugh, J., concurring). That the government apparently thinks this Court’s existing test is malleable enough to permit such a law underscores the need for this Court to step in and course-correct.

3. The D.C. Circuit, to its credit, did not accept the government’s invitation to endorse such complete congressional abdication. Apparently, Intervenor-Respondents have declined as well, as they have abandoned that theory before this Court, in favor of embracing the D.C. Circuit’s attempt to cure the AIM Act’s nondelegation problem by supplying the necessary guidance itself. But far from solving the nondelegation problem, that just added an Article III violation to the mix. After all, an Article III court can no more devise an intelligible principle that Congress omitted than can an Article II agency. *See Whitman*, 531 U.S. at 473.

Implicitly recognizing as much, Intervenor-Respondents double-down on the D.C. Circuit’s claim that the AIM Act itself imposes “ascertainable and meaningful guideposts” on EPA’s allocation authority by requiring the agency to allocate allowances to market participants according to their “historical market share.” *See* Pet.App.16. But as the petition

explained, no historical-market-share requirement appears *anywhere* in the AIM Act. Pet.22-23. The D.C. Circuit instead plucked that requirement from Title VI of the Clean Air Act—an entirely different statutory scheme—and grafted it onto the AIM Act, in a transparent attempt to avoid the glaring nondelegation issue. Resorting to avowed purposivism and snippets of legislative history, the court posited that Congress probably *meant* to model the AIM Act’s allowance allocation scheme on Title VI and its historical-market-share requirement; it just neglected to actually say so.

That (il)logic suffers from myriad problems—not the least of which being that, while Title VI and the AIM Act share some commonality, they differ in several fundamental ways. Most important, Title VI’s statutory text *does* expressly point to a historical-market-share requirement. *See* 42 U.S.C. §7671d(b) (directing EPA to allocate allowances based on the “quantity of [the] substance produced by [the] person during the baseline year”). The AIM Act, by contrast, lacks any comparable language. That deliberate difference in statutory language should be dispositive. After all, courts cannot “read into statutes words that aren’t there,” *Romag Fasteners, Inc. v. Fossil, Inc.*, 590 U.S. 212, 215 (2020)—especially when those words appear in similar statutes, *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 85-86 (2017). And the differences here are clear as day. Indeed, Intervenor-Respondents themselves recognized below that the allowance allocation scheme in Title VI and the AIM Act contain “[a] significant difference,” and that the AIM Act is “stand-alone legislation, not [] an

amendment to the Clean Air Act.” Int.Br.7-8, No.23-1261, (D.C. Cir. May 31, 2024).

Ignoring their prior admission, respondents try to manufacture a textual hook for the D.C. Circuit’s atextual theory by noting that the AIM Act directs EPA to allocate allowances “in accordance with this section.” 42 U.S.C. §7675(e)(3)(A). Int.Resp.Br.7-8; HARDI.Amici.Br.11. That gets them nowhere. “[T]his section” refers to the broader AIM Act, so it simply directs EPA to allocate allowances according to the phasedown schedule contained in the Act. It is not a hidden direction to adopt from an entirely different section of an entirely different law a historical-market-share requirement that appears nowhere in the AIM Act’s text.

Lacking textual support, respondents and their amici follow the D.C. Circuit’s lead of trying to shift focus away from the statutory text. But none of their creative interpretive leaps comports with ordinary rules of statutory construction. Pet.24-25. For example, they spill much ink explaining how the AIM Act was supposedly passed as a follow-on to Title VI, purportedly to address similar environmental concerns. Int.Resp.Br.3-6; HARDI.Amici.Br.4-11. But while repurposing the AIM Act into a climate-crisis program was certainly *EPA’s* goal, *the statute* says nothing about greenhouse gases or the environment. A few rogue statements during a subcommittee hearing notwithstanding, the only legislative purpose expressed by the Act, contained in its title, is to promote “American Innovation and Manufacturing.” 42 U.S.C. §7675(a). And while respondents make much of some limited structural

similarities between the AIM Act and Title VI, those similarities just confirm that, where the AIM Act expressly diverges from Title VI—*e.g.*, on allowance allocation—that difference is intentional. Neither the D.C. Circuit, respondents, nor their amici can explain why Congress would use markedly different language in the AIM Act’s allowance-allocation provision if it meant to incorporate Title VI’s historical-market-share requirement.

The D.C. Circuit’s strained construction of the AIM Act is particularly puzzling given that EPA itself disclaims that interpretation and has implemented an allocation scheme that is deliberately *not* based on historical market share. The *ad hoc* allocation scheme EPA adopted instead assigned allowances for new market entrants and permits EPA to “retire, revoke, or withhold” allowances from any company it wishes to penalize. *See* 86 Fed. Reg. 55,116, 55,147, 55,169-70 (Oct. 5, 2021). Of course, EPA’s interpretation is not binding on the courts. *See* Int.Resp.Br.22 (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024)). But it is exceedingly strange for the D.C. Circuit to try to salvage the AIM Act by adopting a narrowing construction that is directly at odds with how the agency implementing the Act is actually administering it, and then uphold the agency’s administering rule. That sort of contradictory interpretative gymnastics powerfully illustrates the obscene lengths to which courts go to avoid invalidating a law on nondelegation grounds.

II. This Case Provides An Excellent Vehicle To Resolve An Exceedingly Important Question.

This case affords an excellent opportunity for this Court to either finally breathe some life into the intelligible-principle test or consider whether it needs reforming. As the D.C. Circuit's opinion demonstrates, lower courts would rather rewrite statutes wholesale than find unconstitutional delegations of legislative power, even when one stares them in the face. This case provides the perfect vehicle to remedy that intolerable state of affairs. *See* Pet.26-29.

Respondents' efforts to evade review fall flat. Respondents first protest that there is no circuit split on how to interpret the AIM Act. Of course not: Congress requires that challenges to the Act be brought exclusively in the D.C. Circuit. *See* 42 U.S.C. §7675(k)(1)(C). Congress' decision to centralize challenges in a single circuit should not immunize them from this Court's review. *See West Virginia*, 597 U.S. at 717-20 (granting review of EPA rule governed by the same judicial-review provision and lacking any circuit split); *see also Gundy*, 588 U.S. at 135. Moreover, this case is not just about the AIM Act; it is about whether there are *any* judicially enforceable limits on Congress' delegation power. As noted in Choice's petition, judges across the country have implored this Court to revisit and clarify the contours of the law on that critical question. Pet.29. Indeed, respondents concede that "[t]he nondelegation question is presently top of mind for jurists and non-jurists alike." Int.Resp.Br.28.

Respondents bizarrely (and unfairly) question Choice’s motivations in bringing this challenge, claiming that Choice’s real concern is with how EPA allocated the allowances, not whether it was constitutionally permitted to do so. Int.Resp.Br.15. Of course Choice cares about how EPA allocated allowances; it would lack Article III standing if EPA had given it everything it wants. But that does not somehow convert this constitutional challenge into an arbitrary-and-capricious one. *Contra id.* Respondents also suggest that Choice should simply petition EPA for a new rulemaking. Int.Resp.Br.17. But forcing Choice to petition the very agency wielding unconstitutional legislative power to wield that power again is hardly a satisfactory solution to the underlying nondelegation concern.

Intervenor-Respondents next suggest that the AIM Act is an unsuitable candidate for addressing nondelegation concerns because it implicates Article II’s treaty power. Int.Resp.Br.24-25. Notably, the government does not embrace this argument. After all, the Act—which, again, targets “American Innovation and Manufacturing”—never even mentions a foreign treaty, let alone purports to implement or ratify one. That is unsurprising; the treaty to which respondents refer was ratified two years *after* the AIM Act was passed. 168 Cong. Rec. S4898 (daily ed. Sep. 21, 2022).

Finally, conceding the need for this Court to revisit the intelligible-principle test, respondents note another petition involving that test. Int.Resp.Br.28 (citing *Pheasant v. United States*, No. 25-6911 (U.S. Feb. 20, 2025)). But that petition asks only whether

the test applies differently to criminal punishments. The more fundamental question is whether Congress can empower executive agencies to make legislative decisions without providing any guidance whatsoever on how to do so. *That* question is squarely presented here. The Court should take this opportunity to make clear once and for all that courts have both the power *and duty* to police violations of Article I's Vesting Clause and the separation of powers that it preserves.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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