NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

Nos. 21-1253
(Consolidated with 21-1251 and 21-1252)

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

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.,*

Respondents.

On Petition for Review of Final Agency Action of the Environmental Protection Agency

PROOF REPLY BRIEF FOR PETITIONER RMS OF GEORGIA, LLC

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July 8, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, petitioner RMS of Georgia, LLC, 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 (No. 21-1253); Worthington Industries, Inc. (No. 21-1252); Heating, Air-Conditioning & Refrigeration Distributors International, Air Conditioning Contractors of America, and Plumbing-Heating Cooling Contractors—National Association (No. 21-1251).

B. Respondents

United States Environmental Protection Agency (Nos. 21-1251, -1252, and -1253) and Michael S. Regan, EPA Administrator (Nos. 21-1251, -1252, and -1253).

C. Intervenors for Petitioners

None.

D. Intervenors for Respondents

None.

E. AMICI CURIAE FOR PETITIONERS

None.

F. AMICUS CURIAE FOR RESPONDENTS

None.

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GLOSSARY

AIM Act	American Innovation and Manufacturing Act of 2020
ASHRAE	American Society of Heating, Refrigerating and Air-Conditioning Engineers
EPA	U.S. Environmental Protection Agency
HFC	Hydrofluorocarbon
JA	Joint Appendix
RTC	Response to Comments

SUMMARY OF ARGUMENT

1. The AIM Act prohibits EPA from listing HFC blends as regulated substances for purposes of the allowance cap-and-trade program. Although a savings clause allows EPA to use its authorities under the Act to regulate listed substances "within" blends for non-trading purposes (such as phasing out end-uses in particular sectors), the statutory prohibition would make no sense if EPA could simply treat HFC blends as regulated substances for purposes of the trading program.

2. The exhaustion provision of the Clean Air Act does not foreclose jurisdiction, as there is no pre-notification requirement to raise constitutional challenges in notice-and-comment rulemaking. The exhaustion provision is explicitly limited to rule-writing or procedural objections which EPA could address during the rulemaking process.

3. While the AIM Act delegates EPA authority to establish an HFC cap-and-trade program and specifies certain details of the allowance program, Congress failed to provide any guiding principle whatsoever on the core question of who gets valuable allowances worth some one billion dollars per year. No precedent has ever countenanced such an abdication of legislative power to unaccountable bureaucrats to decide how to hand out pieces of an entire economic sector in the context of a cap-and-trade program.

ARGUMENT

Petitioner RMS of Georgia LLC d/b/a Choice Refrigerants ("Choice") respectfully submits this reply to Respondents' response brief dated June 2, 2022 (ECF#1949082).

I. EPA HAS NO AUTHORITY TO REQUIRE ALLOWANCES FOR HFC BLENDS

Choice challenges EPA's attempt to expand its October 5, 2021 cap-and-trade rule to require importers of HFC blends (as opposed to listed regulated substances) to hold (or purchase from others) valuable import allowances contrary to Congress' explicit textual direction in the AIM Act that HFC blends cannot be added to the list of regulated substances for which allowances are required under the statute. The key provision, §7675(c)(3)(B)(i), prohibits listing HFC blends as regulated substances for purposes of subsection (e) of the AIM Act. Subsection (e) refers to the cap-and-trade allowance trading program to phase out 18 regulated substances, which Congress listed by name in the statute.

EPA argues that it can achieve the same outcome prohibited by subsection (B)(i) (*i.e.*, adding HFC blends to the statutory list of regulated substances for allowance trading purposes) by ostensibly not adding HFC blends to the regulated list, but rather by requiring allowances for the chemical feedstocks used to manufacture the HFC blends. But the agency's interpretation has several fatal flaws:

First, the result nullifies the language that Congress actually used in the statute. Indeed, EPA admits the result is the same whether EPA adds HFC blends to the list of regulated substances or requires allowances for HFC blends on the basis of regulated substances "within" the blend. EPA Br. 32. As justification, EPA points to subsection (B)(ii), which refers to EPA's authority to regulate the 18 listed chemicals "within a blend." EPA fails to explain how side-stepping the prohibition on listing HFC blends for allowance trading purposes by using subsection (B)(ii) accords with Congress' decision to limit the universe of regulated substances to 18 listed chemicals and its explicit command that HFC blends were not to be regulated "for purposes of phasing down production or consumption of regulated substances under subsection (e) [allowance trading]."[1] Surely Congress would not have drafted this precise language if it really intended to say nothing more than 'the allowance trading program applies to listed regulated substances within HFC blends.' *Air Transport Ass'n v. USDA*, 2022 WL 2203484, at *4 (D.C. Cir. 2022) ("Surplusage can significantly weaken a Chevron Step One argument").

[1] EPA's statement of the case tellingly elides the critical fact that the subsection (B)(i) prohibition on listing HFC blends applies only for the purposes of the subsection (e) trading program, not for other purposes of the statute. EPA Br. 4.

Second, EPA fails to identify any "authority of the Administrator to regulate" HFCs within blends for purposes of invoking the subsection (B)(ii) savings provision. EPA concedes that subsection (B)(ii) is not itself a grant of such authority, EPA Br. 34, so the authority must be found elsewhere in the statute. Likewise, subsection (e)(2)(A)(ii)'s prohibition on importing HFCs without an allowance is a statutory prohibition, not a grant of authority to EPA. Subsection (B)(ii)'s reference to "authority" under the statute makes sense, even if that authority does not include regulating HFC blends under the trading program, because EPA may properly regulate blends in various other ways, most notably through subsection (i)'s authority to "restrict . . . the use of a regulated substance" in particular sectors, which it is now doing. §7675(i)(1); 86 Fed. Reg. 57,141 (Oct. 14, 2021) (announcing rulemaking to restrict end-uses of HFCs).

Third, EPA's protestation that reading the statute literally would open a "massive loophole," EPA Br. 26, rings hollow because there is no indication in the statute that the trading program was intended to require allowances for every HFC in every circumstance. Indeed, EPA itself decided to exclude all HFCs that are pre-packaged in air conditioners or other manufactured products from the trading program. 86 Fed. Reg. at 55147 (allowances not required for "imports of products containing HFCs"). EPA's regulations also exclude all HFCs that are not imported in bulk containers. EPA Br. 22 n.16. Thus even many listed regulated substances

are not subject to the allowance trading program, so excluding HFC blends is not statutory anathema. EPA's concern about circumvention, EPA Br. 26, is similarly unfounded as applied to commercially sold HFC blends like Choice's patented product, which is a genuine ASHRAE-certified chemical with its own commercial uses, not an opportunistic blend designed only to cheat the trading program.

Fourth, HFC blends are products that Congress explicitly decided should not be subject to EPA's allowance trading program. Any watcher of crime TV knows that lab testing can "discern" the components or ingredients of a substance, EPA Br. 24, but the substance is still considered a separate product. EPA's analogy to mixed flour, EPA Br. 25, misses the point because two types of flour, even if mixed together, is merely a mix of raw ingredients, not a separate commercial product like a cake. It is undisputed that HFC blends are separate products with distinct chemical and physical properties, unique identifiers, and separate uses from the HFC "regulated substances" that were originally used to manufacture the blends. Although EPA asserted in its RTC document that blends are not separate chemicals, EPA Br. 24, it never made supporting findings and thus is not entitled to the "extreme" deference for technical decisions that the agency claims. EPA Br. 24-25. Rather, the Court must interpret the statute consistent with Congressional intent as evidenced by the language that the drafters chose. *Am. Hospital Ass'n v.*

Becerra, 142 S. Ct. 1896 (2022) (statute *did not* allow the agency to vary rates among hospitals).

Finally, the fact that EPA counted HFC blends in its baseline calculations, EPA Br. 28, is a consequence of EPA's own mistaken interpretation, which it can correct.

II. EPA DID NOT ACTUALLY EXERCISE ANY AUTHORITY TO REGULATE BLENDS

EPA does not address in its opposition the fact that it never actually exercised or invoked its putative authority to require allowances for HFC blends. Rather, EPA mistakenly assumed that the statute included HFC blends in the subsection (e) trading program.

III. THE CAP-AND-TRADE PROGRAM IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER TO AN UNACCOUNTABLE ADMINISTRATIVE AGENCY

In the AIM Act, Congress failed to specify any intelligible principle to guide the agency in handing out essential cap-and-trade allowances.

A. Choice's Delegation Challenge Is Properly Before the Court under Clean Air Act §307

EPA interposes a threshold argument that this Court lacks jurisdiction to correct a constitutional violation because Choice did not raise this issue in

rulemaking comments.[2] EPA Br. 37. EPA does not argue that the petition for review in this action is in the wrong venue or that this Court lacks jurisdiction generally over constitutional challenges under Clean Air Act §307(b). Nor does EPA argue that Choice's constitutional challenge could only be brought in a district court under 28 U.S.C. §1331 ("district courts shall have original jurisdiction of all civil actions arising under the Constitution") or before some other tribunal. Rather, EPA appears to acknowledge that this Court could review the constitutionality of the AIM Act − if only petitioner had pre-noticed the delegation concerns in rulemaking comments.

But Clean Air Act §307(d)(7)(B) applies only to "an objection to a rule or procedure." This phrasing indicates Congressional intent to require exhaustion only where EPA naturally could address asserted flaws in its drafting of a rule, or objections to "procedure" which EPA could correct by providing appropriate due process. In contrast, Choice's petition raises an objection to the statute itself. That the Clean Air Act would require timely objections only to those types of errors that EPA could correct in the rulemaking process makes sense. The Court is not being asked to inject a futility exemption into section 307, which this Court has declined to do in the past, because no futility exemption is needed where the literal text of

[2] EPA did not raise this jurisdictional issue in initial motions or when briefing limits were discussed.

the provision is self-limited to objections that the agency could cure during the rulemaking proceeding. Under the rule of *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001), EPA had no ability to correct the AIM Act's unprincipled delegation of power, such that any public comment in a rulemaking proceeding would have been meaningless.

Essentially EPA is arguing that the Clean Air Act imposes a never-before-announced procedural requirement of pre-notice of any potential constitutional challenge. This is not a reasonable reading of §307(d)(7)(B) and ignores the plain language of the exhaustion provision ("objection to a rule or procedure"). Indeed, the Supreme Court itself addressed the constitutionality of the Clean Air Act in *Whitman* even where the statutory nondelegation argument was apparently not specifically presented in rulemaking comments in that proceeding. *Id.* at 473 ("Whether the statute delegates legislative power is a question for the courts"); *see also* RTC at 136 (comment that "EPA's proposal assumes, unreasonably, that Congress has delegated to the Agency final authority" but not challenging congressional delegation).[3] Although the Court ultimately upheld the scope of delegation in section 109 of the Clean Air Act as setting forth an intelligible principle, the Court expressed no doubt as to its jurisdiction.

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[3] *Available at* https://www.regulations.gov/document/EPA-HQ-OAR-2004-0394-0012.

Lead Industries, the primary case cited by EPA in support of its argument that §307(d)(7)(B) "contains no exception for constitutional claims," EPA Br. 39, on a close read, reinforces that the Clean Air Act exhaustion requirement applies only to correctable objections. In that case, an industry petitioner belatedly complained that an EPA official had a conflict of interest that deprived the rulemaking proceeding of constitutional due process, but the petitioner had not raised this "objection to a rule or procedure" under §307(d)(7)(B) during the rulemaking process. The court expressed concern that untimely procedural objections would enable "sandbagging" that would be used to "compel the Agency to institute new proceedings" and delay the agency's rule writing. *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1173 (D.C. Cir. 1980). The Court cautioned against tactical bad faith on the part of petitioner, 647 F.2d at 1175 ("tactical decision not to raise this question until after the rulemaking was completed . . . and thereby delay the rulemaking"), a concern that has not been raised with respect to Choice's challenge in this action. In contrast to *Lead Industries*, Choice is not relying on an asserted procedural flaw. Nor is there any delay concern here, as Choice's delegation argument is not an "objection to . . . procedure" (in the words of the Clean Air Act) but rather a constitutional challenge to the AIM Act statute itself; and if successful, Choice's challenge would result in invalidation of the statute, not new serial rulemaking proceedings.

EPA also cites *Texas Mun. Power Agency v. EPA*, 89 F.3d 858 (D.C. Cir. 1996), for the proposition that there is "no futility exception" in §307(d)(7)(B). EPA Br. 39. Choice is not arguing that a futility exemption is needed – the Clean Air Act itself requires objections only to rule-writing or process flaws. Moreover, although this Court in *Texas Municipal Power* declined to read into §307(d)(7)(B) a common-law futility exemption, it is evident that its holding, similar to *Lead Industries*, addressed procedural complaints (about lack of notice and a missing study) that could have been raised in public comments and cured in the rulemaking process. *Texas Municipal Power*, 89 F.3d at 876. Inherent in both cases cited by EPA, unlike in this case, is the supposition that if the petitioner had objected to the official's involvement earlier, the agency could have corrected the rulemaking process before it concluded. *Lead Industries*, 647 F.2d at 1173 ("petitioner "could simply refrain from presenting their constitutional objections . . . and thereby compel the Agency to institute new proceedings" which would thwart "expeditious attainment" of pollution goals).

Moreover, Choice had no occasion to raise the delegation issue in the Framework Rule rulemaking, as it did not yet know that it would be aggrieved by EPA's exercise of its authority. EPA did not allocate allowances to individual companies in the Framework Rule itself, but rather announced its allowance action in a subsequent *Federal Register* notice. The agency never opened a record for

public comment on the allocation action and there was no proposed rule on which Choice could have commented. *See 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 (Oct. 7, 2021) ("Allocation Notice").[4] Moreover, because EPA's Framework Rule covers only two years (2022 and 2023), EPA Br. 9 n.4, the same delegation issue will arise when EPA proposes a framework rule for the years 2024 forward and Choice will raise the delegation in public comments if the Court has not heard its challenge in this action. Thus, this issue will eventually be raised in public comments, and it will be far more disruptive to address the constitutionality of the AIM Act when EPA is another two years into implementation of the cap-and-trade program than to nip the problem in the bud.

B. Congress Unconstitutionally Delegated Life-and-Death Power to an Unaccountable Administrative Agency

On the merits, EPA claims that Congress delegated to the Executive the power to control some 273,498,315 cap-and-trade allowances likely worth over a billion dollars each year, but without specifying who gets the allowances. 86 Fed.

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[4] Choice challenged both the Framework Rule and Allocation Notice in this Court, but the agency moved to sever the two actions and the Court granted severance. Resps' Mot. to Sever, dated Jan. 18, 2022 (ECF#1931100); Order dated Feb. 22, 2022 (ECF#1936059).

Reg. 55,841. EPA cites a litany of precedents that upheld various delegations to administrative agencies, but none of these cases addressed a cap-and-trade program in which Congress dismantled an entire industry and handed over to EPA the power to dole out the pieces. Accordingly, none are dispositive on the particular question of the unique AIM Act delegation before the Court. Moreover, *Panama Refining* and *Schechter Poultry*, although aging, remain good law and are binding on this Court. Pet. Br. 23; *cf. W. Virginia v. EPA*, No. 20-1530, 2022 WL 2347278, at *12 (U.S. June 30, 2022) (noting continuing importance of nondelegation doctrine).

Nor does the detail provided elsewhere by Congress in the AIM Act address how EPA should allocate the pieces of the dismantled HFC products industry. To the contrary, Congress gave EPA direction on the number of allowances, the nature of allowances, and specified sectors that would have first priority to allowances, but as to the most critical structural design question of how to allocate the remaining allowances the statute provides no principle, no guidance, and no standard for EPA's decision making. None of the statutory parameters for number, nature or first priority of allowances address the most critical question − how the allowances in the general pool should be divided. EPA's citation to the grant of application-specific allowances to specific industries in subsection (e)(4)(B)(iv), EPA Br. 43, is at best inapposite, as those allowances are of a different class than

general pool allowances, and at worst, the specificity as to what companies qualify for application-specific allowances highlights the absence of any guiding principle in the statute to allocate general pool allowances.

EPA next argues that despite the absence of any guiding principle in the statutory text, the statutory *context* provides "guideposts" that implicitly limit its allocation discretion to "persons that have produced, imported, or used" HFCs. EPA Br. 45-46. In support, EPA points to the statutory definition of allowances as limited authorizations and the first-priority right to allowances granted by the statute to certain essential uses like medical devices and defense applications. But EPA's reasoning leaps from those provisions to finding implicitly a supposed principle that limits allocations of general pool allowances to market participants (presumably excluding persons who were not previously in the chemicals market). This cannot be the case, however, because EPA has already interpreted the scope of its delegated powers under the AIM Act as including an auction in which potentially any person could buy allowances. Proposed Rule, 86 Fed. Reg. 27,150, 27,203 (soliciting comment on "[e]stablishing an auction system for the total set, or some subset, of generally available allowances").[5] Even if Congress impliedly specified the category of market participants, how is EPA to choose who wins and

[5] Accordingly, EPA should be deemed to have waived this argument.

loses amongst that group? This is not the "directing the details of [a statute's] execution" that the Constitution allows. *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928).

EPA also attempts to characterize the decision about who gets free allowances as a "fact-intensive technical judgment" that can be delegated to agency officials. EPA Br. 46. To the contrary, this is a policy choice to be made by legislators. But regardless EPA undertook no such fact-intensive technical inquiry − the administrative record is devoid of any analysis of the economic impact of EPA's decision on Choice or any other company, despite the fact that Choice submitted three letters detailing the impacts EPA's actions might have on it.

EPA callously brushes aside the severe impact that EPA's allocation of allowances will have on Choice's business. EPA's lawyers argue that "Choice overstates matters," EPA Br. 46, but the government in doing so goes outside the administrative record. The only factual evidence in the record is Choice's uncontroverted letters to EPA explaining that Choice would get some 30% less allowances under EPA's allocation approach than it needed to continue its business. JA __ { Choice Refrigerants Comment Letter, EPA-HQ-OAR-2021-0044-0168 (July 6, 2021)}. EPA pollyannishly asserts that the "market" will "efficiently reallocate allowances," EPA Br. 46, as if there is no financial impact

on companies like Choice who are short-changed allowances. To the contrary, when an agency decides to hand out market permits to other companies, Choice must pay millions of dollars to buy those permits back, just so it can continue importing the same volume of its patented product as before (not considering the across-the-board cuts that the AIM Act mandates for the entire sector). *Cf.* Pet. Br. 8, 25-26. This decision is not mere "minutiae" as EPA describes it, EPA Br. 46, but for market participants is the primary − and perhaps only really important − decision to be made in designing the allocation program.

CONCLUSION

Under our constitutional system, decisions to divide up markets must be made by elected representatives, not jaded bureaucrats who think that market forces have no economic consequences for individual businesses. In the end, the absence of any guiding principle in the AIM Act statute determining who gets allowances is a reflection of the fraught politics of climate change (which Congress sought to avoid in this legislation) and an abdication of legislative responsibility to make core decisions. *Cf. Indus. Union Dep't v. Amer. Petroleum Inst.*, 448 U.S. 607, 681, 687 (1980) (Congress "simply avoid[ed] a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge") (Rehnquist, J. concurring).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of this Court's order of March 15, 2022, because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this response contains **3384** 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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CERTIFICATE OF SERVICE

I certify that on this date, I caused to be filed a copy of this brief using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

/s/ David M. Williamson
David M. Williamson

July 8, 2022