PANEL DECISION ENTERED JUNE 20, 2023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-1253

(Consolidated with 21-1251, 21-1252)

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

Petitioner,

v.

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

Respondents.

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

PETITION FOR PANEL REHEARING & REHEARING EN BANC

ZHONETTE M. BROWN
KAITLYN D. SCHIRALDI
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, D.C. 20036
Tel.: (202) 869-5210
zhonette.brown@ncla.legal
kaitlyn.schiraldi@ncla.legal

DAVID M. WILLIAMSON
WILLIAMSON LAW + POLICY, PLLC
1001 Connecticut Ave. NW, Suite 612
Washington, D.C. 20036
Tel.: (202) 256-6155
maxwilliamson@williamsonlawpolicy.com

Counsel for Petitioner RMS of Georgia, LLC

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GLOSSARY

AIM Act	American Innovation and Manufacturing Act of 2020
CAA	Clean Air Act
EPA	U.S. Environmental Protection Agency
HFC	Hydrofluorocarbon
JA	Joint Appendix

RULE 35 STATEMENT

The petition in this case presents a novel question of exceptional importance: whether the Clean Air Act ("CAA") bars courts from reviewing the constitutionality of a statute if the issue was not first presented to an agency. In its consideration of Petitioner's Article 1, § 1 delegation claim, the panel did not reconcile its reasoning to the Supreme Court's view of agency action or this Circuit's key assumptions doctrine. Rehearing by the panel or review en banc is therefore necessary. *See* FED. R. APP. P. 35, 40; D.C. Cir. R. 35, 40.

Petitioner, RMS of Georgia, LLC d/b/a Choice Refrigerants ("Choice"), asserts that the American Innovation and Manufacturing Act of 2020 ("AIM Act"),[1] violates the Constitution because Congress unlawfully delegated legislative power to the Environmental Protection Agency ("EPA"). *See* U.S. CONST. art. I, § 1. The AIM Act, with no guidance, permits EPA to determine which market participants may continue to produce or import materials needed for their business and in what proportion to the rest of the market. *See* 42 U.S.C. § 7675(e). EPA acknowledged that "there is [*sic*] no congressional guideline on EPA's discretion."[2]

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[1] 42 U.S.C. § 7675 (2023). The AIM Act is considered to be part of the CAA for purposes of judicial review. *See* 42 U.S.C. § 7675(k)(1)(C).

[2] Transcript of Nov. 18, 2022, Oral Argument ("O.A. Tr.") at 60:5–6, *Heating, Air Conditioning & Refrigeration Distrib. Int'l v. EPA*, No. 21-1251 (D.C. Cir.).

The panel determined that it could not consider the merits of Choice's constitutional challenge because the issue had not been administratively exhausted under 42 U.S.C. § 7607(d)(7)(B).[3] Yet, by its terms, § 7607(d)(7)(B) applies only to "an objection to a rule or procedure," not to faults in a statute or to other agency action. Further, the panel's holding and the operation of § 7607 may preclude any challenge to an otherwise fatal infirmity in a CAA statutory provision when the issue is not raised during early rulemaking. The risk that judicial review of constitutional violations may be so easily thwarted warrants rehearing or review.

In finding that Choice was necessarily challenging a rule, the panel did not acknowledge that the CAA provides for the "review of any action of the Administrator" within the context of a rulemaking, 42 U.S.C. § 7607(d)(9), and any "final action taken[] by the Administrator under" chapter 85 of Title 42. 42 U.S.C. § 7607(b)(1). Agency action is broader than promulgating a rule, and the Supreme Court has held that when confronted with an unlawful delegation, the 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." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001). Regardless of the rule's substance, Choice suffered harm and the EPA violated the

[3] *Heating, Air Conditioning & Refrigeration Distrib. Int'l (HARDI) v. EPA*, 71 F.4th 59, 64–65 (D.C. Cir. 2023).

Constitution. *See Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 903–04 (2023) (harm arises from being subject to an illegitimate proceeding by an illegitimate decisionmaker, regardless of the outcome).

Finally, as the panel noted, the Constitution's Take Care clause requires EPA to ensure that it is faithfully executing the law. 71 F.4th at 65 n.1. This Circuit has repeatedly held that "an agency has the 'duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a [lawful] rule' and therefore … 'must justify that assumption even if no one objects to it during the comment period.'"[4] When "key assumptions" are at issue, exhaustion through regulatory comment has not been required. *See Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004) (rejecting EPA's exhaustion argument, in part because issue went to a key assumption the agency was duty-bound to address); *Appalachian Power*, 135 F.3d at 818 (even if petitioner had not raised argument before EPA, because issue related to a key assumption agency had a burden to justify, court was not prohibited from considering it); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 534–35 (D.C. Cir. 1983) (holding EPA must justify its key assumptions even if no one objects to such assumptions during

[4] *Am. Fuel & Petrochem. Mfrs. v. EPA*, 937 F.3d 559, 589 (D.C. Cir. 2019) (quoting *Okla. Dep't of Envtl. Quality v. EPA*, 740 F.3d 185, 192 (D.C. Cir. 2014)); *see also Appalachian Power Co. v. EPA*, 135 F.3d, 791 818 (D.C. Cir. 1998) (per curiam).

the comment period and that the petitioner could properly ask the court to review whether EPA had done so).

That EPA was acting within its constitutional power was a key assumption underlying its action. Therefore, *even assuming* that Choice challenged a rule, the panel decision to decline review on exhaustion grounds cannot be reconciled with this Circuit's key assumptions doctrine.

Choice respectfully requests rehearing by the panel or en banc consideration of the panel's decision in Part II.B of its opinion relating to administrative exhaustion and its constitutional claim.

FACTUAL AND PROCEDURAL BACKGROUND

Choice is an American small business that imports, produces, and sells refrigerants for heating and cooling in the United States. Choice's flagship product is a patented, proprietary hydrofluorocarbon ("HFC") blend, which is an environmentally preferrable substitute for older, ozone layer-depleting refrigerants.

In late 2020, Congress passed the AIM Act, a cap-and-trade program that phases down HFCs by requiring that all producers or consumers (*i.e.*, importers) of HFCs hold "allowances." The AIM Act constricts the number of available allowances over time to eventually eliminate most HFC use in the United States. *See* 42 U.S.C. § 7675(e) (2023); 40 C.F.R. pt. 84 (2021) (EPA implementing regulations).

When Congress delegated implementation of the AIM Act to the EPA, it provided details as to the chemical compounds at issue, prescribed the method for establishing a baseline from which to measure the phase-down, and directed EPA to establish an allowance trading program to phase down the HFC industry in the United States. *See* 42 U.S.C. §§ 7675(c), (e). Congress provided absolutely *no* guidance, however, as to *who* should receive the "allowances" now needed to continue to produce or consume HFCs.[5] *See* 42 U.S.C. § 7675(e)(3). This unconstrained discretion opened the door for EPA to make bizarre allocation decisions, issuing allowances to Choice's import agent (rather than to Choice as the principal) and to a foreign company that pirated Choice's patented product.

During its rulemaking, EPA repeatedly noted that the AIM Act gave it "considerable" or "significant" discretion in assigning allowances. *See* JA2092, JA2094, JA2104, JA2129. Indeed, EPA on its own created a "set aside pool" of allowances for unknown and new market participants, and proposed no less than five allocation schemes, suggesting that the schemes may change over time. *See* JA2102–03; JA2129; *see also* JA2094.

[5] The panel likened the allowances to licenses. 71 F.4th at 62. Choice disagrees with this characterization to the extent that it implies that the Executive Branch had discretion in dismantling Choice's business.

After EPA published its framework allocating allowances, Choice filed a petition to challenge, among other things, the improper delegation of legislative power to EPA. Choice's Statement of Issues and opening brief addressed the unconstitutional delegation of legislative power. *See* Petitioner's Non-Binding Statement of Issues, Doc. 1932061, at 2 (Issue 3) (Jan. 24, 2022); Final Opening Br. for Pet'r RMS of Georgia, LLC, Doc. 1956091, at 21–28 (July 22, 2022). EPA waited until its response brief to argue that Choice's constitutional challenge was not "properly before" the Court since the issue had not been raised in rulemaking comments. *See* Final Br. for Resp'ts, Doc. 1955962, at 2, 16, 37–40 (July 21, 2022). Choice's reply brief argued that issue exhaustion applies only to *rules or procedures*, not statutes, and that the cases EPA cited involved faults within the agency's ability to cure. *See* Final Reply Br. for Pet'r, Doc. 1956155, at 6–11 (July 22, 2022).

At oral argument, Judge Pillard recognized the novelty of the exhaustion question. O.A. Tr. at 56:18–57:11. EPA responded by asserting that Choice's challenge was to an action of the EPA Administrator while conceding that EPA could do nothing to cure a nondelegation problem beyond explaining what principles would guide its discretion, and arguing that § 7607(d)(7)(B) had no exception for "structural constitutional claims." O.A. Tr. at 57:12–59:5. EPA acknowledged its position that Congress could properly leave it to decide who would receive allowances and that there is "no congressional guideline on EPA's discretion"

beyond the requirement that it not be arbitrary. O.A. Tr. at 59:19–23; 60:5–11, 62:6–14.

Adopting EPA's position, the panel did not reach the merits of Choice's delegation claim. Rather, the panel noted that a challenge to a statute "alone" would fail to state a claim under the CAA. 71 F.4th at 65. The panel then described Choice's petition as "best read" to challenge the agency's implementing rule and determined that the exhaustion requirement of § 7607(d)(7)(B) therefore applied. *Id.* Noting that the unlawful delegation issue had not been raised in rulemaking comments, the panel then held that the Court "may not consider" the unexhausted constitutional question. *Id*.

ARGUMENT

I. WHETHER THE CLEAN AIR ACT PROHIBITS JUDICIAL REVIEW OF AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER ABSENT ADMINISTRATIVE EXHAUSTION IS A QUESTION OF EXCEPTIONAL IMPORTANCE

As Judge Pillard observed during oral argument, this case presents an issue of first impression: "[D]oes the [CAA] exhaustion requirement even apply" to Choice's argument that the AIM Act contravenes the Constitution? O.A. Tr. at 56–57. This question implicates the full breadth of the CAA judicial review provision, has not been previously addressed, and has profound consequences for regulated entities' ability to vindicate constitutional rights.

The question here is exceptionally important because allocation of constitutional powers is fundamental to our nation's very form and operation of government. *See, e.g.*, U.S. CONST. art. I, § 1; *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 61 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty."); *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 471 (D.C. Cir. 1982) ("The doctrine of separation of powers 'is at the heart of our Constitution.' … The fundamental purpose … to protect the people from oppression."); *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1557 (D.C. Cir. 1985) (noting that the separation of powers is a "bedrock issue of the structure of the National Government").

A. Section 7607(d)(7)(B) Limits the Exhaustion Requirement to Objections to Agency Rules and Procedures

As a plain textual matter, § 7607 distinguishes between types of agency action and pertains to more than EPA rules. The panel, however, did not consider whether agency action other than the rule could be at issue.

Subsection (b) of § 7607 addresses judicial review for any "final action taken, by the Administrator under" chapter 85, which, by cross-reference, includes the AIM Act. *See* 42 U.S.C. § 7607(b)(1); 42 U.S.C. § 7675. Even within the rulemaking provision, § 7607(d), subsections (d)(7)–(9) address different types of agency action. Under subsection (d)(7)(B), "an objection to a rule or procedure" cannot be judicially challenged unless it was raised with reasonable specificity during the

comment period—the exhaustion requirement. 42 U.S.C. § 7607(d)(7)(B). Subsection (d)(8) places further limitations on "challenging procedural determinations." 42 U.S.C. § 7607(d)(8). The broadest provision, however, is subsection (d)(9), which explains the judicial standards for reviewing "*any action of the Administrator*." 42 U.S.C. § 7607(d)(9). Subsection (d)(9) logically includes challenges to arbitrary rulemaking actions that are also subject to subsection (d)(7), but further encompasses a remedy for *any* agency action contrary to constitutional right or power or in excess of statutory jurisdiction. 42 U.S.C. §§ 7607(d)(9)(B)–(C).

Here, Choice directed its claim at the *statute, not a rule*. Choice Reply Br. at 7 (Doc. 1956155). Without addressing any viable alternative agency action, the panel found that the "substance" of Choice's petition is that the "*rule is unlawful* because the statute authorizing it is an unconstitutional delegation of legislative power." 71 F.4th at 65 (emphasis added). Choice's argument, however, logically falls under § 7607(d)(9), which does not require exhaustion. EPA engaged in agency action the moment it reached to pick up the legislative power Congress improperly laid at its feet. While the existence of the rule provides Choice with standing as an aggrieved stakeholder, the substance of the rule is irrelevant to the merits of Choice's claim. This view of agency action, which as explained below is supported by Supreme Court precedent, makes exhaustion inapplicable because the unlawful

conduct was not limited to an agency rule or process. Put another way, there is no need for an exemption from subsection (b)(7) exhaustion because the plain text of the CAA does not apply the exhaustion requirement to challenges to the underlying statute brought pursuant to subsection (b)(9).

Every CAA case cited to the panel by EPA to argue for exhaustion is distinguishable. Each case presented questions about a rule or process; exhaustion has not been required for judicial review of a statute because, prior to this case, the Court had yet to confront the issue. For example, EPA (and the panel) cite *Lead Industries Association, Inc. v. EPA*,[6] in noting that § 7607(b)(7)(B) "contains no exception for constitutional claims." EPA Br. at 39 (Doc. 1955962); 71 F.4th at 65. That holding, however, arises from a rulemaker's conflict of interest, an agency due process issue, not from a claim that a statute was faulty. *Lead Indus.*, 647 F.2d at 1173.

The other CAA cases cited by the EPA likewise addressed exhaustion in the context of a rule or agency process, not a defective statute. *See Tex. Mun. Power Agency v. EPA*, 89 F.3d 858 (D.C. Cir. 1996) (addressing claim that agency failed to give proper notice of standards or to provide relied-upon study during comment period); *Nat. Res. Def. Council v. EPA*, 571 F.3d 1245, 1259 (D.C. Cir. 2009)

[6] 647 F.2d 1130, 1172–74 (D.C. Cir. 1980).

(addressing claim agency misinterpreted statute, but not asserting statute itself was flawed).[7]

When EPA raised the exhaustion issue in this case, it set up a strawman by framing the question as whether there was an exception to the exhaustion requirement. EPA Br. at 16, 37, 39 (Doc. 1955962). This framing, however, relies upon the premise that Choice was challenging a "rule" subject to subsection (d)(7)(B) and could not have been challenging some other agency action. This framing also disregards a more fundamental inquiry relevant to the textual statutory interpretation of § 7607—why is exhaustion found only in § (d)(7), applicable to agency rules and process, and not in § (b)(1) or § (d)(9)? The answer mirrors Choice's argument: Congress placed an exhaustion requirement where having EPA address the question would not be futile. EPA could remedy a problem with its own rule or process, but EPA cannot remedy a problem with a statute.

Whether Choice or any other party may challenge a constitutionally improper delegation under subsection (d)(9) or (b)(1), yet outside of subsection (d)(7), remains an important unanswered question that should be addressed on rehearing or en banc.

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[7] *Fleming v. Dep't of Agric.*, 987 F.3d 1093, 1098 (D.C. Cir. 2021), relied upon in EPA's brief and oral argument, did not construe the CAA but rather 7 U.S.C. § 6912(e), which is applicable to the Department of Agriculture.

B. The Panel Decision May Prohibit Consideration of Important Constitutional Questions Not Addressed During Rulemaking

The likely result of the panel decision is that important constitutional issues not anticipated in comments to a proposed rule (prior to the rule being finalized and implemented) are forever insulated from judicial review, which presents a question of exceptional importance.

The panel surmised that Choice may be able to challenge the AIM Act in a different venue or under a different legal theory, for example under federal question jurisdiction. 71 F.4th at 65 n.2. That is far from certain, however, and if wrong Choice is left without remedy. No matter where Choice turns to adjudicate this constitutional issue, EPA must be a defendant.[8] Since EPA is the *only* proper defendant and since a party must have a redressable harm, any suit would logically challenge or seek to prohibit EPA action. EPA would likely seek dismissal of such a suit, arguing that § 7607 encompasses "final action taken, by the Administrator[,]" which must be challenged in the circuit courts. *See* 42 U.S.C. §§ 7607(b)(1), (d)(1)(I), (d)(9); 42 U.S.C. § 7675(k)(1)(C).

[8] The panel noted that suing on a statute "alone" would fail to state a claim under the CAA. 71 F.4th at 65. But no one can sue under any theory on a statute "alone." Sovereign immunity is not generally waived for Congress and a suit must challenge an action or reasonably anticipated action or there is no standing.

If § 7607 precludes challenge in other courts or under other legal theories, and if the panel decision remains, the practical result is: (1) Choice is left without an immediate remedy for the unconstitutional throttling of its business in 2022–2023; and (2) any constitutional problem lurking in an enabling statute under the CAA is impervious to judicial review if not anticipated and raised in a preliminary public comment process.

Rehearing or en banc consideration is needed to clarify and ensure that constitutional challenges to unlawful delegation of legislative power are not lost.

II. THE PANEL'S DECISION LACKS UNIFORMITY WITH SUPREME COURT ANALYSIS AND THIS CIRCUIT'S KEY ASSUMPTIONS DOCTRINE

En banc review is also appropriate to ensure consistency in this Circuit's decisions. *See* FED. R. APP. P. 35(a)(1). Specifically, the panel decision does not address the Supreme Court's characterization of agency action or this Circuit's key assumptions doctrine.

A. Supreme Court Precedent Demonstrates that the Unlawful Agency Conduct Here Did Not Require Promulgation of a Rule

The Supreme Court has previously rejected this Circuit's conclusion that an agency could cure an unconstitutional delegation and in doing so suggested that any action an agency takes pursuant to an unconstitutional delegation would itself be unlawful agency action.

In *American Trucking Associations, Inc. v. EPA*,[9] the D.C. Circuit found that sections 108 and 109 of the CAA were "unconstitutional delegations of legislative power." 175 F.3d at 1034. Specifically, the Court found that there was no intelligible principle in the statute and that EPA had not supplied one. *Id.* The Court remanded the issues to EPA to either identify an intelligible principle that it would select, or to report back to Congress that no such principle was available. The Court reasoned that its remand would address two of three "rationales for the nondelegation doctrine": it would tether the agency to an articulated standard that could prevent arbitrary conduct and would allow for "meaningful judicial review" of the standard. *Id*. at 1038. The Court recognized, however, that remand would leave the agency making "fundamental policy choices." *Id*.

The Supreme Court found remand to the agency to cure a non-delegation problem constitutionally 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 delegation 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

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[9] 175 F.3d 1027 (D.C. Cir. 1999), *rev'd sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

legislative authority." *Id*. at 473. The Supreme Court stated that, "[w]hether the statute delegates legislative power is a question for the courts[.]" *Id*.

Under the reasoning of *Whitman*, action by EPA under an overbroad delegation was contrary to constitutional right and power *no matter what EPA put in its rule*. And while EPA sought input on which allocation methods it should initially use, the "very choice" of potential allocation schemes was an improper agency action exercising legislative power. *Id*.

That agency action can cause harm without regard to outcome is further supported by the recent decision in *Axon Enterprise*, 143 S. Ct. 890. There the Supreme Court noted that the harm was "subjection to an illegitimate proceeding, led by an illegitimate decisionmaker," the "'here-and-now' injury of subjection to an unconstitutionally structured decisionmaking process … irrespective of its outcome." *Id*. at 903–04. So too here—EPA is an illegitimate legislator. While Choice's case is different from *Axon Enterprise*—challenging agency implementation rather than adjudication—the entire process of EPA's illegitimate policymaking violates the Constitution. Like in *Axon Enterprise*, Choice challenged EPA's "power to proceed at all, [not just] actions taken in the agency proceedings…" *Id*. at 904. The rule, no matter what it contained, merely confirmed Choice's standing, it is not the basis for Choice's constitutional harm or the only agency action subject to challenge.

B. The Panel Decision Conflicts with This Circuit's Key Assumptions Doctrine

The panel decision conflicts with other decisions of this Circuit. The panel concluded that because Choice did not raise its constitutional argument in rulemaking, the Court can "not consider its nondelegation claim now." 71 F.4th at 65. This Circuit, however, has long-standing precedent that EPA has an affirmative duty to consider key assumptions underlying its rulemaking. *See Am. Fuel & Petrochem. Mfrs*., 937 F.3d at 589; *Okla. Dep't of Envtl. Quality*, 740 F.3d at 192; *Ne. Md. Waste Disposal Auth.*, 358 F.3d at 948; *Appalachian Power Co.*, 135 F.3d at 818.

In one of the earliest of such cases, the Court agreed with EPA that a petitioner's failure to raise an issue in rulemaking barred late-breaking "technical objections." *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 534–35. The Court held, however, that because the objection was addressed to a "key assumption" underlying the rule, the petitioner "may properly ask this court to review" whether the assumption was justified. *Id.* More recently, this Circuit clarified that the key assumptions doctrine applies to "aspects of a rule that are foundational to its existence, such as assumptions regarding the *agency's statutory authority*." *Am Fuel & Petrochem. Mfrs*., 937 F.3d at 589 (citing *Nat. Res. Def. Council v. EPA*, 755 F.3d 1010, 1022–23 (D.C. Cir. 2014)) (emphasis added). The concern about unlawful

divestment of legislative power that Choice presents is likewise "foundational" to any rule and rulemaking.

Moreover, this Circuit has held that it may consider any issue EPA addresses during rulemaking; in that circumstance, the agency has already brought its expertise to bear. *Nat. Res. Def. Council*, 755 F.3d at 1022–23. Here, EPA repeatedly noted its expansive discretion in making allocations, suggesting at least five allocation schemes, that the schemes could shift over time, and that the schemes could include "set aside" allowances not contemplated by Congress. *See* JA2092, JA2094, JA2101–04, JA2129.

EPA's constitutional authority to legislate policy priorities is a key assumption in its rulemaking, and the panel's holding that it could not address the merits of Choice's claim should be reconciled with Circuit precedent.

CONCLUSION

For the foregoing reasons, the petition for rehearing or en banc consideration should be granted.

Dated: August 3, 2023

Respectfully submitted,

/s/ *Zhonette M. Brown*
Zhonette M. Brown
Kaitlyn D. Schiraldi
NEW CIVIL LIBERTIES ALLIANCE

1225 19th St. NW, Suite 450
Washington, D.C. 20036
(202) 869-5210
zhonette.brown@ncla.legal
kaitlyn.schiraldi@ncla.legal

David M. Williamson
WILLIAMSON LAW + POLICY, PLLC
1850 M Street NW, Suite 840
Washington, D.C. 20036
(202) 256-6155
maxwilliamson@williamsonlawpolicy.com

Counsel for RMS of Georgia, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies as follows:

1. Exclusive of the exempted portions provided in Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), this petition contains 3,866 words in compliance with the length limitation in Fed. R. App. P. 35(b)(2)(A).

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Zhonette M. Brown
Zhonette M. Brown

Dated: August 3, 2023

CERTIFICATE OF SERVICE

I certify that on this day, 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.

Zhonette M. Brown
Zhonette M. Brown

Dated: August 3, 2023

ADDENDUM

71 F.4th 59
United States Court of Appeals, District of Columbia Circuit.

HEATING, AIR CONDITIONING & REFRIGERATION DISTRIBUTORS INTERNATIONAL, et al., Petitioners
v.
ENVIRONMENTAL PROTECTION AGENCY and Michael S. Regan, in his official capacity as Administrator of the U.S. Environmental Protection Agency, Respondents

No. 21-1251
|
Consolidated with 21-1252, 21-1253
|
Argued November 18, 2022
|
Decided June 20, 2023

Synopsis

Background: Petitioners sought judicial review of Environmental Protection Agency's (EPA) final rule phasing down hydrofluorocarbons (HFCs) through cap-and-trade program, pursuant to American Innovation and Manufacturing Act (AIM Act).

Holdings: The Court of Appeals, Walker, Circuit Judge, held that:

[1] AIM Act authorized EPA to regulate HFCs within blends;

[2] petitioner's nondelegation claim was not exhausted; but

[3] AIM Act did not authorize EPA's refillable-cylinder and quick response (QR) code rules.

Vacated in part and remanded.

Pillard, Circuit Judge, filed opinion concurring in part and dissenting in part.

Procedural Posture(s): Review of Administrative Decision.

West Headnotes (15)

[1] **Environmental Law** Air pollution

Under the CAA, Court of Appeals may set aside the Environmental Protection Agency's (EPA) rule phasing down hydrofluorocarbons (HFCs) through cap-and-trade program, pursuant to American Innovation and Manufacturing Act, if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Clean Air Act § 307, 42 U.S.C.A. § 7607(d)(9)(A); 42 U.S.C.A. § 7675(k)(1)(C).

[2] **Environmental Law** Air pollution

Court of Appeals applies the same standard of review under the CAA as the court does under the Administrative Procedure Act (APA). 5 U.S.C.A. § 706; Clean Air Act § 307, 42 U.S.C.A. § 7607(d)(9)(A).

[3] **Environmental Law** Particular Pollutants

Hydrofluorocarbon (HFC) within blend constituted "regulated substance," within meaning of American Innovation and Manufacturing Act (AIM Act), directing Environmental Protection Agency (EPA) to phase down production and consumption of regulated substances through cap-and-trade program and defining regulated substance to include HFCs, and thus, EPA had statutory authority to regulate HFCs within blends, since HFC within blend was chemically identical to unblended HFC. 42 U.S.C.A. §§ 7675(b)(11), 7675(c)(1), 7675(e)(2)(A), 7675(e)(3)(A)-(B).

[4] **Environmental Law** Exhaustion of administrative remedies

Petitioner failed to exhaust administrative remedies, as required under CAA, for its claim that Congress unconstitutionally delegated its legislative authority to Environmental Protection Agency (EPA) in American Innovation and Manufacturing Act (AIM Act), directing EPA to pass rule phasing down production and consumption of hydrofluorocarbons (HFCs) through cap-and-trade program, and thus, petitioner's nondelegation claim challenging EPA's final phasedown rule could not be

considered by Court of Appeals, where petitioner failed to make its claim to EPA during notice and comment. U.S. Const. art. 3, § 1; Clean Air Act § 307, 42 U.S.C.A. § 7607(d)(7)(B); 42 U.S.C.A. § 7675(k)(1)(C).

[5] **Environmental Law**🔑Exhaustion of administrative remedies

The CAA's exhaustion rule has no exception for futile challenges. Clean Air Act § 307, 42 U.S.C.A. § 7607(d)(7)(B).

[6] **Administrative Law and Procedure**🔑Constitutional or legal questions
Constitutional Law🔑Exhaustion of other remedies

Some constitutional challenges to agency action may be brought directly in district court without exhausting administrative remedies, even if a statute requires other run-of-the-mill challenges to be first litigated before the agency.

[7] **Environmental Law**🔑Exhaustion of administrative remedies

When litigants choose to use a statutory review mechanism like the CAA, they must still meet its strictures such as the exhaustion requirement. Clean Air Act § 307, 42 U.S.C.A. § 7607(d)(7)(B).

[8] **Environmental Law**🔑Particular Pollutants

Environmental Protection Agency's (EPA) regulations, mandating refillable cylinders to transport hydrofluorocarbons (HFCs) and requiring any person who imported, sold, or distributed HFCs to permanently affix quick response (QR) code to HFC's container that documented valid certification identification, were not authorized under American Innovation and Manufacturing Act (AIM Act), directing EPA to pass rule phasing down production and consumption of HFCs through cap-and-trade program, since EPA was not authorized to require refillable cylinders or QR-code tracking system by any provision in AIM Act, including subsection requiring EPA to ensure HFC production and consumption did not exceed phasedown cap, that was math equation, not grant of regulatory power. 42 U.S.C.A. §§ 7675(e)(2)(B), 7675(k)(1)(A); 40 C.F.R. §§ 84.5(h), 84.23(a).

[9] **Statutes**🔑Plain Language; Plain, Ordinary, or Common Meaning

Courts must vindicate the plain meaning of the text wherever it is placed in the statute.

[10] **Statutes**🔑Express mention and implied exclusion; expressio unius est exclusio alterius

When draftsmen of statutes mention one thing, like a grant of authority, it necessarily, or at least reasonably, implies the preclusion of alternatives.

[11] **Administrative Law and Procedure**🔑Statutory basis and limitation

The "major-questions doctrine" holds that courts expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.

[12] **Statutes**🔑Regulatory statutes

Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.

[13] **Statutes**🔑Regulatory statutes

Whereas the major-questions doctrine has a constitutional basis of safeguarding the separation of powers by ensuring that agencies do not use statutory ambiguities to make decisions vested in elected representatives, the rule of interpretation that Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions rests on a more modest intuition about how language is used. U.S. Const. art. 3, § 1.

[14] **Statutes**🔑Plain Language; Plain, Ordinary, or Common Meaning

The touchstone of statutory interpretation is always to interpret words consistent with their ordinary meaning at the time Congress enacted the statute.

[15] **Statutes**🔑Regulatory statutes

Ordinary readers of English do not expect statutory provisions setting out math equations to

empower an agency to prescribe other fundamental details of a regulatory scheme.

West Codenotes

Held Invalid
40 C.F.R. §§ 84.5(h), 84.23(a)

***61** On Petitions for Review of a Final Action of the Environmental Protection Agency

Attorneys and Law Firms

Stephen K. Wirth and Wayne J. D'Angelo argued the causes for Association Petitioners and Petitioner Worthington Industries, Inc. With them on the briefs were Ethan G. Shenkman and Jonathan S. Martel. Zachary J. Lee entered an appearance.

David M. Williamson argued the cause and filed the briefs for petitioner Choice Refrigerants.

Andrew S. Coghlan, Attorney, U.S. Department of Justice, argued the cause for respondents. On the brief were Todd Kim, Assistant Attorney General, and Eric G. Hostetler, Attorney.

Melissa J. Lynch and David Doniger were on the brief for amicus curiae Natural Resources Defense Council in support of respondents.
Before: Henderson, Pillard and Walker, Circuit Judges.

Opinion

Walker, Circuit Judge:

Fridges, freezers, and air-conditioning are technological marvels, making our lives much more comfortable. But those amenities rely on harmful greenhouse gases ***62** called hydrofluorocarbons — HFCs for short.

According to the Environmental Protection Agency, those gases threaten the environment because they "can be hundreds to thousands of times more potent than carbon dioxide." 86 Fed. Reg. 55,123 (Oct. 5, 2021). To reduce their use, Congress enacted the American Innovation and Manufacturing Act. 42 U.S.C. § 7675. The Act directs the EPA to pass a rule phasing them out. *Id.* § 7675(e).

After the EPA passed that rule, two regulated companies and three trade associations sought judicial review. They say that the agency exceeded its statutory authority in two different ways, and that the Act violates the nondelegation doctrine.

One of the statutory arguments fails, as does the nondelegation challenge. But the remaining argument has merit: The EPA lacked statutory authority to pass two measures regulating the distribution of HFCs. So we vacate those parts of the EPA's rule and remand to the agency.

I. Background

A. Congress Tasked the EPA with Reducing HFC Use

The United States has long struggled with the environmental impact of refrigeration technology. Before fridges, freezers, and air conditioners used *hydro*fluorocarbons as coolants, they used *chloro*fluorocarbons. But chlorofluorocarbons deplete the ozone layer. So in 1990 Congress started to phase them out. 42 U.S.C. §§ 7671a, 7671c.

That prompted a shift to HFCs. But Congress's change swapped one environmental hazard for another. HFCs, the EPA says, are harmful greenhouse gases — "hundreds to thousands of times more potent than carbon dioxide." 86 Fed. Reg. at 55,123.

In 2020, Congress intervened again, this time passing the American Innovation and Manufacturing Act to phase out HFCs. 42 U.S.C. § 7675. The Act directs the EPA to "issue a final rule ... phasing down" HFCs "through an allowance allocation and trading program." *Id.* § 7675(e)(3). The Act provides the outline for how that program will work, leaving the agency to fill in the details.

Here's how it works. The EPA first calculates the baseline levels of HFC production and consumption in the United States. *Id.* § 7675(e)(1)(C). The agency then caps maximum annual HFC production and consumption at a percentage of those baselines — for instance, ninety percent in 2023. *Id.* § 7675(e)(2)(B), (C). Over time, the caps come down, eventually reaching fifteen percent in 2036. *Id.*

To ensure that production and consumption stay under the respective caps, the Act puts in place a system of "allowances." *Id.* § 7675(e)(2)(D). An allowance is like a

license; without one, "no person shall ... produce" or "consume" HFCs. *Id.* § 7675(e)(2)(A).

Allowances are initially distributed to HFC users by the EPA. Once allocated, HFC users can buy and sell allowances from one another to adjust their production or consumption capacity. *Id.* § 7675(g). The total number of allowances in circulation corresponds to the current HFC production or consumption cap.

Late last year, the EPA issued its final Phasedown Rule, implementing the cap-and-trade program. 40 C.F.R. pt. 84. Among other things, the Phasedown Rule calculates the annual production and consumption caps, explains how the agency will distribute allowances, and establishes reporting and auditing requirements for HFC consumers. *Id.*

***63 B. The Petitioners Make Three Challenges to the Rule**

The petitioners challenge three different aspects of the Phasedown Rule.

First, Choice Refrigerants, a manufacturer of heating and cooling chemicals, challenges the EPA's authority to regulate HFCs within blends.

An HFC blend is a mix of HFCs and other chemicals. Blends are better than plain-vanilla HFCs for some heating and cooling applications. Choice's flagship product is an HFC blend that it manufactures abroad and imports into the United States.

The EPA says mixing an HFC with another chemical does not exempt the HFC from the cap-and-trade program. So importing blends "requires expenditure of allowances," with the number of "allowances necessary" determined according to the "components of the blend that are regulated HFCs." JA 1112; *see also* 86 Fed. Reg. at 55,133, 55,142. If that's correct, Choice must buy allowances to import its blend, and its production costs will go up.

Second, Choice claims that Congress impermissibly delegated legislative power to the EPA by giving it unguided discretion to distribute HFC allowances.

The Act lists six types of HFC users — including "mission-critical military" users — who get preferential access to the pool of allowances. 42 U.S.C. § 7675(e)(4)(B)(iv)(I)(ee). The Act also lets the agency designate other "essential" users who should get allowances. *Id.* § 7675(e)(4)(B)(i)-(ii). But beyond that, Choice argues, the Act lets the EPA decide who should get the remaining allowances. And because the statute gives no additional guidance, Choice says it violates the nondelegation doctrine.

Third, three trade associations challenge two HFC-distribution regulations in the EPA's rule. The first regulation mandates refillable cylinders to transport HFCs, thus banning the disposable cylinders used by the industry today. 40 C.F.R. § 84.5(h). The second regulation establishes a certification and tracking system for HFC distribution. *Id.* § 84.23(a). Under that system, "any person who imports, sells, or distributes" HFCs "must permanently affix a QR code to the [HFC's] container that documents a valid certification identification." *Id.* § 84.23(c)(2).

The trade associations argue that the Act does not give the EPA authority to pass those regulations — nowhere does the Act say anything about QR codes or refillable cylinders. That challenge is joined by Worthington Industries, the only domestic manufacturer of refillable and disposable cylinders.

II. Analysis

[1] [2] Under the Clean Air Act, this Court may set aside the EPA's Phasedown Rule if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A); *see id.* §§ 7607(d)(1)(I), 7675(k)(1)(C). We "apply the same standard of review under the Clean Air Act as we do under the Administrative Procedure Act." *Maryland v. EPA*, 958 F.3d 1185, 1196 (D.C. Cir. 2020) (cleaned up).

Applying that standard, we vacate in part the EPA's Phasedown Rule. Choice's challenges fail: The AIM Act gives the EPA authority to regulate HFCs within blends, and we may not consider Choice's nondelegation argument because Choice failed to exhaust it before the agency. But the trade associations' petition fares better: The EPA does not identify a statutory provision authorizing its QR-code and refillable-cylinder rules. So we vacate those ***64** parts of the Phasedown Rule and remand to the agency.

A. The EPA May Regulate HFCs Within Blends

[3] The EPA has statutory authority to regulate HFCs within blends. That's because an HFC within a blend remains a regulated HFC under the Act.

Start with the EPA's statutory authority. The AIM Act directs the EPA to "phas[e] down the production [and consumption] of regulated substances ... through an allowance allocation and trading program." 42 U.S.C. § 7675(e)(3)(A)-(B). So the EPA has authority to require allowances for any regulated substance. *Id.* § 7675(e)(2)(A).

The Act defines a "regulated substance" to include HFCs "listed" in a statutory table. *Id.* § 7675(b)(11), (c)(1) (table of regulated substances). The HFCs listed in the table are identified by their molecular formulas. *Id.*

Under that definition, an HFC within a blend is still a "regulated substance" because it is chemically identical to an HFC outside of a blend. Both have the same molecular structure. As the EPA put it during notice and comment, "[t]he components [of a blend] are not chemically altered in [the blending] process." JA 1112.

In other words, an HFC in a blend of other chemicals is like a blue M&M in a bag of red M&Ms. The blue one does not stop being blue just because it is tossed in with a bunch of red ones. In the same way, an HFC mixed with other chemicals does not stop being a regulated substance under the Act. *Cf.* 42 U.S.C. § 7675(e)(4)(A)(i) (when a chemical process "consume[s]" an HFC to create some other chemically-distinct product, that product is not covered by the allowance-trading program).

In response, Choice argues that blended HFCs are different enough from unblended HFCs that they are not regulated substances. It says "blended products ... have distinct physical and chemical properties" and "cannot be readily separated into their component[s] ... without complex fractionation equipment." Choice Br. 4.

That may be true. But it does not go to whether an HFC within a blend has a different molecular composition than an unblended HFC. And when pressed at argument, Choice repeatedly conceded that HFCs within blends are chemically identical to HFCs outside of a blend.

Finally, Choice notes that under the Act, the EPA may not "designate as a regulated substance a blend of substances that includes a[n] [HFC] for purposes of phasing down production or consumption of regulated substances." 42 U.S.C. § 7675(c)(3)(B)(i). But that provision conditions the Administrator's authority to list new HFCs as "regulated substances" subject to the allowance-trading program. *Id.* § 7675(c)(3)(A). Here, the EPA has not exercised that authority, let alone used it to list a blend as a regulated HFC. It has instead regulated already-listed HFCs *within* a blend. And the Act confirms that the prohibition on listing blends "does not affect the authority of the Administrator to regulate under this Act a regulated substance *within* a blend of substances." *Id.* § 7675(c)(3)(B)(ii) (emphasis added).

B. Choice Failed to Exhaust Its Nondelegation Challenge

[4] Next, Choice says Congress impermissibly delegated its legislative authority to the EPA. *See* 86 Fed. Reg. at 55,142 (noting EPA's "considerable discretion" in allocating allowances under the AIM Act), 55,203 (final rule allocating allowances). But because Choice failed to make its nondelegation argument to the EPA during ***65** notice and comment, Choice may not raise that argument now.

Choice sues under § 307 of the Clean Air Act, which "appl[ies] to" the AIM Act. 42 U.S.C. § 7675(k)(1)(C). That cause of action has an exhaustion requirement: a litigant may raise in court only "an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment." *Id.* § 7607(d)(7)(B).

Choice concedes that it did not raise its nondelegation argument during notice and comment. Instead, it says it did not need to exhaust its nondelegation argument because it is an objection to the *statute* and not an "objection to a rule or procedure" subject to exhaustion. *Id.* § 7607(d)(7)(B).

That argument collapses under scrutiny. The Clean Air Act's cause of action authorizes only a limited category of suits: "petition[s] for review of *action of the Administrator* [of the EPA]." *Id.* § 7607(b)(1) (emphasis added). So litigants using the Clean Air Act's cause of action must bring challenges to agency action, not free-floating challenges to statutes. Statutes are passed by Congress, not the "Administrator [of the EPA]." *Id.*

Thus, to the extent that Choice's suit is an objection to the AIM Act alone, Choice fails to state a claim under the Clean Air Act. And to the extent Choice is challenging the Phasedown Rule, the Clean Air Act's exhaustion requirement applies. 42 U.S.C. § 7607(d)(7)(B). Either way, Choice's nondelegation claim is not properly before us.

That said, Choice's petition is best read as a challenge to the EPA's rule. In substance, its argument is that the EPA's rule is unlawful because the statute authorizing it is an unconstitutional delegation of legislative power. Indeed, Choice characterizes its argument that way in its brief. It lists the "ruling[ ] under review" as the "Cap-and-Trade Rule" and it asserts that "[t]his Court has jurisdiction ... to review EPA's final rule." Choice Br. ii, 1. Because Choice's challenge is to the Phasedown Rule, any objections to that rule had to be made first to the EPA. 42 U.S.C. § 7607(d)(7)(B). Choice did not do that here. So we may not consider its nondelegation claim now.

[5] [6] [7] Requiring litigants to first bring nondelegation challenges to the EPA may seem futile. After all, the agency cannot change Congress's grant of broad discretion.[1] But the Clean Air Act's exhaustion rule has no exception for futile challenges. *Texas Municipal Power Agency v. EPA*, 89 F.3d 858, 876 (D.C. Cir. 1996) (per curiam) (no futility exception); *see also* *Lead Industries Association Inc. v. EPA*, 647 F.2d 1130, 1172-74 (D.C. Cir. 1980) (no exception for constitutional challenges to the rulemaking process).[2]

***66 C. The Refillable-Cylinder and QR-Code Rules Lack Statutory Basis**

[8] Finally, the trade associations and Worthington argue that the EPA's refillable-cylinder and QR-code rules lack a statutory basis. We agree. The EPA has not identified a provision of the AIM Act giving it the authority to require refillable cylinders or a QR-code tracking system. 40 C.F.R. §§ 84.5(h), 84.23(a).

To support those regulations, the EPA attempts to rely on two provisions of the AIM Act. It initially points to Section 7675(k)(1)(A), which gives the agency authority to "promulgate ... such regulations as are necessary to carry out the functions of the [EPA] under [the AIM Act]." The EPA recognizes that (k)(1)(A) is a source of procedural not substantive authority — it lets the agency pass rules to carry out powers granted by other provisions of the statute.

For substantive authority, the EPA relies on Section 7675(e)(2)(B):

> (B) Compliance
>
> For each year [of the phasedown period], the Administrator shall ensure that the annual quantity of all regulated substances produced or consumed in the United States does not exceed the product obtained by multiplying —
>
> (i) the production baseline or consumption baseline, as applicable; and
>
> (ii) the applicable percentage listed on the table contained in subparagraph (C).

Relying on Congress's instruction to "ensure" that HFC production and consumption "do[ ] not exceed" the phasedown cap, the EPA's final rule claimed the "authority to establish complementary measures ... [to] meet the statutory reduction [target]," 86 Fed. Reg. at 55,172 (citing 42 U.S.C. § 7675(e)(2)(B)).

But the EPA's reading has two major problems: It ignores the role that subsection (e)(2)(B) plays in the statutory scheme and it reads too much into the word "ensure."

To start, subsection (e)(2)(B) is a math equation, not a grant of regulatory power. It tells the agency how to calculate the production and consumption cap for each year of the phasedown. To calculate the cap, the agency must "multiply[ ]" the "production baseline or consumption baseline" by the "applicable percentage listed on the table" in (e)(2)(C). 42 U.S.C. § 7675(e)(2)(B).

Confirming that reading, statutory cross-references treat (e)(2)(B) as a formula setting the cap for each year of the phasedown. For example, subsection (e)(2)(D)(i) instructs the EPA to "determine the quantity of allowances ... that may be used for the following calendar year" by referring to the cap "calculated under" (e)(2)(B). *Id.* § 7675(e)(2)(D)(i). Similarly, under (e)(5), the EPA may allow an HFC producer to make more HFCs than authorized by his "production allowances" if doing so "would not violate" the cap in (e)(2)(B). *Id.* § 7675(e)(5), (B)(iii).

[9] Given the role that (e)(2)(B) plays in the statutory scheme, that subsection would be an odd place for Congress to locate a grant of sweeping regulatory power letting the agency pass additional measures to phasedown HFCs. True, the placement of statutory language is only one part of the puzzle. Courts must vindicate the plain meaning of the text wherever it is placed in the statute. But here the statutory text does not support the EPA's assertion of power.

Reading subsection (e)(2)(B) to grant the EPA authority to pass complementary ***67** measures leans heavily on the word "ensure." The EPA asserts that (e)(2)(B)'s use of "shall ensure" reflects Congress's "intentional effort to confer the flexibility necessary [for] the agency to accomplish the statute's aims" and so gives the EPA "more general authority to establish complementary measures to ensure that the statutory phasedown is achieved." EPA Br. 52 (cleaned up).

We disagree. To "ensure" is "to make sure, certain, or safe." Ensure (def. 1), *Merriam-Webster* (2023). So when Congress told the EPA to "ensure" that the annual HFC consumption cap is not "exceed[ed]," all it said was that the agency should guarantee that result. 42 U.S.C. § (e)(2)(B). Subsection (e)(2)(B) does not tell the agency anything about *how* to "ensure" the cap is met.

The rest of the statute does that job. Congress gave the EPA the power to ensure the cap is met by using the allowance-trading program, *id.* § 7675(e), detailed statutory auditing and reporting requirements, *id.* § 7675(d), and the EPA's power to pass rules regulating "practice[s], process[es], or activit[ies]" for "servicing, repair[ing], dispos[ing of], or install[ing] [HFC] equipment," *id.* § 7675(h)(1).

[10] Those detailed instructions undercut the agency's claim that (e)(2)(B) gives it power to pass other measures. When "draftsmen[ ] mention ... one thing, like a grant of authority" it "necessarily, or at least reasonably, impl[ies] the preclusion of alternatives." *Shook v. D.C. Financial Responsibility and Management Assistance Authority*, 132 F.3d 775, 782 (D.C. Cir. 1998). Congress's exhaustive instructions to the agency throughout the AIM Act make it less plausible that Congress meant the words "shall ensure" in (e)(2)(B) to give the EPA broad power to pass new rules.

That intuition becomes even stronger when we consider the breadth of the EPA's claimed power. The refillable-cylinder rule alone is likely to impose between $ 441 million and $2 billion in costs on the regulated industry. 86 Fed. Reg. at 55,174 ($ 441 million estimate); JA 119 ($ 2 billion estimate). It is unlikely that Congress would have granted the agency authority to pass a rule of that magnitude in a provision of the statute that says nothing about complementary measures, refillable cylinders, or QR Codes.

[11] To be clear, we do not decide this case under the major-questions doctrine. That doctrine holds that courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *West Virginia v. EPA*, —— U.S. ——, 142 S. Ct. 2587, 2605, 213 L.Ed.2d 896 (2022) (cleaned up). And the EPA's QR-code and refillable-cylinder rules are less important and expensive than other regulations to which the Supreme Court has applied that doctrine. *See id.* at 2609; *NFIB v. OSHA*, —— U.S. ——, 142 S. Ct. 661, 666, 211 L.Ed.2d 448 (2022).

[12] [13] [14] [15] Instead, we rely on another long-standing rule of interpretation: "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. American Trucking Associations*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). Whereas the major-questions doctrine has a constitutional basis — safeguarding the "separation of powers" by ensuring that agencies do not use statutory ambiguities to make decisions vested in our elected representatives — the *American Trucking* rule rests on a more modest intuition about how we use language. *West Virginia*, 142 S. Ct. at 2609. The touchstone of statutory interpretation is always to "interpret the words consistent with ***68** their ordinary meaning at the time Congress enacted the statute." *Wisconsin Central Ltd. v. United States*, —— U.S. ——, 138 S. Ct. 2067, 2070, 201 L.Ed.2d 490 (2018) (cleaned up). Ordinary readers of English do not expect provisions setting out math equations to empower an agency to prescribe other "fundamental details of a regulatory scheme." *Whitman*, 531 U.S. at 468, 121 S.Ct. 903.

Because the EPA's interpretation of (e)(2)(B) seeks to do just that, it strains against the ordinary use of language. That is an important clue that the EPA advances an implausible reading of the statute.

* * *

The EPA has not identified a statute authorizing its QR-code and refillable-cylinder regulations. We therefore vacate those parts of the Phasedown Rule and remand to the agency.

We deny Choice's challenges to other aspects of the rule.

So ordered.

Opinion concurring in part and dissenting in part filed by Circuit Judge Pillard.

Pillard, Circuit Judge, concurring in part and dissenting in part:

I agree with my colleagues that EPA has the statutory authority to regulate hydrofluorocarbons (HFCs) that are contained within blends. I also agree that we may not hear Choice's nondelegation argument because Choice failed to exhaust it before the agency.

I write separately to explain why EPA has the authority to require refillable cylinders for regulated HFCs and to implement a QR-code tracking system to trace the import, sale, and distribution of HFCs through the supply chain. In the American Innovation and Manufacturing Act, Congress imposed on EPA a duty to "ensure" compliance with the schedule Congress mandated for phasing down HFC production and consumption. 42 U.S.C. § 7675(e)(2)(B). The Act makes clear that Congress intended its phasedown schedule to be met. To that end, it empowered EPA to "promulgate such regulations as are necessary" to effect compliance. *Id.* § 7675(k)(1)(A).

The rule under review falls squarely within EPA's congressionally delegated authority: The agency determined that, to accomplish the HFC phasedown, it was necessary to require refillable cylinders with unique, trackable QR codes, so it promulgated a final rule to that effect. After all, requiring refillable and trackable cylinders is a straightforward way to "ensure" that the regulated substances they contain correspond to allowances the statute requires. Without such tools, it is hard to see how EPA can ensure the phasedown.

My colleagues' conclusion that EPA's duty to ensure compliance is nothing more than a "math equation," Maj. Op. 66, understates and undercuts the responsibility Congress gave the agency. Their reading runs counter to the statute's text and structure. It will hamstring EPA's efforts to combat illicit trade in HFCs, making it less likely that the United States accomplishes the HFC reductions Congress mandated. And the majority's interpretation will have unfortunate side effects for domestic industry and law enforcement: Even as it places law-abiding U.S. importers and producers at a competitive disadvantage by making the United States market an easy target for illegal HFCs, it will help the illegal product to circulate unseen by U.S. law enforcement.

***69 I.**

HFCs are highly potent greenhouse gases with global warming potentials "that can be hundreds to thousands of times more potent than carbon dioxide." 86 Fed. Reg. 55,116, 55,123/3 (Oct. 5, 2021). "[T]heir use is growing worldwide," in part due to "the increasing use of refrigeration and air conditioning equipment globally." *Id.* The amount of HFCs in the global atmosphere is thus increasing at "accelerating rates." *Id.* "[E]levated concentrations of [greenhouse gases] including HFCs have been warming the planet, leading to changes in the Earth's climate," such as "in the frequency and intensity of heat waves, precipitation, and extreme weather events." *Id.* at 55,124/2.

Recognizing that releases of these potent greenhouse gases are projected to continue accelerating rapidly, the United States joined with more than 140 countries to ratify the so-called Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer. The signatories to the 2016 Kigali Amendment committed to a "global phasedown of the production and consumption of HFCs." *Id.* at 55,123/3-24/1; *see id.* at 55,139/1-2. If fully implemented, the Kigali Amendment "is expected to avoid up to 0.5 °C of warming by 2100." *Id.* at 55,124/1.

In keeping with that international commitment to phase down HFCs, Congress enacted the bipartisan American Innovation and Manufacturing (AIM) Act. Pub. L. No. 116-260, div. S, § 103, 134 Stat. 2255, 2255-71 (2020) (codified at 42 U.S.C. § 7675). Under the Act, HFC production and consumption in the United States must be phased down to 15 percent of baseline levels by 2036. 42 U.S.C. § 7675(e)(2). The Act imposes those steep restrictions on HFC supply while other parties to the Kigali Amendment are also limiting the supply of HFCs in "ways that are similar." 86 Fed. Reg. at 55,139/1.

Ensuring compliance with that HFC phasedown will be no small feat. As countries around the world tighten restrictions on HFCs, incentives to trade illegally are surging. In EPA's experience—including during the United States' participation in the global phasedown of ozone-depleting substances and in the early stages of the HFC phasedown elsewhere—declining allowances for lawful import and production of a substance tend to increase its illegal trade. *See id.* at 55,166/2-68/1, 55,166/2 n.63. Indeed, observed rates of noncompliance with HFC quota systems have been dramatic. One study found that even those imports that were reported to European customs officials "exceeded the quota amount by 16 percent in 2019

and 33 percent in 2020." *Id.* at 55,167/1. In another study, 72 percent of surveyed companies in Europe, where disposable cylinders are illegal, "had seen or been offered refrigerants in disposable cylinders." *Id.* at 55,166/3. The United States faces similar pressures. *Id.* at 55,167/2. Without appropriate compliance measures to enable vigorous enforcement, illegal trade will likely swamp the congressionally mandated phasedown. Left unchecked, illicit trade in HFCs threatens to "significantly harm the environment, the United States economy, and consumer and worker safety." *Id.* at 55,168/1.

In promulgating the phasedown rule mandated by the Act, EPA thus took a "multifaceted approach ... to deter, identify, and penalize illegal activity." *Id.* EPA adopted sensible compliance measures to ensure the HFC phasedown and "to create a level playing field for the regulated community." *Id.* Two such compliance measures are at issue here: first, a prohibition on single-use cylinders for regulated HFCs and, second, a container-tracking ***70** system requiring QR codes to provide visibility into the import, sale, and distribution of HFCs.

II.

Two provisions of the AIM Act work in tandem to authorize EPA's refillable-cylinder and QR-code regulations. First is subsection 7675(k)(1)(A), which empowers EPA to "promulgate such regulations as are necessary to carry out the functions of the Administrator" under the Act. 42 U.S.C. § 7675(k)(1)(A). The majority explains that "(k)(1)(A) is a source of procedural not substantive authority – it lets the agency pass rules to carry out powers granted by other provisions of the statute." Maj. Op. 66. So far, so good. On this much the majority and I agree: Whenever the Act assigns to EPA a substantive responsibility or function, EPA may also promulgate rules "as necessary" to carry out that function.

The second provision—and source of EPA's substantive responsibility—is subsection 7675(e)(2)(B). Recall that subsection (e)(2)(B), entitled "Compliance," says that EPA "shall ensure" that annual HFC production or consumption "does not exceed" the congressionally mandated cap for any given year. 42 U.S.C. § 7675(e)(2)(B). On the meaning of that provision, the majority and I part ways. To be sure, the majority starts off on the right foot: Subsection (e)(2)(B) does set out the production and consumption caps and provide the formula for calculating them. But, while it includes a formula, subsection (e)(2)(B) is not just a "math equation." Maj. Op. 66.

In subsection (e)(2)(B), Congress called on EPA to make certain that the HFC phasedown is achieved. That duty flows from the plain text of the provision. The operative words are "shall ensure." "The first sign that the statute impose[s] an obligation is its mandatory language: 'shall.' " *Me. Cmty. Health Options v. United States*, —— U.S. ——, 140 S. Ct. 1308, 1320, 206 L.Ed.2d 764 (2020). "[T]he word 'shall' usually connotes a requirement." *Id.* (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171, 136 S.Ct. 1969, 195 L.Ed.2d 334 (2016)). The duty subsection (e)(2)(B) places on EPA is to "ensure"—that is, to guarantee—that annual HFC production or consumption "does not exceed" the congressionally mandated cap for any given year. 42 U.S.C. § 7675(e)(2)(B). In other words, as EPA put it, the agency has "the responsibility to ensure that the statutorily required phasedown occurs." 86 Fed. Reg. at 55,172/3.

Congress supplied another cue as to the intended meaning of subsection (e)(2)(B): its heading. *See* *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, —— U.S. ——, 138 S. Ct. 883, 893, 200 L.Ed.2d 183 (2018). In subsection (e)(2)(B), Congress described EPA's authority as one of "Compliance"—not just "Calculation." That choice of heading underscores that Congress intended to impose on EPA a duty to guard against non-compliance with the congressionally mandated phasedown.

As the majority recognizes, however, subsection (e)(2)(B) does not spell out in detail *how* the agency is to ensure the cap is met. Maj. Op. 66–67. For that, we return to EPA's procedural authority found in subsection (k)(1)(A). Because one of the Administrator's functions under the Act is to "ensure" compliance with the phasedown, 42 U.S.C. § 7675(e)(2)(B), EPA may issue appropriate rules as necessary to do so, *id.* § 7675(k)(1)(A). That is, Congress delegated to EPA the authority to promulgate reasonable compliance measures, so long as they are necessary to guaranteeing that the phasedown is met (and do not ***71** conflict with any other provision of the Act).

The final rule under review is a run-of-the-mill exercise of EPA's compliance responsibilities under the Act. EPA concluded that both the refillable-cylinder and QR-code requirements were "necessary" to "ensure" annual HFC production and consumption do not exceed the phasedown

limits. *See id.* § 7675(e)(2)(B), (k)(1)(A). As EPA explained, "[a] program to control the production and import of HFCs is only achievable to the extent it can be enforced." 86 Fed. Reg. at 55,175/1. Therefore, "[r]estrictions designed to deter and identify illegal imports ... are a *necessary* component to such a program." *Id.* (emphasis added).

A refillable-cylinder requirement is necessary because the "visual differences" between disposable and refillable cylinders "allow Customs officials and law enforcement personnel to easily distinguish" between legally permitted refillable cylinders and disposable ones that "are favored for illicit trade." *Id.* at 55,173/1. Indeed, refillable-cylinder requirements have a "proven track record of facilitating detection and interdiction of illegal HFCs." *Id.* Several other jurisdictions, including the European Union, Canada, Australia, and India, have already adopted such requirements.

Similarly, "a comprehensive container tracking system is needed" so as "[t]o help ensure the quantity of regulated substances produced or consumed in the United States does not exceed the Congressionally mandated cap." *Id.* at 55,186/1. The QR-code tracking system makes it easy to spot HFCs that do not enter the market legally. *Id.* at 55,183/3. Such a system is also "especially important for identifying illegal production [within the United States]—as that material will not have a check at the port like imports." *Id.* at 55,185/3.

Not only were both measures permissibly promulgated under the AIM Act, but they were also well within EPA's expertise. For example, EPA has long regulated the containers and labeling for other substances it regulates, such as pesticides, *see, e.g.*, 40 C.F.R. § 156.3 *et seq.* (labeling requirements); *id.* § 165.1 *et seq.* (container requirements), and underground storage tanks for biofuels, *see id.* § 280.10 *et seq.* And, in running other trading programs, EPA is familiar with the need for systems to track substances subject to statutory quantity controls. *See, e.g.*, *id.* § 80.1425 *et seq.* (requiring renewable identification numbers, or RINs, to account for batches of qualifying renewable fuels). Furthermore, EPA has long partnered with other federal agencies, including U.S. Customs and Border Protection (CBP) and the Department of Justice, to help curb illicit trade in substances that it regulates. Since the 1990s, for instance, EPA has coordinated with CBP and other agencies to ensure the phaseout of ozone-depleting substances—an experience which informed EPA's promulgation of the rule at issue here. *See* 86 Fed. Reg. at 55,167/3.

As the final rule well illustrates, EPA's compliance function is vital to the statutory scheme. Ensuring compliance with a stringent new HFC phasedown is a daunting task, for which agency specialization and adaptability are paramount. Rather than confine EPA to any one tool, Congress left it to agency discretion to determine how best to root out non-compliant trade in HFCs. Given sophisticated efforts to evade HFC phasedowns elsewhere—as well as EPA's own experience combatting illicit trade in ozone-depleting substances—it made sense for Congress not to specify precise methods, but to charge EPA to adopt compliance measures as necessitated by the circumstances, and to ***72** adapt and improve them based on the lessons of experience. *See id.* at 55,166/2-68/1.

The AIM Act is clear and robust on paper. But without the subsection (e)(2)(B) compliance function, it may prove flimsy in practice. As EPA explained, the steep domestic phasedown of HFCs will meet forceful and sophisticated efforts from around the globe to evade the HFC allowance system. *See id.* The court's decision today to read out of the Act the limited but flexible authority to prevent such noncompliance leaves EPA with few and inadequate tools to ensure the HFC phasedown is achieved.

III.

The majority resists the plain meaning of subsection (e)(2)(B) by characterizing it as only "a formula setting the cap for each year of the phasedown." Maj. Op. 66. That is a cramped reading of the language Congress used in subsection (e)(2)(B).

For one, Congress' use of the word "ensure"—which, as the majority agrees, means to make sure or to "guarantee," Maj. Op. 66–67—is a perplexing one for a provision that my colleagues say describes only a calculation. If Congress wanted subsection (e)(2)(B) to provide EPA only the limited authority to calculate the production and consumption caps, it could easily have done so. Subsection (e) is littered with instructions for EPA to establish or calculate certain numerical values: Congress instructed that EPA "shall establish" production and consumption baselines for the phase-down of regulated substances, 42 U.S.C. § 7675(e)(1)(A); that each of those baselines "is the quantity equal to the sum of" certain statutorily enumerated calculations, *id.* § 7675(e)(1)(B), (C); and that, in calculating those baselines, "the Administrator shall use" certain exchange values provided in the statute, *id.* § 7675(e)(1)(D).

Put otherwise, Congress knew how to prescribe a mere calculation. It did more than that in subsection (e)(2)(B).

Nor should we read much into the fact that the Act at times gives EPA "detailed instructions" regarding other agency responsibilities. Maj. Op. 67. The *expressio unius* canon on which the majority relies is "an especially feeble helper in the administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990). In the administrative context, "we have consistently recognized that a congressional mandate in one section and silence in another often 'suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, *i.e.*, to leave the question to agency discretion.' " *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009) (quoting *Cheney R.R. Co.*, 902 F.2d at 69).

The majority's reliance on the *expressio unius* canon is doubly irksome, however, because we normally "do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003). To read the statute as the majority does, we would have to "be confident that a normal draftsman when he expressed 'the one thing' "—for example, the creation of an allowance-allocation-and-trading program—"would have likely considered the alternatives that are arguably precluded"—that is, refillable-cylinder and QR-code requirements—and by not mentioning them meant to put them off limits. *Shook v. D.C. Fin. Resp. & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998). But neither the majority nor the trade associations have provided ***73** any reason to think that Congress considered and rejected either a refillable-cylinder requirement or container-tracking system.

Rather, recognizing that it could not foresee every way in which regulated entities might evade the HFC phasedown, Congress in subsection (e)(2)(B) stated EPA's compliance duties in general terms so as " 'to confer the flexibility necessary' for [EPA] to address yet unknown threats" to the HFC phasedown. *Corbett v. TSA*, 19 F.4th 478, 488 (D.C. Cir. 2021) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 532, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007)). To the extent EPA's compliance authority might be viewed as "broad," Maj. Op. 67, that reflects Congress' deliberate choice to leave specific compliance measures to EPA's discretion. "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington v. FCC*, 569 U.S. 290, 296, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013).

Finally, it bears emphasis that the compliance authority granted and exercised here is not, relatively speaking, particularly broad. My colleagues' conclusion that the authority EPA claims under subsection (e)(2)(B) is somehow disproportionate to the terms in which Congress conferred it, Maj. Op. 66–68, is badly misplaced. The modest regulatory measures EPA promulgated are a far cry from the kinds of sweeping or implausible measures that have triggered extra skepticism from the Supreme Court—whether that scrutiny takes the form the trade associations demand, *see* Association Reply Br. 11-13 (citing *West Virginia v. United States*, —– U.S. ——, 142 S. Ct. 2587, 213 L.Ed.2d 896 (2022)), or the majority undertakes, *see* Maj. Op. 67–68 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001)). For one thing, EPA acted here within the limited ambit of a recent, pollutant-specific statute to deploy familiar tools to help effectuate a defined phasedown. For another, the ostensible "magnitude" of the compliance costs on industry is overstated. The prohibition on single-use cylinders is projected to cost a mere $22 million annually on average, and the QR-code tracking system would cost even less. 86 Fed. Reg. at 55,174/1; U.S. Env't Prot. Agency, EPA-HQ-OAR-2021-0044-0227-02, Regulatory Impact Analysis for Phasing Down Production and Consumption of Hydrofluorocarbons (HFCs) 69 (2021) (J.A. 720). Those costs would seem to be a mere drop in the bucket for a multi-billion-dollar regulated industry. And they are no reason for enhanced judicial scrutiny in the face of the far greater health and welfare costs likely to flow from circumventing the phasedown. *See* 86 Fed. Reg. at 55,119/1-2 & tbl.1, 55,197 tbl.8 (estimating the rule's annualized net benefits at more than $14 billion).

In any case, the *American Trucking* decision relied on by the majority "stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009). But, as we have already seen, the statutory text and context here point in the other direction: Congress assigned to EPA the function of "ensur[ing]" nationwide "[c]ompliance" with the HFC phasedown schedule and empowered the agency to promulgate rules "as are necessary to carry out" that function. 42 U.S.C. §

7675(e)(2)(B), (k)(1)(A). In so doing, Congress left the development of specific compliance measures up to EPA's informed discretion. EPA's entirely unsurprising choice to set up a standardized system for transporting HFCs in refillable cylinders labeled with ***74** trackable QR-codes falls comfortably within that discretion.

* * *

In short, EPA validly exercised its authority under the AIM Act to ban non-refillable cylinders and adopt a container-tracking system. Because today's decision understates and undercuts EPA's statutorily imposed authority and duty to ensure compliance with the HFC phasedown, I respectfully dissent from Section II.C of the majority opinion.

All Citations

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Footnotes

1 The agency *could*, in the rulemaking process, decide for itself that a statute unconstitutionally delegates too much power, rendering a rule unlawful. *Cf.* U.S. Const., art. II (the executive branch, acting under the President, has a duty to "take Care that the Laws be faithfully executed").

2 True, some constitutional challenges to agency action may be brought directly in district court — even if a statute requires other run-of-the-mill challenges to be first litigated before the agency. *See* *Axon Enterprise, Inc. v. Federal Trade Commission*, —— U.S. ——, 143 S. Ct. 890, 215 L.Ed.2d 151 (2023). But that doesn't excuse Choice from the Clean Air Act's exhaustion requirement here. When litigants *choose* to use a statutory review mechanism like the Clean Air Act's, they must still meet its strictures. So even if Choice could have bypassed the Act's exhaustion requirement by bringing its nondelegation claim directly in district court (we take no position on whether it could), it did not do that here.

CERTIFICATE AS TO PARTIES

Pursuant to Circuit Rule 28(a)(1)(A), petitioner RMS of Georgia, LLC, through undersigned counsel, hereby certifies the following as to parties related proceedings in this case:

A. Petitioners

Petitioners in these consolidated cases are 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

Respondents are 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.

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 the following:

Petitioner 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.