No. 24-316

In the Supreme Court of the United States

ROBERT F. KENNEDY JR., SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

BRAIDWOOD MANAGEMENT, INC., ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

Counsel for the Respondents

QUESTIONS PRESENTED

The Affordable Care Act requires health insurers to cover "preventive health services." 42 U.S.C. § 300gg-13(a). It also empowers the U.S. Preventive Services Task Force to dictate and decree the preventive items and services that insurers must cover. *See* 42 U.S.C. § 300gg-13(a)(1). A separate statute requires that the Task Force members and their preventive-care coverage edicts be "independent and, to the extent practicable, not subject to political pressure." 42 U.S.C. § 299b-4(a)(6).

The court of appeals held that Task Force members must be appointed as "principal" officers because the Task Force wields "significant authority" under the laws of the United States, and because 42 U.S.C. § 299b-4(a)(6) shields the Task Force and its recommendations from "direction and supervision" by others. And because the Task Force was not appointed by the president with Senate confirmation, the court of appeals enjoined the government from enforcing the Task Force's preventive-care coverage mandates against the plaintiffs. The questions presented are:

1. Did the court of appeals correctly hold that Task Force members are "principal" officers under Article II's Appointments Clause?

2. Did the court of appeals correctly refuse to issue a remedy that would "sever," *i.e.*, nullify, 42 U.S.C. § 299b-4(a)(6) and empower the HHS Secretary to direct and supervise the Task Force's preventive-care coverage decisions?

PARTIES TO THE PROCEEDING

Petitioners Robert F. Kennedy Jr., in his official capacity as Secretary of Health and Human Services; Scott Bessent, in his official capacity as Secretary of the Treasury; Lori Chavez-DeRemer, in her official capacity as Secretary of Labor; and the United States of America were defendants-appellants/cross-appellees in the court of appeals. Secretaries Kennedy, Bessent, and Chavez-DeRemer have been substituted as parties for their predecessors in office under Sup. Ct. R. 35.3. For simplicity and ease of exposition, this brief will refer to the petitioners collectively as "the government" or "the defendants."

Respondents Braidwood Management Inc., John Kelley, Kelley Orthodontics, Ashley Maxwell, Zach Maxwell, and Joel Starnes were the plaintiffs-appellees/cross-appellants in the court of appeals. Additional respondents Joel Miller and Gregory Scheideman were plaintiffs/cross-appellants in the court of appeals. For simplicity and ease of exposition, this brief will refer to the respondents as "the plaintiffs."

Neither Braidwood Management Inc. nor Kelley Orthodontics has a parent or publicly held company that owns 10% or more of the corporation's stock. *See* Sup. Ct. R. 29.6.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

In the Supreme Court of the United States

No. 24-316

ROBERT F. KENNEDY JR., SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

BRAIDWOOD MANAGEMENT, INC., ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals is reported at 104 F.4th 930 and reproduced at Pet. App. 1a–48a. The district court's opinions are reported at 666 F. Supp. 3d 613 and 627 F. Supp. 3d 624 and reproduced at Pet. App. 49a–84a and 85a–136a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are included in the appendix.

STATEMENT

The Affordable Care Act requires private health insurers to cover preventive care without any cost-sharing arrangements such as deductibles or co-pays. *See* 42 U.S.C. § 300gg-13(a).[1] But the statute does not specify or delineate the preventive care that insurers must cover. Instead, it delegates this authority to the U.S. Preventive Services Task Force, requiring insurers to cover:

> evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force …

42 U.S.C. § 300gg-13(a)(1).[2]

The "A" and "B" ratings issued by the Task Force do not immediately compel insurers to cover the relevant items or services. Instead, the HHS Secretary must establish a "minimum interval" of at least one year between the issuance of a Task Force "recommendation" and the plan year in which it becomes binding on insurers. *See* 42 U.S.C. § 300gg-13(b).

---

1. The ACA exempts "grandfathered" plans and short-term limited-duration insurance from these requirements. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140; Department of Health and Human Services, *Short-Term, Limited-Duration Insurance*, 83 Fed. Reg. 38,212 (2018).

2. Section 300gg-13(a) also empowers the Advisory Committee on Immunization Practices and the Health Resources and Services Administration to impose preventive-care coverage mandates, *see* 42 U.S.C. § 300gg-13(a)(2)–(4), but those mandates are not before this Court.

Since the ACA's enactment, the Task Force has issued numerous decrees that force insurers to cover items and services without cost-sharing. In June of 2019, for example, the Task Force decided to require coverage of pre-exposure prophylaxis (PrEP) drugs such as Truvada and Descovy. These drugs must now be covered without any cost-sharing arrangements and are funded entirely by premiums paid by others, without any marginal costs imposed on the beneficiary.

I. THE U.S. PREVENTIVE SERVICES TASK FORCE

The Task Force was created in 1984, and its governing statute is codified at 42 U.S.C. § 299b-4(a). Its statutory mandate is to "review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community." 42 U.S.C. § 299b-4(a)(1).

The statute instructs the Director of the Agency for Healthcare Research and Quality (AHRQ) to "convene" an "independent Preventive Services Task Force" for these purposes. 42 U.S.C. § 299b-4(a)(1). The statute further provides that:

> All members of the Task Force convened under this subsection, and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure.

42 U.S.C. § 299b-4(a)(6).

The statute does not specify the number of Task Force members or their method of appointment. But

there are currently 16 members, each serving a four-year term.[3] Until June 28, 2023, the Task Force was appointed by the AHRQ Director.[4] In response to this lawsuit, however, the members received new appointments from then-Secretary Becerra.[5]

Before the Affordable Care Act, the Task Force performed only advisory functions, and its "recommendations" had no legal force. When the Task Force served a purely advisory role, its members did not need to be appointed as "officers of the United States." *See* Walter Dellinger, *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 U.S. Op. Off. Legal Counsel 208, 216 (1995) ("[T]he members of a commission that has purely advisory functions need not be officers of the United States" (citation and internal quotation marks omitted)). But the post-ACA Task Force wields significant authority now that section 300gg-13(a)(1) compels insurers to cover items and ser-

3. *See* https://perma.cc/M7L9-BCWB.

4. *See* http://bit.ly/4bEl6NW (archived website from September 28, 2023) ("Task Force members are appointed by the Director of AHRQ to serve 4-year terms.").

5. *See* Secretary of HHS, *Ratification of Prior Appointment and Prospective Appointment: Appointment Affidavits* (June 28, 2023), https://perma.cc/8TAA-7AMN; Opening Br. for the Federal Defendants, *Braidwood Management Inc. v. Becerra*, No. 23-10326 (5th Cir.), ECF No. 159, at 30, https://perma.cc/SYK3-FPBA ("[E]xisting Task Force members have not yet received an appointment consistent with the Appointments Clause, [but] the Secretary has authority to appoint Task Force members and is in the process of providing them with a constitutional appointment.").

vices that receive its "A" or "B" ratings, and its members must now be appointed as officers of the United States. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam) ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States'").

II. THE PLAINTIFFS' LAWSUIT

On March 29, 2020, the plaintiffs sued to enjoin the government from enforcing the preventive-care coverage mandates imposed by the Task Force. The plaintiffs argued that the post-ACA Task Force was unconstitutionally appointed and that its "recommendations" cannot be given legal force.[6]

A. The District Court's Ruling

The district court held that Task Force members qualify as "officers of the United States" because they (1) occupy a "'continuing position established by law'" and (2) exercise "'significant authority pursuant to the laws of the United States.'" Pet. App. 107a (quoting *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (some internal quotation marks omitted)). The district court further held that Task Force members are "principal" officers rather than "inferior" officers, and must therefore be appointed by the president with the Senate's advice and consent. Pet. App. 115a–116a. The district court explained that "inferior" officers must be "'directed and supervised at some

6. The plaintiffs raised other claims, but none of them are before this Court.

level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" Pet. App. 115a (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)). And Task Force members cannot be "inferior" officers because "they have no superior" and because 42 U.S.C. § 299b-4(a)(6) guarantees their independence and shields them from political pressure. Pet. App. 115a–116a. The district court also held that the Task Force members were unconstitutionally appointed even if "inferior" officers because they were appointed by the AHRQ director, who is not a "Head of Department." Pet. App. 116a.

The district court declared invalid all preventive-care coverage mandates imposed by the post-ACA Task Force, and ordered that any "agency actions" taken to implement these coverage edicts be "set aside" under section 706 of the APA. Pet. App. 72a–84a. This was a "universal" remedy because it formally revoked the disputed agency actions, rendering the defendants incapable of enforcing those agency actions against anyone. *See Data Marketing Partnership, LP v. United States Dep't of Labor*, 45 F.4th 846, 859 (5th Cir. 2022) ("§ 706 … empowers courts to 'set aside'—*i.e.*, formally nullify and revoke—an unlawful agency action." (citation and some internal quotation marks omitted)). The district court also issued a concomitant nationwide injunction that restrained the defendants from "implementing or enforcing" preventive-care coverage requirements in response to an "A" or "B" rating from the Task Force. Pet. App. 83a.

B. The Appellate-Court Proceedings

The government appealed and the parties agreed to a stay of the nationwide injunction and the universal vacatur of the disputed "agency actions," leaving in place the relief that shields the plaintiffs from penalties and enforcement actions for violating 42 U.S.C. § 300gg-13(a)(1).[7]

On appeal, the government conceded for the first time that Task Force members are "officers of the United States," and that they were unconstitutionally appointed by the AHRQ Director.[8] But it tried to rectify this problem by classifying Task Force members as "inferior" officers rather than "principal" officers, and having Secretary Becerra—a Head of Department—reappoint the Task Force and "ratify" the "prior appointments" of the AHRQ Director.[9]

1. The court of appeals' ruling on the Appointments Clause issue

The court of appeals affirmed the district court's holding that Task Force members are "principal" offic-

---

7. *See* Joint Stipulation and Proposed Order ¶¶ 6–7, *Braidwood Management Inc. v. Becerra*, No. 23-10326 (5th Cir.), ECF No. 147-1, https://perma.cc/693F-8B5M.

8. *See* Opening Br. for the Federal Defendants, *Braidwood Management Inc. v. Becerra*, No. 23-10326 (5th Cir.), ECF No. 159, at 30, https://perma.cc/SYK3-FPBA ("[T]he existing Task Force members have not yet received an appointment consistent with the Appointments Clause").

9. *See* Secretary of HHS, *Ratification of Prior Appointment and Prospective Appointment: Appointment Affidavits* (June 28, 2023), https://perma.cc/8TAA-7AMN.

ers. Pet. App. 12a–26a. The court of appeals noted that *Edmond* defines "inferior officers" as "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663. And it held that Task Force members fall outside this definition because 42 U.S.C. § 299b-4(a)(6) immunizes Task Force members and their recommendations from direction and supervision by others:

> [W]e cannot say that any such supervision exists—as a matter of law or reality. … [W]e need look no further than … 42 U.S.C. § 299b-4(a)(6), which again provides that "[a]ll members of the Task Force … , and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure." … [I]t is a clear and express directive from Congress that the Task Force be free from any supervision. … [T]he Task Force cannot be "independent" and free from "political pressure" on the one hand, and at the same time be supervised by the HHS Secretary, a political appointee, on the other.

Pet. App. 20a.

2. The court of appeals' ruling on the remedial issue

The court of appeals rejected the universal remedy imposed by the district court, but it kept the relief that restrains the government from enforcing Task Force coverage recommendations against the plaintiffs. Pet. App. 30a–43a.

The government had proposed a remedy that would "'sever the limitations on secretarial oversight in 42 U.S.C. § 299b-4(a)(6).'" Pet. App. 30. It claimed that this remedy would empower the Secretary to direct and supervise the Task Force, thereby transforming its members into "inferior officers." The court of appeals rejected this remedy because it held that the Secretary lacks authority to overrule the Task Force even in the absence of section 299b-4(a)(6). Pet. App. 31a–33a.

SUMMARY OF ARGUMENT

1. Task Force members are principal officers, and they must be appointed by the President and Senate before they exercise "significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126. They cannot be "inferior" officers because 42 U.S.C. § 299b-4(a)(6) requires that Task Force members and their recommendations be kept "independent" and "to the extent practicable, not subject to political pressure." *See also* 42 U.S.C. § 299b-4(a)(1) (requiring the AHRQ Director to convene "an *independent* Preventive Services Task Force" (emphasis added)). An "inferior" officer must be "directed and supervised" by a principal officer, *see Edmond*, 520 U.S. at 663, and Task Force members cannot be "directed and supervised" by the Secretary (or anyone else) when sections 299b-4(a)(1) and (a)(6) require an "independent" Task Force and immunize its members from "political pressure."

The government's arguments for inferior-officer status are unavailing. Its claim that the Secretary can remove Task Force members at whim—and then use those putative removal powers to control or influence the Task

Force's recommendations—is incompatible with the guarantees of independence and protection from "political pressure" that appear in sections 299b-4(a)(1) and (a)(6). The government's insistence that the Secretary may "review" and "deny binding effect" to "A" or "B" recommendations is likewise incompatible with the governing statutes, as section 300gg-13(a)(1) compels insurers to follow the Task Force recommendations even if the Secretary purports to veto or override its decisions. The Secretary also lacks general rulemaking authority under the Public Health Service Act, so he cannot issue the substantive rules that would be needed to "deny binding effect" to Task Force ratings. And none of the general grants of authority in 42 U.S.C. § 202 or Reorganization Plan No. 3 of 1966 can overcome the specific and later-enacted statutes that guarantee Task Force independence and forbid political meddling in its work.

2. The Court should affirm even if it decides that Task Force members are "inferior officers." Inferior officers must still be appointed by the President and Senate unless Congress opts out of this constitutional default rule by "vesting" the appointment power elsewhere. Yet section 299b-4 says nothing about how Task Force members are to be appointed, which is unsurprising because the Task Force was initially established as a purely advisory body. Anyone could have appointed the Task Force prior to the ACA, and this congressional indifference means that the President and Senate must appoint now that the ACA has converted the Task Force members into officers of the United States. The government also *concedes* that the Task Force was unconstitu-

tionally appointed before Secretary Becerra reappointed its members on June 28, 2023, so the government cannot enforce coverage mandates that the Task Force imposed when its members were not appointed as officers.

3. The Court cannot remedy these Appointments Clause violations by "severing" section 299b-4(a)(6) and empowering the Secretary to veto or cancel the Task Force's "A" or "B" recommendations. This remedy does nothing to redress the plaintiffs' Article III injuries, and it would serve as a mere advisory opinion on the constitutionality of section 299b-4(a)(6). A "severance" remedy also cannot be incorporated into a final judgment that the district court must enter on remand, as judicial remedies must be directed at litigants and not statutory provisions. *See Whole Woman's Health v. Jackson*, 595 U.S. 30, 44 (2021). A final judgment cannot revoke a statutory provision or confer new powers upon a cabinet secretary that Congress has withheld.

The proposed "severance" remedy also will not cure the Appointments Clause violations. It would allow the Secretary to override *only* the Task Force's "A" and "B" recommendations, leaving the Task Force with unreviewable discretion when deciding *not* to require coverage of particular items or services. So Task Force members would retain their status as principal officers, and they would need to be appointed by the president and Senate in any event because Congress has not "vested" the Secretary (or anyone else) with appointment powers. A "severance" remedy also cannot fix the Task Force recommendations that issued before Secretary Becerra's reappointments.

Finally, a "severance" remedy is improper because there is no constitutional flaw in section 299b-4(a)(6) or 300gg-13(a)(1). Congress did not violate the Appointments Clause by empowering the Task Force to impose preventive-care coverage mandates while forbidding political interference with its work, because no statute forecloses the president from appointing Task Force members as principal officers. The constitutional violations occurred because the *executive* failed to implement sections 299b-4(a)(6) and 300gg-13(a)(1) in conformity with the Appointments Clause, so the remedy must compel the executive to implement these congressional enactments in a constitutional manner.

ARGUMENT

I. THE TASK FORCE MEMBERS ARE PRINCIPAL OFFICERS

The government acknowledges that Task Force members must be appointed as "officers of the United States."[10] But it insists that Task Force members are "inferior officers" rather than "principal" officers, and that Congress may therefore vest their appointment in the Heads of Department. Pet. Br. 14–17, 19–38. The court of appeals correctly rejected this argument.

An "inferior" officer is "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."

10. Pet. Br. 3 ("All agree that Task Force members are officers of some kind, because they exercise significant, continuing governmental authority.").

Edmond, 520 U.S. at 663; *United States v. Arthrex, Inc.*, 594 U.S. 1, 13 (2021). That direction and supervision is absent here. 42 U.S.C. § 300gg-13(a)(1) empowers the Task Force—and the Task Force alone—to determine the "items" and "services" that insurers must cover. Neither the Secretary, nor any other principal officer, has authority to "direct" or "supervise" the Task Force or its preventive-care coverage edicts. Indeed, no other officer can even *influence* the Task Force's decisions, as 42 U.S.C. § 299b-4(a)(6) provides that Task Force members and their recommendations "shall be independent and, to the extent practicable, not subject to political pressure." *See also* 42 U.S.C. § 299b-4(a)(1) (requiring the AHRQ Director to "convene an *independent* Preventive Services Task Force" (emphasis added)). These statutory guarantees of independence preclude *any* principal officer from reviewing or reversing the Task Force's recommendations, and they eliminate any possibility of "statutory authority to review" Task Force decisions. *See Arthrex*, 594 U.S. at 15 ("[S]tatutory authority to review" decisions is needed to make one an inferior officer); *id.* at 19 ("[A]dequate supervision entails review of decisions issued by inferior officers.").

The government nonetheless contends that the Task Force is "directed and supervised" by the Secretary despite the requirements of independence in sections 299b-4(a)(1) and (a)(6). First, the government insists that Task Force members are removable at will by the Secretary. Pet. Br. 15–16, 26–28. Second, the government claims that the Secretary may "directly review" and "deny binding effect" to any "A" or "B" rating issued by the

Task Force. *Id.* at 16, 28–29. But the Secretary has no such powers over the Task Force, and even if he did that would not give the Secretary the powers of "direction" and "supervision" needed to satisfy *Edmond*'s test for inferior-officer status.

A. The Secretary Cannot Remove Task Force Members At Will, And Even If He Could That Would Not Make Them Into Inferior Officers

The government contends that the Secretary enjoys an unfettered power to remove Task Force members, but its brief is not clear on whether this supposed at-will prerogative is alone sufficient to make Task Force members into inferior officers.[11] Some passages could be read to suggest that officers subject to at-will removal by a principal officer will automatically fall into the inferior-officer cubbyhole. *See* Pet. Br. 15 ("[T]he authority to remove an officer at will 'carries with it the inherent power to direct and supervise.'" (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667, 707 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)); *id.* at 15–16 (similar); *see also id.* at 21 &

11. In the court of appeals, the government insisted that *every* officer removable at will by a principal officer is an "inferior" officer, and no further powers of "direction" or "supervision" were needed. *See* Opening Br. for the Federal Defendants, *Braidwood Management Inc. v. Becerra*, No. 23-10326 (5th Cir.), ECF No. 159, at 24, https://perma.cc/SYK3-FPBA ("Task Force members … are removable at will and are therefore inferior officers."). The Acting Solicitor General does not repudiate this position, but she does not offer a ringing endorsement of it either.

n.4; *id.* at 25 & n.6. In other places, the government suggests that inferior-officer status is produced only by the *combined* effects of the Secretary's ostensible at-will removal powers and the additional powers that the Secretary claims to "review" and "deny binding effect" to Task Force recommendations. *See id.* at 3–4 ("Taken together, those controls give the Secretary, not the Task Force, ultimate responsibility for whether Task Force recommendations become final, binding decisions."); *id.* at 14 ("In general, an officer will be inferior if he may be removed at will by, and have his decisions reviewed by, a principal officer."); *id.* at 23 ("This Court need not resolve" whether "at-will removability by a superior can[] alone suffice to make someone an inferior officer" because "the Secretary has other means of control besides at-will removal."). None of this ultimately matters because Task Force members cannot be removed at will by the Secretary when sections 299b-4(a)(1) and (a)(6) require that the Task Force be kept "independent" and shielded from "political pressure."[12]

1. The Secretary cannot remove Task Force members at will

An at-will secretarial removal power cannot co-exist with the statutory mandates of independence in sec-

12. 42 U.S.C. § 299b-4(a)(1) ("The Director shall convene an independent Preventive Services Task Force"); 42 U.S.C. § 299b-4(a)(6) ("All members of the Task Force convened under this subsection, and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure.").

tions 299b-4(a)(1) and (a)(6), which require Task Force members and their recommendations to be kept "independent" and "to the extent practicable, not subject to political pressure."[13]

Protection from at-will removal is the very essence of an "independent" officer. *See Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) ("[O]ne who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."); *Morrison v. Olson*, 487 U.S. 654, 693 (1988) ("[T]he congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office."); *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 483 (2010) ("Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause."). Any officer who can be removed at will is necessarily dependent upon the one who holds the removal power. When this Court held that Article II gives the President an at-will removal prerogative over the director of the Consumer Financial Protection Bureau, it described the director and the agency as "dependent" on the President. *See Seila Law LLC v. CFPB*, 591 U.S. 197, 238 (2020) ("The Constitution requires that such officials remain dependent on the President"); *id.* at 236 (plurality opinion of Roberts, C.J.) (considering "whether Con-

13. *See* note 12, *supra*.

gress would have preferred a dependent CFPB to no agency at all." (emphasis removed)). At-will removal is the *sine qua non* of a dependent relationship—and the antithesis of an "independent" one.

If the Secretary could remove Task Force members at will, then the Task Force and its recommendations would no longer be "independent," as required by sections 299b-4(a)(1) and (a)(6), because the Secretary could remove (and threaten to remove) Task Force members who refuse to do his bidding. *See Edmond*, 520 U.S. at 664 ("The power to remove officers … is a powerful tool for control."). At-will removal would also subject Task Force members to "political pressure," in violation of section 299b-4(a)(6). The government not only acknowledges but embraces this, claiming that these putative at-will removal powers will enable the Secretary to bully the Task Force into revoking previously issued preventive-care coverage recommendations.[14] And the Secretary would be equally empowered, under the government's view, to use his removal powers to browbeat Task Force members into bestowing "A" or "B" ratings that they would otherwise be unwilling to confer. *See* Pet. Br. 20–21 ("The 'officer's 'presumed desire to avoid removal' therefore 'creates [a] here-and-now subservience.'" (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986));

14. *See* Pet. Br. 16 ("[I]f the Task Force were to reject the Secretary's request to withdraw a particular recommendation, the Secretary could remove and replace the Task Force members. Through his unfettered removal power, the Secretary can effectively ensure that no preventive-services recommendations contrary to the Secretary's judgment will take binding effect.").

id. at 27–28; *id.* at 37 ("The Secretary can control Task Force recommendations by removing or threatening to remove Task Force members at will").

Yet what is conspicuously missing from the Acting Solicitor General's brief is any attempt to reconcile this at-will removal regime with the statutes that require an "independent" Task Force.[15] If the Secretary can remove Task Force members at will—and if the Secretary can use his at-will removal powers to influence the Task Force and its recommendations—then the Task Force is no longer "independent" under any plausible interpretation of that word. The Acting Solicitor General does not even try to explain how the Task Force can remain "independent" in a world where the Secretary can remove (or threaten to remove) any Task Force member who does not accede to the Secretary's wishes or demands.

When the Acting Solicitor General finally gets around to discussing the statutory guarantees of independence in sections 299b-4(a)(1) and (a)(6), she argues *only* that the Secretary's supposed powers to "review" and "deny binding effect to" "A" or "B" recommendations can coexist alongside an "independent" Task Force. Pet. Br. 31–33. She claims that the statutes that require an "independent" Task Force do not limit the Secretary's ability to overrule the Task Force's "A" or "B" recommendations, but merely shield the Task Force from external influences when offering its recommendations for the Secretary's review and approval. *Id.* at 31–32. The Act-

15. *See* note 12, *supra.*

ing Solicitor General cites dictionary definitions of "independent," claiming that it means:

- "being or acting free of the influence of something else";
- "not looking to others for one's opinions";
- "acting or thinking freely"; and
- "free from the influence or guidance of others."

Pet. Br. 32 (citations and internal quotation marks omitted).

Yet the Acting Solicitor General seems to be unaware that her earlier insistence on an at-will secretarial removal prerogative destroys any semblance of an "independent" Task Force in this sense of the word. Just a few pages earlier, the Acting Solicitor General tells us that the Secretary can control the actual recommendations issued by the Task Force by threatening and replacing Task Force members who refuse to kowtow to his demands.[16] But the Task Force and its recommendations will no longer be "free of the influence of something else," "not looking to others for one's opinions," "acting or thinking freely," or "free from the influence or guidance of others" if the Secretary wields an at-will removal power that can influence the conduct of the Task Force. Allowing the Secretary to hold an at-will removal power violates both sections 299b-4(a)(1) and (a)(6), even under the Acting Solicitor General's interpretation of "inde-

16. *See* note 14, *supra*, and accompanying text.

pendent," because it destroys the independence of the Task Force and subjects its members and recommendations to "political pressure."

This is not to say that the Secretary has no power to remove a Task Force member. It means only that the Secretary must exercise his removal powers in a manner that respects the independence of the Task Force and avoids applying "political pressure" to the Task Force or its work. A Secretary who removes a Task Force member for sleeping on the job does not compromise the independence of the Task Force or subject it to political pressure. But a Secretary who cashiers the entire Task Force because he disapproves of its decision to place an "A" rating on PrEP drugs—and who threatens their replacements with a similar fate unless they revoke the "A" rating that their predecessors had imposed—is violating the statutory requirements of independence in sections 299b-4(a)(1) and (a)(6). The Secretary may remove Task Force members, but only for reasons consistent with the Task Force's status as an "independent" agency that is shielded from "political pressure." *See Humphrey's Executor*, 295 U.S. at 622–23 (officers of an "independent" agency subject to removal only for "inefficiency, neglect of duty, or malfeasance in office.").[17]

17. Sections 299b-4(a)(1) and (a)(6) also protect Task Force members from at-will presidential removal, which subverts Task Force independence no less than at-will secretarial removal. Whether this statutory restriction on *presidential* removal violates Article II is a question that this Court need not (and should not) resolve, as subjecting the Task Force to at-will presidential removal does nothing to make its members into "inferi-

(continued…)

The government notes that *In re Hennen*, 38 U.S. 230 (1839), presumes that appointing officers wield at-will removal powers over inferior officers unless Congress says otherwise. Pet. Br. 26–27. But that presumption applies *only* when Congress has vested the appointment power in the appointing officer, and *only* when the appointed officer is properly characterized as "infe-

---

or officers." *See Morrison*, 487 U.S. at 716 (Scalia, J., dissenting) ("[M]ost (if not all) *principal* officers in the Executive Branch may be removed by the President *at will*."). Nor would existing doctrine empower the President to remove Task Force members at will, as the holdings of *Seila Law* and *Collins v. Yellen*, 594 U.S. 220 (2021), extend only to agencies headed by a single member. The Task Force is a multi-member entity, and it exercises quasi-legislative rather than executive functions. *See Humphrey's Executor*, 295 U.S. at 628. The respondents are not asking this Court to overrule *Humphrey's Executor*, and neither is the Acting Solicitor General.

The court of appeals held that constitutional avoidance counsels against interpreting section 299b-4(a)(6) to restrict the Secretary's removal powers. Pet. App. 18a–19a. That is wrong because Article II empowers only the President and not his subordinates to remove officers at will. *See United States v. Perkins*, 116 U.S. 483, 485 (1886). The vesting clause is not implicated by statutory restrictions on a principal officer's removal prerogatives, unless Congress has limited the President's authority to remove that principal officer. *See Free Enterprise Fund*, 561 U.S. at 484 ("[M]ultilevel protection from removal [violates] Article II's vesting of the executive power in the President"). That is not the situation here, as the HHS Secretary remains subject to at-will presidential removal. The constitutional-avoidance canon is doubly inapplicable because a Task Force that serves at the pleasure of the Secretary cannot be "independent" or free from "political pressure" under any plausible construction of those words. *See Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018).

rior." *Hennen*, 38 U.S. at 258–60; *Reagan v. United States*, 182 U.S. 419, 424 (1901). Section 299b-4 is agnostic on who appoints the Task Force and does not assign the appointing power to anyone. More importantly, the government's reliance on *Hennen* and *Reagan* begs the question by assuming that Congress may lawfully vest the Secretary with appointment powers over the Task Force. That is permissible only if Task Force members are "inferior" rather than "principal" officers—the very issue to be decided by this Court. Finally, the statutory requirements of an "independent" Task Force would rebut the *Hennen* presumption even if it applied. *See* pp. 15–20, *supra*; *Free Enterprise Fund*, 537 F.3d at 695 (Kavanaugh, J., dissenting) ("[W]hat makes an agency 'independent' is the for-cause removal restriction").

2. Task Force members would remain principal officers even if the Secretary could remove them at will

If the Court concludes that Task Force members are subject to at-will secretarial removal, that would not suffice to make them into inferior officers. The government quotes approvingly from sources suggesting that officers removable at will by principal officers are inevitably "inferior,"[18] but this Court has never said that and *Arthrex* explicitly rejects this idea. *See Arthrex*, 594 U.S. at 16 (at-will removal insufficient to confer inferior-officer status); *Morrison*, 487 U.S. at 671–72 (removability is one of four factors in inferior-officer inquiry); *Edmond*, 520

18. *See* Pet. Br. 15–16, 21 n.4.

U.S. at 664–65 (designating officers "inferior" because they were "remov[able] … without cause," subject to administrative oversight, *and* had "no power to render a final decision").

Task Force members are principal officers because their preventive-care coverage decisions are not subject to review or reversal by anyone—and that will remain the case even if the Secretary can remove them at will. *See* pp. 27–41, *infra*; *Edmond*, 520 U.S. at 665 ("What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."). The touchstone for inferior-officer status is whether the individual is "directed and supervised" by a principal officer, not whether he is subject to at-will removal. *Id.* at 663; *Arthrex*, 594 U.S. at 13 ("An inferior officer must be 'directed and supervised at some level by others'" (quoting *Edmond*, 520 U.S. at 663)). Task Force members—even if removable at will—would *still* have "'power to render a final decision on behalf of the United States' without … review by their nominal superior or any other principal officer in the Executive Branch." *Id.* at 14 (quoting *Edmond*, 520 U.S. at 665)).

At-will removal would allow the Secretary to fire Task Force members, but it would not empower him to overrule their recommendations or direct their decisions given the guarantees of independence in sections 299b-4(a)(1) and (a)(6). The government has already admitted that section 299b-4(a)(6) makes the Secretary powerless

to "direct" the Task Force to issue "A" or "B" ratings.[19] And this Court has long recognized that at-will removal powers do not entail the prerogative to overrule or revise a subordinate officer's decisionmaking. *See Myers v. United States*, 272 U.S. 52, 135 (1926) ("[T]here may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. . . . But even in such a case he may consider the decision after its rendition as a reason for removing the officer"). An at-will removal prerogative would not empower the Secretary to "overrule" or "revise" Task Force ratings in the teeth of sections 299b-4(a)(1) and (a)(6), and it would not confer the plenary powers of "direction" and "supervision" needed to convert Task Force members into inferior officers. *See Arthrex*, 594 U.S. at 15 (a principal officer's informal means of influencing another's decisionmaking does not confer inferior-officer status absent formal "statutory authority to review" those decisions); *id.* at 16 (at-will removal powers do not create inferior-officer status when principal officer has "no means of countermanding the [inferior officer's] final decision"); *id.* at 19 ("[A]dequate supervision entails review of decisions issued by inferior officers.").

---

19. J.A. 54 ("The Secretary may not, consistent with 42 U.S.C. § 299b-4(a)(6), direct that the PSTF give a specific preventive service an 'A' or 'B' rating, such that it would be covered pursuant to 42 U.S.C. § 300gg-13(a)(1).").

B. The Secretary Has No Authority To "Review" Or "Deny Binding Effect To" The Task Force's "A" Or "B" Ratings, And Even If He Did That Would Not Sufficiently Empower The Secretary To "Direct And Supervise" The Task Force

The government claims that the Secretary has limited but substantial powers over the Task Force and its coverage recommendations. The precise scope of these supposed powers is not clear from the government's brief, but it insists that the Secretary may:

- "Review" the Task Force's "A" and "B" recommendations;[20] and
- "Deny binding effect" (or "deny legal force") to an "A" or "B" recommendation issued by the Task Force.[21]

---

20. Pet. Br. 16.

21. It is not clear what this power to "deny binding effect" actually is or where it comes from.
    - Is it akin to a presidential veto, where the Secretary has a limited time to disapprove an "A" or "B" rating before it becomes "law," and only the Task Force can withdraw its "A" or "B" ratings after the Secretary signs off?
    - Or do future secretaries hold an ongoing prerogative to "deny binding effect" to "A" or "B" recommendations that their predecessors approved or acquiesced to?
    - Is the Secretary empowered to formally change or revoke the Task Force's "A" or "B" ratings, so that the Secretary's action becomes the Task Force's recommendation for purposes of 42 U.S.C. § 300gg-13(a)(1)?
    - Or is the Secretary a mere a veto-gate whose approval or disapproval is formally distinct from the Task Force's recommendations?

(continued…)

At the same time, the government acknowledges that the Secretary may not:

- Direct the Task Force to impose "A" or "B" ratings on particular items or services;[22] or
- Direct the substance of any Task Force recommendation, or directly exercise powers that 42 U.S.C. § 299b-4(a) confers on the Task Force.[23]

This regime, according to the government, gives the Secretary sufficient powers of "direction" and "supervision" to make Task Force members into inferior officers.

The government's argument is untenable because 42 U.S.C. § 300gg-13 and 42 U.S.C. § 299b-4(a)(6) prevent the Secretary from reviewing or countermanding the Task Force's "A" or "B" recommendations, and no other statute gives the Secretary this authority. And even if the Secretary had these powers, they would not be enough to relegate Task Force members to inferior-officer status.

- Are secretarial actions that "deny binding effect" to Task Force ratings substantive rules that must go through notice-and-comment procedures?

22. J.A. 54.

23. Pet. Br. 36–37.

1. 42 U.S.C. § 300gg-13 and 42 U.S.C. § 299b-4(a)(6) forbid the Secretary to "review" or "deny binding effect to" the Task Force's "A" or "B" recommendations, and no other statute confers this authority on the Secretary

The government insists that the Secretary can override the Task Force by "reviewing" and "denying binding effect" to its "A" or "B" recommendations. Pet. Br. 16, 28–29, 31–36. But 42 U.S.C. § 300gg-13 and 42 U.S.C. § 299b-4(a)(6) make clear that the Secretary has no such powers.

Section 300gg-13 provides (in relevant part):

> **(a) In general**
>
> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—
>
> (1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force; …
>
> **(b) Interval**
>
> **(1) In general**
>
> The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) … is issued and the plan year with respect to which the requirement described in subsection (a) is

> effective with respect to the service described in such recommendation …
>
> **(2) Minimum**
>
> The interval described in paragraph (1) shall not be less than 1 year.

42 U.S.C. § 300gg-13. All that matters under section 300gg-13(a)(1) is what the Task Force recommends, and the Secretary has no role in approving or reviewing the Task Force recommendations. If the Secretary purported to veto or disapprove an "A" or "B" rating from the Task Force, that action would have no effect on an insurer's obligation to cover the recommended items or services under section 300gg-13(a)(1).[24]

42 U.S.C. § 300gg-13(b) also specifically addresses the Secretary's role vis-à-vis the Task Force recommendations, and it empowers him *only* to establish a minimum interval of time before the "A" and "B" recommendations become binding on insurers—not to review or second-guess the recommendations themselves. *See generally* Antonin Scalia and Bryan Garner, *Reading Law* 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others"). The government's claim that Task Force "A" or "B" ratings

---

24. The government suggests that section 300gg-13(a)(1), by requiring coverage of items and services "'that have *in effect* a rating of "A" or "B" in the current [Task Force] recommendations,'" allows the Secretary to deny "effect" to Task Force ratings. Pet. Br. 29. That is sophistry. An "A" or "B" rating is "in effect" if it appears in the Task Force's "current recommendations," regardless of what the Secretary does.

"have operative effect only if they are adopted by someone else" is false. Pet. Br. 32. The Secretary does not decide whether to "adopt" Task Force recommendations; he decides only *when* they will take effect.

Section 299b-4(a)(6) confirms all of this by requiring the Task Force and its recommendations to remain "independent" and "to the extent practicable, not subject to political pressure":

> All members of the Task Force convened under this subsection, and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure.

42 U.S.C. § 299b-4(a)(6); *see also* 42 U.S.C. § 299b-4(a)(1) (requiring an "independent" Task Force"). Giving the Secretary a veto power over the Task Force's "A" and "B" ratings is incompatible with these statutory guarantees, as the Task Force and its recommendations would no longer be "independent" of the Secretary, and the need to obtain secretarial approval will inevitably bring "political pressure" to bear on the Task Force and its recommendations.

The government tries to get around section 299b-4(a)(6) by claiming that it protects only the independence of the Task Force's own work, and that secretarial actions taken to disapprove a previously issued Task Force rating are distinct from Task Force actions and do not compromise the independence of the Task Force or its recommendations. Pet. Br. 31–32, 38. But the government's insistence on a formal distinction between the recommendations of the Task Force and the subsequent

pronouncements of disapproval from the Secretary runs headlong into section 300gg-13(a)(1), which gives binding effect to the Task Force's recommendations and not the Secretary's actions. The *only* way that the government's argument can fit with section 300gg-13(a)(1) is if the Secretary can formally cancel or change an "A" or "B" rating issued by the Task Force, so that the Secretary's pronouncement *becomes* the Task Force's recommendation for purposes of section 300gg-13(a)(1). But if the Task Force's actual recommendations can be formally altered or annulled by the Secretary, then those Task Force recommendations cannot be described as "independent" under section 299b-4(a)(6), as they are entirely dependent on the Secretary's review and approval. So the government is caught between the rock and the whirlpool. It must either insist that the Secretary can modify or revoke the actual recommendations of the Task Force, thereby admitting that Task Force recommendations are no longer "independent" of the Secretary—or it must acknowledge that actions taken to "deny binding effect" to "A" or "B" ratings leave the actual Task Force recommendations in place, which continue to bind insurers under section 300gg-13(a)(1).

2. The Secretary has no general rulemaking authority under the Public Health Service Act

There is a more serious problem with the claim that the Secretary can "review" and "deny binding effect to" the Task Force's "A" and "B" recommendations. Any secretarial action taken to ratify or disapprove a preventive-care coverage mandate recommended by the Task Force will qualify as a substantive or legislative rule. *See* 5

U.S.C. § 551(4) (defining "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"). But the Secretary has no general rulemaking authority under the Public Health Service Act. *See Pharmaceutical Research and Manufacturers of America v. United States Dep't of Health and Human Services*, 4 F. Supp. 3d 28, 42 (D.D.C. 2014) ("HHS has not been granted broad rulemaking authority to carry out all the provisions of the [Public Health Service Act]."); *Novartis Pharmaceuticals Corp. v. Johnson*, 102 F.4th 452, 456, 459 (D.C. Cir. 2024) (recognizing that the Secretary lacks a general grant of substantive rulemaking authority under the Public Health Service Act). Unlike the Social Security Act or the Food, Drug, and Cosmetic Act, which confer general substantive rulemaking authority on the Secretary,[25] the Public Health Service Act grants rulemaking authority only on a section-by-section or program-by-program basis. Some provisions of the Act, such as section 2714, give the Secretary substantive rulemaking authority to implement a particular statutory section. *See* 42 U.S.C. § 300gg-14(b) ("The Secretary shall promulgate regulations to define

25. *See* 42 U.S.C. § 1302(a) ("[T]he Secretary of Health and Human Services … shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter."); 21 U.S.C. § 371(a) ("The authority to promulgate regulations for the efficient enforcement of this chapter, except as otherwise provided in this section, is vested in the Secretary.").

the dependents to which coverage shall be made available under subsection (a).”). But section 2713, which immediately precedes section 2714, contains no such language. *See* 42 U.S.C. § 300gg-13; *see also Loughrin v. United States*, 573 U.S. 351, 358 (2014) (“[W]hen Congress includes particular language in one section of a statute but omits it in another—let alone in the very next provision—this Court presume[s] that Congress intended a difference in meaning.” (citation and internal quotation marks omitted)).

So the government needs to show how the Secretary can “review” and “deny binding effect” to Task Force ratings without crossing the line into substantive rulemaking. Its claim that the Secretary can remove Task Force members at will is hard to square with the statutory guarantee of independence in 42 U.S.C. § 299b-4(a)(6),[26] but at least it falls on the non-substantive-rulemaking side of the line. Its claim that the Secretary can “deny binding effect” to Task Force “A” and “B” ratings cannot be reconciled with absence of substantive rulemaking powers in 42 U.S.C. § 300gg-13 and the Public Health Service Act.

3. No other statute empowers the Secretary to “review” or “deny binding effect to” the Task Force’s “A” or “B” recommendations

The government claims that other statutes empower the Secretary to “review” and “deny binding effect” to

26. *See* pp. 15–22, *supra*.

the Task Force's "A" and "B" ratings,[27] but none of those statutes provide this authority.

a. 42 U.S.C. § 300gg-13(b)(1)

42 U.S.C. § 300gg-13(b)(1) requires the Secretary to establish a "minimum interval" between the issuance of an "A" or "B" rating and the plan year in which insurers must begin covering the recommended care. The government claims that this gives the Secretary control over "whether and when recommendations have binding legal effect." Pet. Br. 28. The government is half right. Section 300gg-13(b)(1) empowers the Secretary to decide *when* Task Force recommendations will bind insurers, but it does not allow him to decide *whether* those recommendations will become binding.

Perhaps the government is suggesting that a Secretary could effectively overrule a Task Force recommendation by establishing a 100-year "minimum interval" period. But any Secretary who tried this would be sued and his action would be set aside as arbitrary, capricious, and an abuse of discretion. *See* 5 U.S.C. § 706(2)(A). The powers conferred by section 300gg-13(b)(1) must be exercised within the confines of the APA, and a Secretary cannot leverage his authority to set "minimum intervals" into a power to effectively nullify preventive-care coverage mandates recommended by the Task Force. *See Biden v. Nebraska*, 600 U.S. 477, 494–507 (2023).

Finally, a Secretary cannot do anything under section 300gg-13(b)(1) to delay or override a coverage mandate

27. Pet. Br. 28–29.

that has already taken effect. Only the Task Force can "deny binding effect" by withdrawing its previously issued "A" or "B" ratings, and the government admits that section 300gg-13(b)(1) gives the Secretary no ability to "direct" or "supervise" those Task Force's decisions. J.A. 54.

b. 42 U.S.C. § 202 and Reorganization Plan No. 3 of 1966

42 U.S.C. § 202 says:

> The Public Health Service in the Department of Health and Human Services shall be administered by the Assistant Secretary for Health under the supervision and direction of the Secretary.

42 U.S.C. § 202. The government says this empowers the Secretary to "supervise and direct" the Task Force, which exists within Public Health Service. Pet. Br. 28. The government also relies on Reorganization Plan No. 3 of 1966, which "transferred" to the Secretary "all functions of the Public Health Service … and of all other officers and employees of the Public Health Service." 80 Stat. 1610. Neither of these statutes empowers the Secretary to "review" or "deny binding effect" to the Task Force's "A" and "B" ratings.

Section 202 merely places the Assistant Secretary for Health—not the Task Force or the Public Health Service—under the Secretary's "supervision" and "direction," while instructing the Assistant Secretary for Health to "administer[]" the Public Health Service. The responsibility to "administer" does not empower the As-

sistant Secretary for Health or his commanding officers to direct and supervise a Task Force that the law requires to be "independent" and free from "political pressure." 42 U.S.C. § 299b-4(a)(6); *see also Cleavinger v. Saxner*, 474 U.S. 193, 203–04 (1985) ("direct subordinates" whose decisions are subject to review cannot be "'independent'"); *Black's Law Dictionary* (11th ed. 2019) (defining "administer" as "[t]o provide or arrange (something) officially as part of one's job"); *Arthrex*, 594 U.S. at 14–15 (powers of "administrative oversight" insufficient to confer inferior-status status absent "statutory authority to review [the officer's] decisions"); Pet. App. 29a–30a.

The reorganization plan is no help because it exempts "advisory" entities from secretarial control. *See* Reorganization Plan No. 3 of 1966, § 1(b), 80 Stat. 1610 ("This section shall not apply to the functions vested by law in any advisory council, board, or committee of or in the Public Health Service which is established by law or is required by law to be established."); Pet. App. 31a–32a. Congress also enacted the reorganization plan in 1966, before the creation of the Task Force. So the "functions of the Public Health Service" that were "transferred" to the Secretary did not include the functions of the Task Force, which did not exist in 1966, and which was subsequently established by law as an "advisory" and "independent" body.

The government denies that the Task Force qualifies as "advisory" under section 1(b) because the post-ACA Task Force no longer has "*purely* recommendatory duties." Pet. Br. 42 (emphasis added). But the Task Force

still performs advisory functions, as its "C," "D," and "I" ratings are "purely recommendatory,"[28] and even its "A" or "B" ratings remain advisory for at least one year—and until the Secretary-imposed "minimum interval" expires. *See* 42 U.S.C. § 300gg-13(b). Section 1(b) does not limit its exemption to "purely" advisory bodies,[29] and the Task Force's grading system remains "advisory" even if a federal statute chooses to incorporate two of its five possible ratings. *See Animal Legal Defense Fund, Inc. v. Shalala*, 104 F.3d 424, 426 (D.C. Cir. 1997) (committee that publishes the "Guide for the Care and Use of Laboratory Animals" is "advisory" under the Federal Advisory Committee Act, even though some agencies had "incorporated the *Guide*'s recommendations into regula-

---

28. *See* J.A. 46.

29. The government falsely claims that the Federal Advisory Committee Act applies only to bodies whose function is "'advisory only.'" Pet. Br. 43 (quoting 5 U.S.C. § 1002(b)(6)). FACA defines "advisory committee" as:

> a committee, board, commission, council, conference, panel, task force, or other similar group … that is established or utilized to obtain advice or recommendations for the President or one or more agencies or officers of the Federal Government and that is—
>
> (i) established by statute or reorganization plan;
>
> (ii) established or utilized by the President; or
>
> (iii) established or utilized by one or more agencies.

5 U.S.C. § 1001(2)(A). The post-ACA Task Force falls squarely within this definition because it was "established" and is "utilized" to obtain advice or recommendations. That is why 42 U.S.C. § 299b-4(a)(5) is still needed to exempt the Task Force from FACA's requirements.

tions" and required funding recipients to follow the *Guide*).

Finally, the government's interpretations of section 202 and Reorganization Plan No. 3 would empower the Secretary to exercise *all* of the Task Force's functions, contrary to the government's insistence that the Secretary cannot formally direct the substance of Task Force recommendations.[30] There is no possible construction of section 202 or Reorganization Plan No. 3 that would allow the Secretary to exercise or direct only *some* of the Task Force's functions, or that would empower the Secretary to "deny binding effect" to "A" or "B" Task Force ratings while forbidding the Secretary to interfere with the Task Force's work in any other way. So adopting the government's interpretations would make the Task Force completely subservient to the Secretary, in the same way that the Secretary wields plenary powers over other components of the Public Health Service,[31] allowing the Secretary to administer and exercise *every* function of the Task Force and destroying every last shred of independence that the Task Force might have from the Secretary.

The government's interpretations of section 202 and Reorganization Plan No. 3 would also create an irreconcilable conflict between those statutes and the later-enacted requirements of Task Force independence in 42 U.S.C. §§ 299b-4(a)(1) and (a)(6), as the Task Force cannot remain "independent" if the Secretary can perform

30. J.A. 54; Pet. Br. 36–37.

31. J.A. 53; Pet. App. 44a–45a.

or commandeer its tasks under section 202 or the reorganization plan. That would trigger a partial implied repeal and require courts to enforce the statutory guarantees of Task Force independence at the expense of any earlier-enacted statute that gives the Secretary plenary control over the Public Health Service. *See Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 685–86 (1975). But implied repeals are heavily disfavored, and courts must adopt any reasonable construction of the competing statutes that will avoid an "irreconcilable conflict" of this sort. *See Branch v. Smith*, 538 U.S. 254, 293 (2003) (O'Connor, J., dissenting). These "irreconcilable conflicts" will be avoided if the Task Force is deemed an "advisory" body under section 1(b) of the reorganization plan, and if the general power to "administer" the Public Health Service in section 202 is construed to preserve rather than override the statutes that specifically require an "independent" Task Force. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); Pet. App. 29a–30a. But under the government's interpretation of these statutes, the guarantees of Task Force independence in sections 299b-4(a)(1) and (a)(6) will conflict with the earlier-enacted laws, and the Court will be obligated to enforce sections 299b-4(a)(1) and (a)(6) over the earlier enactments under the last-in-time rule.

The government also fails to explain how the Task Force could retain *any* autonomy from the Secretary under its interpretations of section 202 and Reorganization Plan No. 3. It seems to us that the government has

no choice but to admit that sections 299b-4(a)(1) and (a)(6) implicitly repeal section 202 and Reorganization Plan No. 3 at least in part, because that is the only way to preserve even a modicum of "independence" for the Task Force under the government's interpretations of section 202 and the reorganization plan.

c. 42 U.S.C. § 300gg-92

The government also cites 42 U.S.C. § 300gg-92, which authorizes the Secretary to

> promulgate such regulations as may be necessary or appropriate to carry out the provisions of this subchapter.

42 U.S.C. § 300gg-92. The "subchapter" to which this refers contains section 300gg-13 but not section 299b-4, which governs the composition and duties of the Task Force.

As noted earlier, the Public Health Service Act does not confer general rulemaking authority on the Secretary. *See* pp. 30–32, *supra*. Neither does section 300gg-92, which authorizes only regulations that are "necessary or appropriate" to "carry out" section 300gg-13 or other provisions in its subchapter. The Secretary does not get deference in determining what is "necessary" or "appropriate"; that is the task of the reviewing court. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

The government claims that section 300gg-92 authorizes regulations that:

- "prescribe procedures for the Task Force's consideration of recommendations about certain services";

- require the Task Force to "consider proposals that [the Secretary] submits"; and
- "provide for a preclearance regime under which the Task Force must notify the Secretary before it votes on a final 'A' and 'B' recommendation, and no such recommendations would take binding effect absent his affirmative approval."

Pet. Br. 29. None of this is authorized by section 300gg-92 because none of it "carries out" section 300gg-13. Section 300gg-13 requires insurers to cover items and services *that have already been recommended* by the Task Force; it does not govern the Task Force or the process by which the Task Force makes recommendations. Those statutes appear in section 299b-4, which falls outside the "subchapter" described in section 300gg-92. And each of these hypothetical regulations contradicts the statutory requirements of Task Force independence in sections 299b-4(a)(1) and (a)(6), so they would not pass muster even under the erstwhile *Chevron* regime.[32]

4. The constitutional-avoidance canon is inapplicable

The government suggests that the constitutional-avoidance canon supports its interpretation of section

32. The government must also confront the fact that no Secretary has ever asserted (let alone exercised) a power to "deny binding effect" to Task Force recommendations in the 15 years of the ACA's existence. *See Biden*, 600 U.S. at 501 (disapproving agency interpretation that was inconsistent with "past practice under the statute."). Nor has any Secretary asserted (or exercised) a power to remove Task Force members at will.

299b-4(a)(6). Pet. Br. 31, 35. That is wrong because section 299b-4(a)(6) cannot violate the Appointments Clause no matter how it is interpreted. Even if section 299b-4(a)(6) immunizes Task Force recommendations from principal-officer review, the *statute* remains constitutional so long as it allows the president to appoint Task Force members with the Senate's advice and consent. The constitutional violations arise from the *executive's* failure to implement section 299b-4(a)(6) in a constitutional manner by appointing Task Force members as principal officers. The statute as written presents no constitutional problems. *See* pp. 53–55, *infra*.

The government claims that the phrase "to the extent practicable" contains ambiguity sufficient to trigger the constitutional-avoidance canon. Pet. Br. 35. But that qualifier attaches *only* to the provision shielding Task Force members from "political pressure." The separate requirements of an "independent" Task Force are absolute, and there is no statutory language that provides an opening to compromise the independence required by sections 299b-4(a)(1) and (a)(6).

Finally, the government's proposed interpretation of section 299b-4(a)(6) will not avoid a constitutional violation because the Task Force was previously appointed by the AHRQ Director, who is not a "Head of Department." The post-ACA Task Force issued many coverage mandates before it was reappointed by Secretary Becerra, and those mandates violate the Appointments Clause no matter how section 299b-4(a)(6) is construed.

5. The Task Force members would remain principal officers even if the Secretary could "review" and "deny binding effect" to their "A" and "B" ratings

The government claims that the Secretary may override the Task Force's "A" and "B" recommendations but *not* its "C," "D," or "I" recommendations or its refusal to recommend coverage of items or services under section 300gg-13(a)(1). Pet. Br. 29; *id.* at 35–36. Yet the Task Force members would *still* be "principal officers"—even if the Secretary held these limited powers of review—because no one can countermand a Task Force decision *not* to adopt an "A" or "B" recommendation. *See Arthrex*, 594 U.S. at 14–15. The "adequate supervision" required by *Arthrex* requires that a principal officer hold power to review *all* of the inferior officer's decisions, not just some of them. *See id.* at 19 ("[A]dequate supervision entails review of decisions issued by inferior officers."); Pet. Br. 14 ("[A]n officer will be inferior if he may … have his *decisions* reviewed by, a principal officer." (emphasis added)).

The respondents are not contending (and have never argued) that Task Force members cannot be "inferior officers" unless the Secretary can "direct" their recommendations "in the first instance," and the government correctly observes that any such claim is incompatible with *Edmond*. Pet. Br. 17, 36–38. A principal officer can provide the "direction and supervision" required by *Edmond* and *Arthrex* by directing an inferior officer's decisionmaking after the fact, *i.e.*, by wielding a power to formally revise or reverse the inferior officer's actions. The problem is that the Task Force will *still* be empow-

ered to "render a final decision on behalf of the United States" when it withdraws or decides not to impose coverage mandates—and it will remain empowered to render these final decisions without any direction, supervision, review, or permission from an executive officer. *See Edmond*, 520 U.S. at 665 ("What is significant is that the [inferior officers] have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."). The government's reliance on the action/inaction distinction is unavailing,[33] as the Task Force undeniably takes "action" and makes "decisions" when issuing "C," "D," and "I" ratings that refuse to compel coverage of items and services.

The government analogizes Task Force members to the hypothetical quasi-judicial actors discussed in *Myers*, who remain subject to at-will presidential removal while their decisions are immunized from "'influence or control.'" Pet. Br. 38 (quoting *Myers*, 272 U.S. at 135). But *Myers* has nothing to say about whether these hypothetical officials would qualify as "inferior officers." And these hypothetical officials will be principal officers—not "inferior" officers—unless *some* principal officer (apart from the President) holds statutory authority to review and formally revise their decisionmaking after the fact. *See Arthrex*, 594 U.S. at 16. The Secretary has no such authority over the Task Force, even under the government's interpretation of the relevant statutes. The

33. Pet. Br. 44 ("[R]espondents offer no authority for the proposition that principal-officer review over a subordinate's *inaction* is necessary to satisfy the Appointments Clause.").

analogy to ALJs and similar "inferior-officer adjudicators"[34] fails for the same reason: The Secretary—even if one accepts the government's rendition of his authorities—remains powerless to review Task Force decisions that withdraw or decline to confer "A" or "B" ratings on particular items or services.

II. TASK FORCE MEMBERS MUST BE APPOINTED BY THE PRESIDENT AND SENATE EVEN IF THEY ARE INFERIOR OFFICERS

If this Court concludes that Task Force members are "inferior officers," the Task Force must *still* be appointed by the president and Senate unless Congress has "vested" the appointment power elsewhere. *See Edmond*, 520 U.S. at 660 ("The prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers."). The government bears the burden of showing that Congress has "by Law" vested the appointment power in the Secretary. Yet the Acting Solicitor General has not attempted to make this showing, and there is no congressional enactment that "vests" the Secretary with appointment powers over the Task Force.

More importantly, the post-ACA preventive-care coverage mandates will remain unlawful regardless of whether the Secretary can constitutionally appoint the Task Force. Both sides agree that the Task Force was unconstitutionally appointed by the AHRQ Director,[35]

---

34. Pet. Br. 33–34, 44.

35. *See* note 8, *supra*, and accompanying text.

and the Task Force did not re-issue its previously announced "A" or "B" ratings after its reappointment by Secretary Becerra.[36] And Secretary Becerra's memorandum of January 21, 2022, which purports to "ratify" those previous Task Force recommendations,[37] won't do the job because: (1) It failed to go through notice and comment, as required for a substantive rule; (2) The Secretary has no authority to impose preventive-care coverage mandates, as even the government acknowledges;[38] and (3) The Secretary has no general grant of substantive rulemaking powers under the Public Health Service Act.[39] So any coverage mandates issued by the unconstitutionally appointed Task Force will remain unenforceable no matter how this Court rules on the inferior-officer issue. *See Lucia*, 585 U.S. at 251–52; *Ryder v. United States*, 515 U.S 177, 182–83 (1995).

III. THE COURT CANNOT REMEDY THE APPOINTMENTS CLAUSE VIOLATIONS BY "SEVERING" 42 U.S.C. § 299b-4(a)(6)

The government wants this Court to remedy the Appointments Clause problems by "severing"[40] (*i.e.*, nullify-

---

36. *See* https://perma.cc/68GG-TZU9; https://perma.cc/3EXR-4WTE; https://perma.cc/VX2T-NFW3.

37. J.A. 34–35.

38. *See* note 19, *supra*, and accompanying text.

39. *See* pp. 30–32, *supra*.

40. The government is (in our view) misusing the term "sever." A court severs a statute when it separates and preserves its constitutional provisions or applications in response to a constitutional problem, rather than pronouncing the entire statutory enactment unconstitutional. *Compare Leavitt v. Jane L.*, 518

(continued…)

ing) the statutory provisions that require an independent Task Force, thereby empowering the Secretary to "review" and "deny binding effect" to Task Force "A" and "B" recommendations.[41] Pet. Br. 38–45. This remedy is unlawful for many reasons.

A. "Severing" Section 299b-4(a)(6) Does Not Redress The Plaintiffs' Article III Injuries

We can start with the most obvious problem: A remedy that "severs" section 299b-4(a)(6) will not redress the plaintiffs' Article III injuries, which are caused by the Secretary's *enforcement* of the preventive-care coverage mandates, not his failure to review or ratify them. J.A. 8–15. The plaintiffs will remain subject to the coverage mandates if section 299b-4(a)(6) is "severed," and a rem-

---

U.S. 137, 138 (1996) (severing Utah abortion statute), *with Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 625 (2016) (refusing to sever Texas abortion law). Everyone agrees that section 299b-4(a)(6) is "severable" in that sense of the word, and no one is asking the Court to declare the entire Affordable Care Act unenforceable if it finds section 300gg-13(a)(1) or 299b-4(a)(6) unconstitutional. *Contra California v. Texas*, 593 U.S. 659, 710–15 (2021) (Alito, J., dissenting). The government is instead using "sever" to mean something akin to "nullify," "revoke," "cancel," or "invalidate." We recommend that the Court avoid the government's "severance" nomenclature, which is imprecise and misleading.

41. The government thinks that a remedy that "severs" section 299b-4(a)(6) will empower the Secretary to "review" Task Force recommendations. Pet. Br. 40. That is non sequitur. Any secretarial action approving or disapproving an "A" or "B" rating would constitute a substantive or legislative rule, and the Secretary has no general grant of rulemaking authority in the Public Health Service Act. *See* pp. 30–32, *supra*.

edy that fails to redress the plaintiffs' injuries is incompatible with Article III. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court."); *Uzuegbunam v. Preczewski*, 592 U.S. 279, 291 (2021) ("[N]o federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury.").

B. A District Court Cannot Enter A Judgment That Formally Revokes A Statute Or Confers New Powers On A Cabinet Secretary

There is a more serious problem with the government's proposed remedy: A federal district court has no power and no ability to revoke section 299b-4(a)(6) or confer new powers on a cabinet secretary. A district court's remedial tools extend to declaratory judgments, injunctions, APA remedies, and writs—which are limited by statute and historical practice. *See Whole Woman's Health*, 595 U.S. at 44. The government does not explain how its "severance" remedy fits into any of these categories. Nor does it explain how its "severance" remedy could be boiled down to a final judgment entered by a district court. *See Haaland v. Brackeen*, 599 U.S. 255, 292–94 (2023) ("[A] federal court's judgment, not its opinion … remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability.").

The Declaratory Judgment Act authorizes courts to declare only "the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). It does not authorize abstract pronouncements of law, and it does not allow courts to veto or erase statu-

tory provisions. *See Whole Woman's Health*, 595 U.S. at 44. The only "interested part[ies]" seeking a declaration of their "rights" and "legal relations" are the plaintiffs, as the Secretary has not counterclaimed for declaratory relief. But the plaintiffs are *not* "seeking such declaration" that section 299b-4(a)(6) is unconstitutional or should be severed.[42] And even if they were, a "severance" remedy would not declare the plaintiffs' "rights and other legal relations." It would purport to nullify a statute, which is beyond the remedial powers of a federal district court.

It is likewise impossible to craft an injunction that implements the proposed "severance" remedy. Injunctions restrain litigants from violating the law or order litigants to comply with existing law. Yet the government's proposed remedy would confer a new and discretionary *power* upon the Secretary—the power to "review" and "deny binding effect to" the Task Force's "A" and "B" recommendations. That regime cannot be imposed through an injunction. Whom would the injunction be directed to, and what would it say? The equitable powers of federal courts are limited to relief that was "traditionally accorded by courts of equity" when the Constitution was ratified. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999); *Whole Woman's Health*, 595 U.S. at 44. But courts of equity did not create or confer powers for

42. The government's proposed remedy would also need to excise the word "independent" from 42 U.S.C. § 299b-4(a)(1), although the government does not ask for this.

government officials, and the government cites no authority to support this idea. Allowing a court judgment to confer new powers on executive-branch officials also violates the separation of powers, as officers must trace their authority to a valid congressional enactment. *See FEC v. Ted Cruz for Senate*, 596 U.S. 289, 301 (2022) ("An agency … 'literally has no power to act'—including under its regulations—unless and until Congress authorizes it to do so by statute." (citation omitted)).

The APA allows reviewing courts to "hold unlawful and set aside"[43] agency action, but the government is not asking for that. It is instead asking the courts to *authorize* agency action by conferring powers on the Secretary that Congress has withheld. Nothing in the APA authorizes that relief. The APA also permits reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed,"[44] but the "severance" remedy would not *compel* the Secretary to do anything. It would instead give the Secretary a purely *discretionary* power to review and countermand the Task Force's "A" and "B" recommendations.

Finally, the government does not (and cannot) identify any writ that a court could use to impose its "severance" remedy under 28 U.S.C. § 1651(a). Judicial remedies are directed at litigants, not statutes, and there are no "writs of severance" that would formally revoke stat-

43. 5 U.S.C. § 706(2) .

44. 5 U.S.C. § 706(1).

utory provisions such as section 299b-4(a)(6) (or single words in statutes such as section 299b-4(a)(1)).[45]

The government claims that its proposed remedy is supported by *Arthrex*. Pet. Br. 39–43. But *Arthrex* was an appeal from an agency adjudication, which allowed this Court to remand to the Acting Director of the PTO to allow him to review decisions of Administrative Patent Judges. *See Arthrex*, 594 U.S. at 26–27 (plurality) ("[A] limited remand to the Director provides an adequate opportunity for review by a principal officer."). This case, by contrast, was initially filed in federal district court, so it cannot be remanded to an agency official—and it certainly cannot be remanded to the Secretary with instructions to review the Task Force recommendations. This Court is reviewing a district court's *judgment*, and it must direct entry of a judgment on remand that awards relief authorized by the Declaratory Judgment Act, the APA, the All Writs Act, or the historical practice of equity courts.

C. The Government's Proposed Remedy Will Not Cure The Appointments Clause Violations

The government's "severance" remedy also fails to rectify the Appointments Clause problems. Its proposed

45. The judgment on remand will also need to preserve at least a remnant of sections 299b-4(a)(1) and (a)(6), because the government insists that its proposed remedy will empower the Secretary to override *only* the Task Force's "A" or "B" recommendations. Pet. Br. 40. How a district-court judgment can issue a partway severance remedy of this sort presents even more of a mystery.

"severance" of section 299b-4(a)(6) would allow the Secretary to override the Task Force's "A" and "B" recommendations but not its refusals to recommend coverage of items or services. Pet. Br. 40, 43–44. Yet the Task Force would *still* wield "significant authority pursuant to the laws of the United States"[46] in this scenario, because preventive-care mandates cannot take effect without the Task Force's recommendation and approval, and Task Force members would remain "principal" officers because no one can countermand their decisions *not* to adopt an "A" or "B" recommendation. *See* pp. 42–44, *supra*. And even if this "severance" remedy could somehow convert Task Force members into "inferior officers," that *still* would not obviate the Appointments Clause problems because Congress has not "vested" the Secretary with appointment powers over the Task Force. *See* p. 44, *supra*.

The situation in *Arthrex* was different because the court-imposed remedy made *every* decision by the Administrative Patent Judges reviewable by the Director of the Patent and Trademark Office—regardless of which direction the decision took. A decision denying the validity of a patent was subject to the same plenary review by the Senate-confirmed Director as a decision upholding a patent's validity. *See Arthrex*, 594 U.S. at 24 ("Decisions by APJs must be subject to review by the Director."). The government's proposed remedy, by contrast, allows for principal-officer review of only Task Force decisions that *recommend* preventive-care coverage, leaving the

46. *Buckley*, 424 U.S. at 126.

Task Force with unreviewable discretion when it issues "C," "D," or "I" ratings or otherwise declines to recommend new coverage mandates.[47] There was also no dispute in *Arthrex* that Congress had "vested" the appointment of the Administrative Patent Judges in the Secretary of Commerce, thereby opting out of the default method of appointment described in Article II. *See* 35 U.S.C. § 6(a) ("The administrative patent judges shall be … appointed by the Secretary"); *Arthrex*, 594 U.S. at 8 ("The Secretary of Commerce appoints … the APJs").[48] In this case, the Task Force members were not even appointed as "inferior officers" because they were tapped by the AHRQ Director (who is not a Head of Department), and no congressional enactment "vests" their appointment in the HHS Secretary. *See* p. 44, *supra*.

Finally, a "severance" remedy does nothing to salvage the post-ACA Task Force recommendations issued

---

47. The government's reliance on *Free Enterprise Fund*, 561 U.S. 477, is misplaced for the same reason, as there was no dispute that the court-imposed remedies in those cases would completely eliminate the Appointments Clause violations. *See Free Enterprise Fund*, 561 U.S. at 510 ("[Because] the statutory restrictions on the Commission's power to remove Board members are unconstitutional and void … we have no hesitation in concluding that under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a 'Hea[d] of Departmen[t].'").

48. The same was true in *Free Enterprise Fund*, where Congress unambiguously "vested" the appointment of the Public Company Accounting Oversight Board in the SEC (a Head of Department). *See* 15 U.S.C. § 7211(e)(4)(A) ("[T]he Commission … shall appoint the chairperson and other initial members of the Board").

before June 28, 2023, the date on which Secretary Becerra reappointed the Task Force. Even the government concedes that the Task Force was unconstitutionally appointed during that time.[49] But a "severance" remedy has only prospective effect and cannot retroactively validate coverage mandates that were issued before the Secretary's reappointments.

D. A "Severance" Remedy Is Improper Because None Of The Relevant Statutes Violate The Constitution

A court should not consider or issue a "severance" remedy unless it is "confronting a constitutional flaw in a statute" or attempting to resolve "a conflict between the Constitution and a statute." *Arthrex*, 594 U.S. at 23–24 (2021) (plurality opinion). But neither section 299b-4(a)(6) nor section 300gg-13(a)(1)—nor the operation of the statutes in combination—conflicts with the Appointments Clause. Congress does not violate the Appointments Clause by conferring unreviewable powers upon an independent agency, so long as it does not foreclose principal-officer appointments for the agency's members.[50] And Congress did not violate the Appoint-

---

49. *See* notes 5 and 8, *supra*, and accompanying text.

50. In *Arthrex*, the relevant statutes gave administrative patent judges powers of principal officers while *requiring* the Secretary of Commerce to appoint them as inferior officers. *See* 35 U.S.C. § 6(a) ("The administrative patent judges shall be … appointed by the Secretary"); *Arthrex*, 594 U.S. at 13 ("Congress provided that APJs would be appointed as inferior officers"). This made the statutes impossible to implement without violating the Appointments Clause, which caused the Court to "sever" one of the offending statutory provisions. The statutes govern-

(continued…)

ments Clause by enacting section 300gg-13(a)(1) alongside the requirements of Task Force independence in sections 299b-4(a)(1) and (a)(6). Once these statutes were enacted, the executive was obligated to implement both section 300gg-13(a)(1) and section 299b-4(a) in a constitutional manner by ensuring that Task Force members were appointed as principal officers. The constitutional violations occurred because: (1) The President failed to appoint the Task Force with the Senate's advice and consent, as required by Article II; and (2) The Task Force exercised "significant authority pursuant to the laws of the United States"[51] before receiving constitutional appointments. Congress did not violate the Constitution by enacting the underlying statutes; the executive violated Article II by failing to implement sections 300gg-13(a)(1) and 299b-4(a)(6) in conformity with the Appointments Clause. The proper remedy is to direct the executive to comply with *both* the Appointments Clause *and* the relevant statutes, rather than freeing the executive of any

---

ing the Task Force are indifferent toward the method of appointment, so the executive (and the courts) *must* enforce sections 300gg-13(a)(1) and 299b-4(a) as written and remedy the constitutional violations by having Task Force members appointed as principal officers.

The "severance" remedies in *Seila Law*, *Free Enterprise Fund*, *Barr v. American Ass'n of Political Consultants, Inc.*, 591 U.S. 610 (2020), and *United States v. Booker*, 543 U.S. 220 (2005), were also directed at unconstitutional statutes that were impossible to implement without violating the Constitution. That is not the situation here.

51. *Buckley*, 424 U.S. at 126.

obligation to comply with a congressional enactment that can still be enforced in a constitutional manner.[52]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

March 19, 2025

52. The government wrongly asserts that the court of appeals' remedy requires "new legislation" for Task Force recommendations to bind insurers. Pet. Br. 15, 39. All that is needed is for the president to re-appoint the Task Force with the Senate's advice and consent.

APPENDIX

TABLE OF CONTENTS

1. U.S. Const. art. II, § 2, cl. 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2. The Declaratory Judgment Act, codified at 28 U.S.C. § 2201, provides, in relevant part:

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(9) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

3. 42 U.S.C. § 202, also known as section 201 of the Public Health Service Act, provides:

The Public Health Service in the Department of Health and Human Services shall be administered by the Assistant Secretary for Health under the supervision and direction of the Secretary.

4. 42 U.S.C. § 299b-4(a), also known as section 915(a) of the Public Health Service Act, provides:

(a) Preventive Services Task Force

(1) Establishment and purpose

The Director shall convene an independent Preventive Services Task Force (referred to in this subsection as the "Task Force") to be composed of individuals with appropriate expertise. Such Task Force shall review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community, and updating previous clinical preventive recommendations, to be published in the Guide to Clinical Preventive Services (referred to in this section as the "Guide"), for individuals and organizations delivering clinical services, including primary care professionals, health care systems, professional societies, employers, community organizations, non-profit organizations, Congress and other policy-makers, governmental public health agencies, health care quality organizations, and organizations developing national health objectives. Such recommendations shall con-

sider clinical preventive best practice recommendations from the Agency for Healthcare Research and Quality, the National Institutes of Health, the Centers for Disease Control and Prevention, the Institute of Medicine, specialty medical associations, patient groups, and scientific societies.

(2) Duties

The duties of the Task Force shall include—

(A) the development of additional topic areas for new recommendations and interventions related to those topic areas, including those related to specific sub-populations and age groups;

(B) at least once during every 5-year period, review[1] interventions and update[2] recommendations related to existing topic areas, including new or improved techniques to assess the health effects of interventions;

(C) improved integration with Federal Government health objectives and related target setting for health improvement;

(D) the enhanced dissemination of recommendations;

(E) the provision of technical assistance to those health care professionals, agencies and organizations that request help in implementing the Guide[3] recommendations; and

---

1. So in original. Probably should be "review of".
2. So in original. Probably should be "updating of".
3. So in original. Probably should be "Guide's".

(F) the submission of yearly reports to Congress and related agencies identifying gaps in research, such as preventive services that receive an insufficient evidence statement, and recommending priority areas that deserve further examination, including areas related to populations and age groups not adequately addressed by current recommendations.

(3) Role of Agency

The Agency shall provide ongoing administrative, research, and technical support for the operations of the Task Force, including coordinating and supporting the dissemination of the recommendations of the Task Force, ensuring adequate staff resources, and assistance to those organizations requesting it for implementation of the Guide's recommendations.

(4) Coordination with Community Preventive Services Task Force

The Task Force shall take appropriate steps to coordinate its work with the Community Preventive Services Task Force and the Advisory Committee on Immunization Practices, including the examination of how each task force's recommendations interact at the nexus of clinic and community.

(5) Operation

Operation.[4] In carrying out the duties under paragraph (2), the Task Force is not subject to the provisions of chapter 10 of title 5.

---

4. So in original.

(6) Independence

All members of the Task Force convened under this subsection, and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure.

(7) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary for each fiscal year to carry out the activities of the Task Force.

5. 42 U.S.C. § 300gg-13, also known as section 2713 of the Public Health Service Act, provides:

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

(1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;

(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[1]

1. So in original. The word "and" probably should not appear.

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[2]

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[3]

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009.

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

(b) Interval

(1) In general

The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) or (a)(2) or a guideline

2. So in original. The period probably should be a semicolon.
3. So in original. The period probably should be a semicolon.

under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.

(2) Minimum

The interval described in paragraph (1) shall not be less than 1 year.

(c) Value-based insurance design

The Secretary may develop guidelines to permit a group health plan and a health insurance issuer offering group or individual health insurance coverage to utilize value-based insurance designs.

6. 42 U.S.C. § 300gg-14, also known as section 2714 of the Public Health Service Act, provides:

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage that provides dependent coverage of children shall continue to make such coverage available for an adult child until the child turns 26 years of age. Nothing in this section shall require a health plan or a health insurance issuer described in the preceding sentence to make coverage available for a child of a child receiving dependent coverage.

(b) Regulations

The Secretary shall promulgate regulations to define the dependents to which coverage shall be made available under subsection (a).

(c) Rule of construction

Nothing in this section shall be construed to modify the definition of "dependent" as used in title 26 with respect to the tax treatment of the cost of coverage.

7. 42 U.S.C. § 300gg-92, also known as section 2792 of the Public Health Service Act, provides:

The Secretary, consistent with section 104 of the Health Care Portability and Accountability Act of 1996, may promulgate such regulations as may be necessary or appropriate to carry out the provisions of this subchapter. The Secretary may promulgate any interim final rules as the Secretary determines are appropriate to carry out this subchapter.

8. Reorganization Plan No. 3 of 1966, which appears at 80 Stat. 1610, provides, in relevant part:

SECTION 1. *Transfer of functions.* (a) Except as otherwise provided in subsection (b) of this section, there are hereby transferred to the Secretary of Health, Education, and Welfare (hereinafter referred to as the Secretary) all functions of the Public Health Service, of the Surgeon General of the Public Health Service, and of all other officers and employees of the Public Health Service, and all functions of all agencies of or in the Public Health Service.

(b) This section shall not apply to the functions vested by law in any advisory council, board, or committee of or

in the Public Health Service which is established by law or is required by law to be established.

SEC. 2. *Performance of transferred functions.* The Secretary may from time to time make such provisions as he shall deem appropriate authorizing the performance of any of the functions transferred to him by the provisions of this reorganization plan by any officer, employee, or agency of the Public Health Service or of the Department of Health, Education, and Welfare.