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 AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The U.S. Preventive Services Task Force (Task Force), which sits within the Public Health Service of the Department of Health and Human Services (HHS), issues clinical recommendations for preventive medical services, such as screenings and medications to prevent serious diseases. Under the Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119, health insurance issuers and group health plans must cover certain preventive services recommended by the Task Force without imposing any cost-sharing requirements on patients. 42 U.S.C. 300gg-13(a)(1). The question presented is as follows:

Whether the court of appeals erred in holding that the structure of the Task Force violates the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, and in declining to sever the statutory provision that it found to unduly insulate the Task Force from the HHS Secretary's supervision.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute ("GI") is a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are implicated. Among GI's priorities are enforcing constitutional limitations on administrative agencies and protecting and promoting the individual's rights to medical autonomy. The Institute has appeared in this Court and other courts, both representing parties and as an amicus, in cases involving these issues. *See*, *e.g.*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *NFIB v. Sebelius*, 567 U.S. 519 (2012); *United States v. California Stem Cell Treatment Ctr. Inc.*, 117 F.4th 1213 (9th Cir. 2024). GI attorneys also litigated *Coons v. Lew*, 762 F.3d 891 (9th Cir. 2014), involving the Independent Payment Advisory Board, structured similarly to the Task Force involved here. GI scholars have also published research on these issues, *see*, *e.g.*, Christina Sandefur, *Safeguarding the Right to Try*, 49 Ariz. St. L.J. 513 (2017); Timothy Sandefur & Jon Riches, *Confronting the Administrative State*, Goldwater Inst. (Apr. 29, 2020)[2]; Diane Cohen & Michael F. Cannon, *The Independent*

1. Pursuant to Rule 37.6, counsel for amicus affirms that no counsel or any party authored this brief in whole or part and no person or entity, other than amicus, their members, or counsel, made a monetary contribution toward its preparation or submission.

2. https://www.goldwaterinstitute.org/policy-report/administrative-state-blueprint/.

Payment Advisory Board: PPACA's Anti-Constitutional and Authoritarian Super-Legislature, Cato Inst. Policy Analysis No. 700 (June 14, 2012).[3] GI believes its legal experience and public expertise will assist the Court in deciding this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our Constitution uses several mechanisms to safeguard individual liberty. Among the most familiar is the separation of governmental powers into legislative, executive, and judicial branches. Less apparent, but equally important, are provisions such as the Appointments Clause, which helps implement the separation of powers principle by ensuring that legislative and executive authority are not exercised by the same people, let alone by people insulated from democratic accountability. At its core, "the principle of separation of powers is embedded in the Appointments Clause." *Freytag v. C.I.R.*, 501 U.S. 868, 882 (1991).

Unfortunately, Congress has a strong incentive to find ways to give away its power—and therefore, its responsibility—to officials or agencies that are shielded from voter control. And when Congress enacted, and President Obama signed, the Patient Protection and Affordable Care Act ("ACA"), they left much work to be done by executive agencies, including the creation of rules governing insurance coverage for preventive healthcare services and the assignment of financial responsibility for

3. https://www.cato.org/sites/cato.org/files/pubs/pdf/PA700.pdf.

those services. Congress entrusted these questions to the United States Preventive Services Task Force ("PSTF" or "Task Force"), a group of unelected subject matter experts whose independence from political pressure was to be secured "to the extent practicable." 42 U.S.C. § 299b-4(a)(6).

Congress created the PSTF in 1984 as a panel of medical specialty authorities with technical expertise in disease prevention. The Task Force works to improve the public's health by making evidence-based recommendations about clinical preventive services.[4] It was given no inherent authority. 42 U.S.C. §299b-4(a). Nevertheless, Section 2713 of the ACA requires private insurers to cover the cost of all preventive services for which the Task Force assigns a grade of "A" or "B" (meaning a high certainty that the net benefit is either substantial or moderate). Such services must be paid for by insurers with no cost-sharing (i.e., no deductibles or co-payments).[5] In other words, the ACA transformed what had previously been a powerless advisory body, created to make recommendations based on its members' technical expertise, into a government agency with law-making powers.

But the Constitution—and specifically, the Appointments Clause—forbids the government from giving such authority to people who are not "accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884.

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4. https://tinyurl.com/3a9ajkb9.

5. https://www.uspreventiveservicestaskforce.org/uspstf/us-preventive-services-task-force-ratings.

At issue here is whether members of the PSTF qualify as "officers of the United States" who must be appointed through the Senate-confirmation process, or whether they are "inferior" officers whose appointment Congress can entrust to the President alone, or to the heads of departments. U.S. Const. art. II § 2. For many years this Court has used a functional test to distinguish between superior and inferior officers. This test involved several factors including the degree of discretion the officers exercise, the content of the work they do, and their removability. But the government here takes a *formalistic* approach to the question, arguing that officials whose dictates are *ipso facto* the law of the land are *not* officers of the United States, based exclusively on the fact that they are removable by the Secretary. That, however, is contrary to the *realistic* or *functional* approach this Court has taken for more than a century. The fact that an official is removable at will cannot alone determine the "superior" / "inferior" classification. Instead, the scope of that officer's powers is also an important factor.

What's more, the whole purpose of the Task Force is to exercise independent judgment. It is logically contradictory to assert that the Task Force is independent and unsupervised, *but also* subject to the political process through the Secretary. Yet that is in substance the government's argument, when it contends that the phrase "to the extent practicable" in the ACA (42 U.S.C. § 299b-4(a)(6)) cures the constitutional violation by incorporating the requirements of checks and balances into the PSTF's structure. *See*, *e.g.*, Pet. at 21. To interpret the statute that way is to rob the Task Force of its very reason for being. The government cannot have it both ways.

Finally, numerous medical group amici argued below that significant benefits to public health are at stake in this case. Certainly, improving public health is a core purpose for the PSTF and the preventive health service recommendations, and those amici are right that the PSTF's work affects preventive healthcare services for millions of Americans. "But this argument, which boils down to a policy judgment . . . cannot vitiate the constitutional allocation of powers." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 132–33 (2015) (Thomas, J., concurring). Such arguments are properly addressed to Congress, to persuade it to restructure the PSTF in a constitutional manner. They cannot, however, justify diverting from the Constitution's mandates.

ARGUMENT

I. The inferior / superior distinction does not turn exclusively on an officer's removability.

A. The distinction depends on "where the buck stops," not on removability alone.

The Appointments Clause requires Senate confirmation for principal officers of the United States, such as diplomats and judges, but lets Congress give the responsibility of appointing "inferior officers" (of which the text provides no examples) to the President, or to the heads of departments, or to the courts alone. U.S. Const. art. II § 2.

The original meaning of "officers" included any person with significant responsibility for enforcing statutory duties. Jennifer Mascott, *Who Are "Officers of*

the United States"? 70 Stan. L. Rev. 443, 471–545 (2018). This included even government employees engaged in ministerial tasks. The distinction between "principal" and "inferior," meanwhile, has long turned on the *substance* of that person's responsibilities. For example, in *United States v. Germaine*, 99 U.S. (9 Otto) 508, 511–12 (1878), this Court described the difference between principal and inferior officers by reference to their "tenure, duration, emolument, and duties."

A century later, *Buckley v. Valeo*, 424 U.S. 1 (1976), reiterated the Court's substantive or functional approach to distinguishing inferior from principal when it held that commissioners of the Federal Election Commission (FEC) were not constitutionally appointed. It said that the question turned on whether the purported officer was "exercising significant authority pursuant to the laws of the United States." *Id.* at 126.

Some cases have used a more formalistic analysis, however, suggesting that the decisive factor in determining whether an officer is inferior or superior is removability. This has caused considerable confusion. *See* Damien M. Schiff & Oliver J. Dunford, *Distinguishing Between Inferior and Non-Inferior Officers Under the Appointments Clause—A Question of "Significance,"* 74 Rutgers U.L. Rev. 469, 506–07 (2022).

Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477 (2010), for example, rightly warned of the danger that "the Executive Branch, which now wields vast power and touches almost every aspect of daily life, . . . may slip from the Executive's control, and thus from that of the people," *id.* at 499, but it

decided the inferior/principal question based exclusively on removability. *Id.* at 495–96. And *Edmond v. United States*, 520 U.S. 651 (1997), seemingly treated removability the *only* relevant factor—declaring, for example, that "[w]hether one is an 'inferior' officer depends on whether he has a superior." *Id.* at 662. Although Justice Souter hastened to add that "[i]t does not follow . . . that if one is subject to some supervision and control, one is an inferior officer," no other justice joined his opinion. *Id.* at 667 (Souter, J., concurring).

More recently, however, the Court has appeared to return to the more holistic approach recommended in *Buckley*—one that views removability not as decisive but only indicative. Thus, *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021), answered the question of whether the Administrative Patent Judges (APJ) serving on the Patent Trial and Appeal Board (PTAB) were inferior or principal officers by considering factors besides mere removability. Instead, the question was whether the *decisions* of APJs were subject to review by the Director. *Id.* at 26. This Court said that "*regardless* [of] whether the Government is correct that at-will removal by the Secretary would cure the constitutional problem, review by the Director better reflects the structure of supervision within the PTO and *the nature of APJs' duties*." *Id.* (emphasis added).

The lower court in *Arthrex* had declared that it was enough to declare the tenure provision of the act at issue unconstitutional, but this Court held otherwise. Mere removability, it said, gave the Director no "means of countermanding the final decision already on the books." *Id.* at 16. That meant that "[i]n all the ways that matter to the parties who appear before the PTAB, the buck stops

with the APJs, not with the Secretary or Director." *Id.* at 17.

The same is true, of course, of the PSTF. Its members are appointed by the Secretary to four-year terms. New members are selected each year to replace those completing their terms. Thus, although individual appointments are time-limited, the duties of the 16 members of the Task Force are continuing and ongoing.[6] And their decisions are where the buck stops. Section 2713 of the ACA, codified at 42 U.S.C. 300gg-13 and embodied in regulation at 29 C.F.R. § 2590.715–2713(a)(1)(i), *mandates* that group health plans and health insurers offer group health insurance, provide coverage, and not impose any cost-sharing requirements for, items and services having an "A" or "B" rating in current recommendations of the PSTF.

But the PSTF's structure is even more defiant of the constitutional order than was the PTAB in *Arthrex*. As the court below observed, the PSTF is "not part of HHS or any federal agency," and therefore the decisions of its members are not automatically subject to secretarial oversight. Pet. App. 81a. So, even more than in *Arthrex*, the buck stops not with an official who is subject to Senate confirmation, but with the "volunteers" who serve on PSTF.

Not only are the decisions of the PSTF members effectively final, but the nature and scope of those decisions is significant. Since at least *Germaine*, and certainly since *Buckley*, this Court has found that one

6. https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/current-members.

factor in determining who is a superior or inferior officer is the substantive effect of that person's discretionary authority. "Lesser functionaries" carrying out minor tasks may not qualify, but anyone entrusted to "exercis[e] significant authority pursuant to the laws" is likely a principal officer. *Buckley*, 424 U.S. at 126 & n.162. *Arthrex* rightly recognized that removability is not dispositive; the substantive impact of the officer's decision-making power is also key. Thus "even when a higher-ranking officer has substantial direction and supervision over other officers . . . the latter are not inferior officers if they exercise significant authority—most prominently, final decision-making authority—on behalf of the Executive Branch." Schiff & Dunford, *supra* at 513.

The most recent list of recommendations includes 14 services rated "A" and 40 rated "B."[7] According to a 2022 report from the HHS Assistant Secretary for Planning and Evaluation, 150 million people with private health insurance can receive these preventive services without cost-sharing. *Access to Preventive Services without Cost-Sharing: Evidence from the Affordable Care Act* (ASPE Office of Health Policy Brief HP-2022-01, Jan. 11, 2022) at 1.[8] The Task Force's ability to order health insurers to cover the cost, without cost-sharing, of over 50 preventive health services for nearly half the country's population is certainly a significant power. And the fact that Congress expressly designed the Task Force to be independent—mandating that it "shall be independent," 42 U.S.C. § 299b-4(a)(6)—means that its members exercise their

7. https://www.uspreventiveservicestaskforce.org/uspstf/recommendation-topics/uspstf-a-and-b-recommendations.

8. https://tinyurl.com/38vdp3r4.

authority without meaningful oversight by responsible, Senate-confirmed superiors. On these issues, the buck stops with them.

B. The Court should not make removability the dispositive consideration.

In *Lucia v. SEC*, 585 U.S. 237 (2018), this Court considered whether administrative law judges (ALJs) with career appointments, chosen by the staff of the Securities and Exchange Commission (SEC), were officers who must be appointed in accordance with the Appointment Clause. Once again, the Court employed a functionalist, multi-factor analysis, not a formalistic test based solely on removability. Echoing the significant-authority test from *Buckley*, it said that ALJs not only "[held] a continuing office established by law," but that they also "exercise . . . 'significant discretion' when carrying out . . . 'important functions.'" *Id.* at 247–48 (quoting *Freytag*, 501 U.S. at 878). Specifically, the ALJs could receive evidence, examine witnesses, and regulate the course of proceedings and the behavior of counsel, decide motions, rule on the admissibility of evidence, and even enforce compliance with discovery orders. *Id.* at 248. Their "duties and powers" were therefore significant enough that, combined with other considerations, they were officers of the United States who must go through Senate confirmation. *Id.*

This consideration of the substantive duties and powers of the officer, rather than a single-minded focus on removability, is crucial for at least three reasons. *First*, an officer who is *theoretically* removable may be *effectively* unremovable due to various circumstances.

To make removability the determinative factor would enable Congress to vest officials with immense powers and to insulate them from any meaningful oversight by including some provision for removability that is nothing but window-dressing.

Second, the powers an official exercises may be wide and various, and that official may be the final decision-maker on many matters—but still be removable by an official whose authority is *not* "superior" on *those subjects.* By analogy, a police chief might be "removable" by the city council, but nevertheless be the ultimate authority in charge of running the police department; the city council's binary choice whether to remove her does not necessarily imply any real control over her decisions as long as she remains chief. Thus, despite the fact that the chief is removable by the council, she remains the point at which "the buck stops" for all practical purposes—and is thus a principal officer.

Third, and relatedly, merely removing an official has only *prospective* effects; it does not nullify decisions that the official made before being removed. Thus, even if the Secretary were to remove Task Force members, neither he nor the President has any power to override or modify the Task Force's work: i.e., its mandates to insurers to cover certain preventive care services. All they could do is hope that those members' replacements are more aligned with their own policy views. But that is not control or accountability in any meaningful sense.

The government has argued in this case that "removability of an officer" is "strong and likely dispositive evidence of inferior-officer status." Pet. at 15. But such

a myopic analysis would overlook situations in which an officer (like the police chief) has authority over a range of action and is, in fact, the ultimate decision-maker, due to the theoretical removability of that official. It would also make it impossible to decide cases in which an agency is structured to establish some illusory form of removability merely to evade the constitutional mandate. Because the Constitution deals with substance, not shadows—with things, not names, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 230 (2023)—that cannot be the rule.

II. The "to the extent practicable" clause cannot salvage the statute.

The statute reads, "[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). In the courts below, the government has tried to use the phrase "to the extent practicable" to salvage the statute's constitutionality. It has argued that the phrase applies both to the word that precedes it ("independent"), and to the phrase that follows it ("not subject to political pressure"). The government asserts that this bi-directional application of the phrase would result in the Secretary having sufficient approval authority over the Task Force recommendations as well as the removal and reorganization of the PSTF itself. By that reading, the Task Force is not independent, and therefore no issue with the Appointments Clause exists.

That reading of the phrase "to the extent practicable" is ungrammatical, nonsensical, and inconsistent with the canons of statutory construction.

First, it is ungrammatical. The ordinary speaker of English would express the government's version of this phrase as "to the extent practicable, shall be independent and not subject to political pressure." But that is manifestly not what the statute says. The statute applies the qualifier only after the word "and" and a comma: "shall be independent **and,** to the extent practicable, not subject to political pressure." This word and comma would play no role in the statute under the government's reading. But of course, in construing statutes, courts "give effect, if possible, to every word Congress used," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), and "heed the commands of [the statute's] punctuation." *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). Congress' use of terms connected by a conjunction and comma indicates the establishment of two distinct requirements for the PSTF. Congress meant for the members of the PSTF and their recommendations first to be "independent," and then, second and separately, to be not subject to political influence "to the extent practicable."

Over 100 provisions of the U.S. Code use the phrase "and to the extent practicable," and in every one of these instances, the qualifier is understood only to apply to what follows, not what precedes. To cite just three examples:

• 22 U.S.C. § 6448(a)(1), which requires the president to publish certain matters in the *Federal Register*, requires publication of "[a]ny designation of a country of particular concern for religious freedom under section 6442(b)(1) of this title, together with, when applicable *and to the extent practicabl*e, the identities of the officials or entities determined to be responsible for the violations

under section 6442(b)(2) of this title" (emphasis added). Here, the qualifier applies only to the publication of the identities of officials or entities—not to the designation of a country of particular concern, which must be published in any event.

• 20 U.S.C. § 6318(b)(1), which requires that certain school policies be given to parents in writing, says: "Parents shall be notified of the policy in an understandable and uniform format *and, to the extent practicable*, provided in a language the parents can understand" (emphasis added). Plainly the practicability qualifier applies only to the language requirement—whereas the requirements of understandability and uniformity apply to every case without any such qualification.

• 33 U.S.C. § 1256(e)(1), which governs grants for certain pollution control programs, prohibits the Administrator of the EPA from giving such grants to states that fail to implement certain monitoring procedures. It bars funding if a state fails to provide for "the establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor . . . the quality of navigable waters *and to the extent practicable*, ground waters including biological monitoring . . . ." (emphasis added). Once again, the qualifier plainly applies only to the groundwater monitoring. It does not apply to the navigable-water monitoring, which is required in all events, not just when practicable.

In other words, it appears that "and to the extent practicable" is *never* used in the U.S. Code in the bidirectional manner that the government proposes here.

Not only is the government's reading ungrammatical; it is also nonsensical. The statute attempts to preserve both the PSTF's *independence* and its *immunity from political pressure*. Laying aside the question of whether the second goal is legitimate at all, these are two significantly different things. The Task Force's members are supposed to be experts who exercise their "independent" judgment. But the "independent" judgment of any experts will be based in a significant measure on outside recommendations, analysis, arguments, etc.—everything from advocacy by interested parties to publications in peer-reviewed medical literature. That is just what "independent" judgment means. By way of analogy, a judge exercises her "independent" judgment even though she reads the parties' briefs and listens to their advocacy. These are types of influences (or, so to speak, "pressures") that Congress expected to be brought to bear on the PSTF members, and to which it had no objection.

Political influence, by contrast, it sought to avoid. Again, aside from the question of whether such insulation is proper, Congress implicitly acknowledged that *some* external influences, with an array of motivations and on a broad spectrum of scientific objectivity, play an appropriate role in affecting the PSTF's recommendations—but that *other* influences (namely, "political" influences) should not. The Task Force *should* be "independent" in the sense of listening to certain types of arguments (presumably, scientific ones)—but, separately, it should *not* listen to, or be forced to listen to, other types of argument (namely, "political" ones).

That understanding is incompatible with the government's proposed reading of the statute. Its reading would transform the phrase into: "to the extent practicable, shall be independent . . . " etc. But Congress did not want the PSTF to be independent (i.e., to exercise scientific objectivity) only "to the extent practicable." It wanted the PSTF to do so *in all events*. It would be nonsensical to suggest that Congress wanted the PSTF to compromise its scientific independence to any degree. That, however, is the result to which the government's grammar would lead.

Congress applied common rules of grammar when it placed that qualifying phrase "to the extent practicable" prior to "not subject to political pressure." It sought only to modify what came after the qualifier and not what came before.

Further evidence for this reading comes from the placement of the word "shall." Its location in the text immediately before specifying the independence of the Task Force indicates mandatory intent on the part of the drafters. The phrase reads: "*shall* be independent and, to the extent practicable, not subject to political pressure." Thus, the independence provision is mandatory—whereas the qualifying phrase merely expresses a directional and aspirational goal.

All of this makes sense in a broader perspective, too. The entire point of the PSTF statute is to render that Task Force as autonomous as possible. *See* 42 U.S.C. § 299b-4. As used in the statute, "independent" means not subject to control, restriction, modification or limitation from an outside source. From its inception, the statute provided

that the members of the PSTF would establish their own recommendations.

The whole point of the Task Force is to act without political oversight or control. Its members reach a collective decision on those recommendations based upon their subject matter expertise as healthcare professionals. They are not required by statute to seek the opinion, counsel or guidance of others. The work they produce is not subject to appeal or review. The Task Force precisely embodies Congress's choice to adopt a technocratic approach whereby "experts" oversee the operation of public health without effective public control.

What one scholar said of Medicare applies equally here: "a hidden rationing problem has developed where Medicare considers the cost of new treatments when deciding whether to cover them, but *does so in an undemocratic way that is not transparent nor subject to direct public response*." Jacqueline Fox, *The Hidden Role of Cost: Medicare Decisions, Transparency and Public Trust*, 79 U. Cin. L. Rev. 1, 4 (2010). It is no secret that the ACA was the product of a "belief that bureaucrats might more effectively govern the country than the American people." *Perez*, 575 U.S. at 129 n.6 (Thomas, J., concurring).

The government has posited that although Task Force members are independent, they are protected from political influence only "to the extent practicable," and that this phrase makes them subordinate to the Secretary—therefore, there is no issue with the Appointments Clause. But as the court below held, such a reading would allow the exception to "swallow the rule." Pet. App. 106a.

Perhaps more importantly, it would also nullify the mandate that the PSTF be independent. The Task Force simply cannot be "independent" while at the same time being subject to management at the hands of the Secretary. The government cannot have it both ways.

III. The policy arguments of the medical amici cannot overcome the constitutional mandate.

In their amicus brief to the Fifth Circuit, 28 medical groups argued that the circuit court's ruling would jeopardize access to, and coverage of, preventive healthcare services for millions, and potentially threaten positive trends in public health. To be sure, these amici are subject-matter experts who know firsthand the value of preventive health services. Their daily work revolves around making it possible for patients to live longer and healthier lives.

Amici explained that preventive services include those aimed at early detection and treatment and those that encourage healthier lifestyles.[9] Indeed, preventive healthcare services "avoid acute illness, identify and treat chronic conditions, prevent cancer or lead to earlier detection." *Access to Preventive Services without Cost-Sharing: Evidence from the Affordable Care Act*, U.S. Dep't of Health & Human Servs. at 1 (Jan. 11, 2022).[10] "When provided appropriately, these services can identify diseases at earlier stages when they are more treatable

9. Brief Amicus Curiae of AMA, et al. (Doc. 204-2), Section 1, at 6, 18.

10. https://aspe.hhs.gov/sites/default/files/documents/786fa55a84e7e3833961933124d70dd2/preventive-services-ib-2022.pdf.

or may reduce a person's risk for developing a disease." *Eleventh Annual Report to Congress on High-Priority Evidence Gaps for Clinical Preventive Services*, 5 (U.S. Preventive Servs. Task Force 2021).[11] Therefore, it is not surprising that preventive services reduce overall spending on healthcare because they "reduce the amount of undiagnosed or untreated conditions," making less invasive treatment an option. Robert Brent Dixon & Attila J. Hertelendy, *Interrelation of Preventive Care Benefits & Shared Costs Under the Affordable Care Act*, 3 Int'l J. Health Pol'y & Mgmt. 145, 146 (2014).[12]

The full measure of benefits from preventive health services can only be achieved if patients receive those services. Unfortunately, it is also true that the costs associated with receiving preventive services may impair the public's ability to access care. Amanda Borsky, *et al., Few Americans Receive All High-Priority, Appropriate Clinical Preventive Services*, 37 Health Affs. 925, 927 (2018). Indeed, it is well documented "that out-of-pocket payments can be a barrier to the use of recommended preventive services, and reductions in cost sharing were found to be associated with increased use of preventive services." Christine Leopold, *et al., The Impact of the Affordable Care Act on Cancer Survivorship*, 23 Cancer J. 181, 184 (2017).

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11. https://www.uspreventiveservicestaskforce.org/uspstf/sites/default/files/inline-files/2021-uspstf-annual-report-to-congress.pdf.

12. https://www.ijhpm.com/article_2873_82e924a0ee21074a1a60025d3990d1d4.pdf.

The medical group amici are right about this. But none of it changes the mandates of the Constitution. The Appointments Clause exists for good reason: to ensure that the people are governed by officials who are meaningfully answerable to the public. *Cf. Nat'l Fed. of Indep. Bus. v. Dep't of Labor*, 595 U.S. 109, 126 (2022) (Gorsuch, J., concurring) ("The question before us is not how to respond to the pandemic, but who holds the power to do so.. . . . [W]e do not impugn the intentions behind the agency's mandate. Instead, we only discharge our duty to enforce the law's demands when it comes to the question who may govern the lives of 84 million Americans."). Every generation is tempted by the notion that if government power were given over to an individual or group who is made immune from "political pressure," such "experts" can solve political problems "correctly" or "objectively"—whatever that might mean. For example, one prominent advocate of the ACA defended its creation of undemocratic administrative agencies like the PSTF on the grounds that they could serve as "the Platonic Guardian[s] of our health care system." Timothy Stoltzfus Jost, *The Independent Medicare Advisory Board*, 11 Yale J. Health Pol'y, L. & Ethics 21, 31 (2011).[13] But this is always a utopian delusion, with potentially disastrous consequences.

First, the Constitution's authors expressly rejected any notion of "Platonic guardians." Indeed, they spurned the idea of being governed by "a will in the community

13. Jost was referring to the Independent Payment Advisory Board (IPAB), another agency created in the ACA and given power to limit expenditures for certain treatments—while being effectively protected from any Congressional control. *See Coons v. Lew*, 762 F.3d 891, 895–96 (9th Cir. 2014). In all relevant respects, it is similar to the PSTF.

independent of the majority," because such an independent entity could impose "unjust" legislation without any check by the people. *The Federalist* No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).[14] As Thomas Jefferson said, "Sometimes it is said that man can not be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the forms of kings to govern him?" *Jefferson: Writings* 493 (Merrill Peterson, ed., 1984).

Second, the idea that any government entity will be immune from political pressures is fantastical. As scholars in the "public choice" tradition have shown, any time a government entity has authority to redistribute wealth or opportunities from one sector of the populace to another, that power has an economic value, and pressure groups in the society will therefore expend effort to obtain that value

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14. Plato proposed that political power should reside "[o]nly in the hands of the select few or of the enlightened individual," *Statesman* 297c, *in Plato: The Collected Dialogues* 1067 (Edith Hamilton & Huntington Cairns eds., 1961), and thus imagined a society overseen by Guardians who would (among other things) govern the "art of medicine" by laws which "will care for the bodies and souls of such of your citizens as are truly wellborn, but those who are not, such as are defective in body, they will suffer to die, and those who are evil-natured and incurable in soul [the Guardians] will themselves put to death." *Republic* 409e–410a, *in id.* at 654. "This," the argument goes, "has been shown to be the best thing for the sufferers themselves and for the state." *Id.* at 410a. Thomas Jefferson and John Adams called these ideas "shock[ing] . . . disgust[ing]" "unintelligible . . . nonsense" produced by a "foggy mind." *Compare* Letter from Jefferson to Adams, July 5, 1814, *in The Adams-Jefferson Letters* 432-33 (Lester J. Cappon, ed., 1987), *with* Letter from Adams to Jefferson, July 16, 1814, *in id.* at 437.

through lobbying of various kinds. *See generally* James Buchanan & Gordon Tullock, *The Calculus of Consent* (1962). As long as the government is run by human beings, and makes decisions that grant concentrated benefits to some particular beneficiaries, it will be subjected to political influences of one sort or another. Attempting to insulate it from public control only pushes political influence into the shadows, where it can be less guarded against.

In fact, the amici who warn that this Court's decision may jeopardize millions of Americans' health aptly illustrate the Appointments Clause problem: the Task Force is made up of principal officers precisely to the extent it exercises significant power, as detailed in the preceding sections. To say otherwise—that the Court should enforce the separation of powers *less* scrupulously when doing so might have considerable effects in the real world—would eviscerate not only the Appointments Clause, but other safeguards, like the major questions doctrine. *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023) ("A decision of such magnitude and consequence on a matter of earnest and profound debate across the country must rest with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." (citation omitted, alterations adopted)).

In the particular case of preventative medicine, the risks of undemocratic control might seem minor. But the across-the-board prohibition on unaccountable rule implemented by the principle of separation-of-powers and the requirements of the Appointments Clause was intended to prevent the establishment of precedents

that could be used again in the future. As this Court observed in *Stanley v. Illinois*, 405 U.S. 645, 656 (1972), "the Constitution recognizes higher values than speed and efficiency. . . . [It was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." In any particular instance, it might seem easier or more effective to disregard the constitutional rule. But if the difficulty of obeying the Constitution were justification for ignoring it, then "the people may well despair of ever being able to set a boundary to the powers of the government." *Oakley v. Aspinwall*, 3 N.Y. 547, 568 (1850).

CONCLUSION

Clarity and actionable guidance are particularly important here precisely because of the effect on public health resulting from the "recommendations"—i.e., mandates—of the PSTF. Regardless of the medical arguments, no policy argument can prevail over the requirements of the Appointments Clause. The Court should dismiss the tortured reading of the statutory text advocated by the government and find that members of the Task Force are principal officers. It should also make clear that the distinction between principal and inferior officers turns not exclusively on removability, but also on the substantive significance of the decisions falling within their authority.

The judgment should be *affirmed*.

Respectfully submitted,

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