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 OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

1. Did the Fifth Circuit Court of Appeals correctly hold that Task Force members are "principal" officers under Article II's Appointments Clause?

2. Did the Fifth Circuit Court of Appeals correctly refuse to issue a remedy that would "sever," *i.e.*, nullify, 42 U.S.C. § 299b-4(a)(6), thereby empowering the HHS Secretary to direct and supervise the Task Force's preventive-care coverage decisions in contravention of the statute?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests Cato because the U.S. Preventative Services Task Force is an autonomous rulemaking body whose membership violates the Appointments Clause, thus threatening the accountability and transparency mandated by Article II of the Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

To preserve accountability, our Constitution creates a unitary executive—"a single object for the jealousy and watchfulness of the people." THE FEDERALIST NO. 70, at 412 (Alexander Hamilton) (Royal Classics ed. 2020). While the Framers acknowledged the necessity of "lesser executive officers [to] assist the supreme Magistrate in discharging the duties of his trust," they also guaranteed under the Appointments Clause that such "officers [would] remain accountable to the President,

[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

whose authority they wield." *Seila Law, LLC v. CFPB*, 591 U.S. 197, 213 (2020) (cleaned up).

The Appointments Clause establishes two types of officers: principal officers and inferior officers. Principal officers must be appointed by the President and confirmed by the Senate. But for the sake of "administrative convenience," the Framers "dispense[d] with joint appointment [by the President and Senate] . . . for inferior officers," *United States v. Arthrex, Inc.*, 594 U.S. 1, 12 (2021), allowing such appointments to be vested instead "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2.

While their methods of appointment might vary, what is true of both principal and inferior officers is that they must remain accountable to the President, "whose authority they wield." *Seila Law,* 591 U.S. at 213. However, the mechanism for such accountability varies between inferior and principal officers. For a principal officer to be accountable to the President, the President must wield an unqualified power of removal. *See generally* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014); *see also Myers v. United States*, 272 U.S. 52 (1926).[2] "[A]rmed with the threat of removal, the President can direct his subordinates and remove [them] for failure to follow direction," thus "command[ing] the[ir] loyalty—a simple truth of administration that an officer will seek to please the

[2] *But see Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (carving out a narrow exception for the heads of quasi-judicial and quasi-legislative agencies).

person that decides whether the officer stays or goes." Rao, *supra*, at 1228.

The standard for inferior officers is different, however, and the government errs in advancing removability by a principal officer as the *sole* relevant criterion. *Compare* Pet. Br. 21 & n.4 *with* Rao, *supra*, at 1244 ("Removal at will provides the rule for principal officers, but it need not apply to inferior officers.").[3] To the contrary, this Court has strongly implied that supervision in the form of decisional reviewability—either by the President himself or a principal officer as his agent—is the more relevant consideration. *See Arthrex*, 594 U.S. at 27 (identifying "the source of the constitutional violation" as "the restraint on the review authority of the [principal officer]"). That is, a principal officer answerable to the President must wield the power to review and modify an inferior's decisions before they become binding on the Executive Branch. *Id.* Without the possibility of principal-officer review, the putative "inferior" is, for constitutional purposes, rendered principal, and must

[3] Unlike his power over nearly all principal officers, the President does not have the inherent constitutional right to terminate inferior officers without cause. *See United States v. Perkins*, 116 U.S. 483, 485 (1886); *accord Morrison v. Olson*, 487 U.S. 654, 724 n.4 (Scalia, J., dissenting). Of course, because the President possesses the greater power to fire principals (unless a rare exception such as *Humphrey's Executor* applies), nothing could realistically stop the President from causing an inferior officer to be terminated by conditioning the principal's continuance in office on the inferior's termination. The series of resignations culminating in the so-called "Saturday Night Massacre" are cases in point. *See, e.g.*, Ken Gormley, *The Saturday Night Massacre: How our Constitution trumped a reckless President*, CONSTITUTION DAILY BLOG (Oct. 20, 2015)., https://tinyurl.com/ycyr572z.

be appointed by the President with Senate consent. U.S. CONST. art. II, § 2, cl. 2.

Under the Affordable Care Act ("ACA"),[4] Congress created an autonomous rulemaking body called the United States Preventative Services Task Force ("Task Force"). Pet. App. 3a. "As part of its stated goal of broadening health insurance coverage, the ACA requires private insurers to cover certain preventative-care services without 'cost sharing'—that is, without requiring the insured to pay deductibles, copayments, or other out-of-pocket expenses." *Id.* (quoting 42 U.S.C. § 300gg-13(a)). But rather than define "preventative care services," Congress instead empowered various agencies "to determine what services are required under four different categories of care." *Id.* at 4a. Relevant here is one category in particular: "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventative Services Task Force." 42 U.S.C. § 300gg-13(a)(1).

Consisting of sixteen volunteers "with appropriate expertise," 42 U.S.C. § 299b-4(a)(1), who, by regulation, are now appointed by the Secretary of Health and Human Services,[5] the Task Force is responsible for "issu[ing] recommendations and guidelines for preventative-care services that most private insurers must cover by law." Pet. App 6a (citing 42 U.S.C.§ 300gg-13(a)). When the Task Force promulgates what are nominally "recommendations,"

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[4] Pub. L. No. 111-148, 124 Stat. 119 (2010).

[5] *See* Solicitation for Nominations for Members of the U.S. Preventive Services Task Force (USPSTF), 89 Fed. Reg. 379 (Jan 3, 2024), available at https://tinyurl.com/bdfpd954.

the ACA leaves no room for supervision or direction by the Secretary or any principal officer answerable to the President. Pet. App. 31a. Nor does the ACA permit a principal officer to substantively review and modify the Task Force's guidelines. Pet. App. 23a. Instead, the statute plainly contemplates an "independent" Task Force insulated from the "political pressure" occasioned by presidential or cabinet oversight. 42 U.S.C. § 299b-4(a)(6).

Respondents are a group of individuals and businesses who have religious objections to the Task Force's preventative-care recommendations. Pet. App. 2a. They challenged the Task Force's recommendations on multiple grounds. Among other things, Respondents argued that these recommendations were unlawful because the government officials who promulgated them were principal officers of the United States who had not been validly appointed under the Appointments Clause. *Id.* The district court largely agreed. *Id.*

The Fifth Circuit Court of Appeals, in an opinion by Judge Willett, affirmed. Pet. App. 1a–48a. Condemning the Task Force for running afoul of the Appointments Clause, the court held that members of the Task Force were principal officers of the United States who must be nominated by the President and confirmed by the Senate. Pet. App. 26a.

Arthrex largely settles this case: Because the Task Force promulgates rules binding on private third parties without any principal officer wielding some subsequent power of review, Task Force members are principal officers under the Appointments Clause. But even if Task Force members were inferior officers, their current secretarial mode of appointment was

authorized by regulation rather than by Congress's choice to vest that appointment "by Law." For that reason, their appointments would still nonetheless violate the Appointments Clause "by wresting from Congress its constitutionally prescribed role in the officer-appointing process." *United States v. Trump*, 740 F. Supp. 3d 1245, 1284 (S.D. Fla. 2024); *cf. also Trump v. United States*, 603 U.S. 593, 649–50 (Thomas, J., concurring) (2024). The Court should affirm.

ARGUMENT

I. *ARTHREX* REQUIRES PRINCIPAL OFFICERS TO HAVE REVIEW AUTHORITY OVER INFERIOR-OFFICER DECISIONS.

In *Arthrex*, this Court declared unconstitutional a statute that denied the Director of the Patent and Trademark Office ("PTO")—a Senate-confirmed officer—the power to review certain patentability decisions by administrative patent judges (APJs), officers appointed by the Secretary of Commerce. *Id.* at 27. Significantly, the Court rejected the government's contention that the APJs were inferior officers simply because they were removable at will by a principal. While "the Director . . . could manipulate the composition of the [APJ] panel" to make it "more amenable to his preferences," or "assemble an entirely new panel" predisposed in his favor, what mattered was that the APJs' decisions, once made, were *unreviewable* by the PTO Director or any other principal officer answerable to the President. *Id.* at 15–16, 17. Most telling, however, was this Court's choice of remedy and its deliberate decision to reject the remedy granted by the Federal Circuit.

Rather than make APJs removable without cause, as the Federal Circuit had done,[6] the Court instead purported to reform the statute by rendering APJ decisions subject to the Director's substantive review and modification. *Id.* at 25. That choice of remedy, combined with the Court's reversal of the Federal Circuit, casts serious doubt on the government's contention that simply making an officer removable at will is enough to render him inferior under the Appointments Clause. Pet. Br. 20–21. The fact that a superior might influence a decision behind the scenes is no substitute for formal review because, even if successful, "such machinations blur the lines of accountability demanded by the Appointments Clause." *Arthrex*, 594 U.S. at 16. Although the threat of removal may constrain an officer's decision-making, even to the extent of forcing the officer's hand, at-will removability of a purportedly inferior officer does not ensure accountability to the President concerning the decisions made. As such, the Court concluded that "review by the Director," a principal officer answerable to the President, "better reflect[ed] the structure of supervision" required by the Appointments Clause. *Id.* at 26.

A. *ARTHREX*'S REVIEWABILITY REQUIREMENT SHOULD BE EXTENDED TO RULEMAKING.

As a threshold matter, the Court should extend *Arthrex*'s reviewability rule to the rulemaking context.

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[6] According to the Federal Circuit, "severing the restriction on removal of APJs render[d] them inferior rather than principal officers" because, "coupled with the power of removal by the Secretary without cause," there were "significant constraint[s] on [the] issued decisions [of inferior officers]." *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1338 (Fed. Cir. 2019).

To be sure, *Arthrex* involved patent adjudications and "[did] not address supervision outside th[at] context," whereas this case concerns rulemaking. *Id.* at 23. But *Arthrex did* squarely address removability in the context of inferior-officer status, "demonstrat[ing] that [it] is not the sole criterion by which to judge inferiority." Pet. App. 20a. For purposes of the Appointments Clause, whether an inferior officer is engaged in rulemaking or adjudication makes no difference. What matters under *Arthrex* is *supervision of decision-making*: whether an inferior officer's decisions are reviewable by a principal officer answerable to the President.

If anything, *Arthrex*'s reviewability requirement should apply with even greater force to inferior-officer rulemaking. Whereas adjudications are constrained by procedural due process, rulemaking is typically not; and whereas adjudications concern particular facts about particular parties, rulemaking involves a potentially infinite universe of legislative facts affecting the population at large. *Compare Londoner v. Denver*, 210 U.S. 373, 385 (1908) (involving adjudication—"whether, in what amount, and upon whom" a special tax assessment would be levied for "special benefits"—thus implicating due process of law) *with Bi-Metallic Inv. Co v. State. Bd. of Equalization*, 239 U.S. 441, 446 (1915) (concerning rulemaking—"a general determination dealing only with the principle upon which all the assessments in a county had been laid"—and thus *not* implicating due process of law). The upshot of these distinctions is that significantly more policy discretion inheres in rulemaking than adjudication. This only increases the necessity for principal-officer supervision when rulemaking is performed by an inferior officer.

B. REQUIRING PRINCIPAL REVIEWABILITY BETTER IMPLEMENTS ARTICLE II THAN THE GOVERNMENT'S REVIEWABILITY TEST.

The core object of Article II is accountable government through a chain of command answerable to the President. By vesting *the whole* executive power in this elected office, U.S. CONST. art. II, § 1, the Framers furnished "a single object for the jealousy and watchfulness of the people," thus enhancing accountability and transparency in government. THE FEDERALIST NO. 70, at 412 (Alexander Hamilton) (Royal Classics ed. 2020); *see also Seila Law*, 591 U.S. at 224. To implement Article II's twin aims of accountability and transparency, this Court should interpret the "inferior Officer" provision of the Appointments Clause to require principal-officer *supervision* of inferior-officer decision-making (*i.e.*, reviewability). The government's preferred benchmark of mere principal-offer *removability*—Pet. Br. 21—is insufficient.[7]

As the powers and responsibilities of the federal bureaucracy expand, subdelegation to inferior officers becomes not only necessary, but rampant, thus

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[7] Textually speaking, the "inferior Officer" provision of the Appointments Clause is ambiguous. *See, e.g.*, Gary S. Lawson, *The 'Principal' Reason Why the PCAOB Is Unconstitutional*, 62 VAND. L. REV. EN BANC 73, 78 (2009) (describing two commonly accepted definitions of inferiority from the founding era: one based on the structural hierarchy between or among actors, and another based on an actor's scope of authority). That ambiguity renders the original spirit of Article II—that is, its original functions and purposes—particularly important in any construction of the Appointments Clause. *See generally* Randy E. Barnett & Evan E. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018).

attenuating the President's control over administration. The President does not possess the inherent power to remove inferior officers without cause, *see Myers v. United States*, 272 U.S. 52, 127 (1926); *Morrison v. Olson*, 487 U.S. 654, 689 n.27 (1988); *United States v. Perkins*, 116 U.S. 483, 485 (1886);[8] but the cabinet secretaries responsible for their appointment do. Thus "armed with the threat of removal," it becomes the secretaries—not the President—who "command[] the [inferior officers'] loyalty." Rao, *supra*, at 1228. On a large enough scale, this "simple truth of administration that an officer will seek to please the person that decides whether the officer stays or goes"[9] creates a risk of Congress wrestling control over administration from the President by flooding the Executive Branch with tenure-protected inferior officers loyal to cabinet secretaries, creating "mini-Executive[s]"[10] who leverage these loyalties to undermine the President's agenda. *Cf.* Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1835 (2023) (raising the possibility of Congress "consolidating all existing departments into a single behemoth, staffed with thousands of tenure-protected inferior officers").

To be sure, the President's power to fire principal officers without cause provides him some measure of influence over inferior-officer decision-making. *Cf.*

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[8] Justice Scalia agreed with *Perkins* that Article II does not require the President to be able to remove inferior officers without cause. *See Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting).

[9] *Id.*

[10] *Morrison*, 487 U.S. at 732 (1988) (Scalia, J., dissenting).

Edmond v. United States, 520 U.S. 651, 664 (1997) (describing removal as "a powerful tool for control"). But at-will termination of principals allows the President only to negate actions he disagrees with; it does not give him the power to direct inferior officers to act. By requiring principal-officer *reviewability*, *Arthrex* ensures that the President, through his principals, retains ultimate and *affirmative* control over decisions binding on the Executive Branch. 594 U.S. at 26. Affirmative presidential control over final Executive decision-making is consonant with the Framers' vision for an energetic and decisive chief administrator. *See* THE FEDERALIST NO. 70, at 407 (Alexander Hamilton) (Royal Classics ed. 2020) (emphasizing "[d]ecision," "activity," and "despatch").

By contrast, the government's proffered removability test cannot guarantee the same level of presidential accountability. Indeed, it may in fact leave the President on the backfoot, bound to important policy determinations he never made or even disagrees with. The government argues that an officer's removability by a cabinet secretary automatically renders him "inferior" under the Appointments Clause. Pet. Br. 21. Under this test, so long as an inferior officer is removable at will by one of the President's principals, that officer could promulgate significant rules binding on private parties, as well as the President, without a principal officer (*i.e.*, the President's direct agent) having the ability to review them. That construction of the Appointments Clause would undermine the core object of Article II's unitary structure: accountability. The Court should apply *Arthrex*'s reviewability test instead.

II. TASK FORCE MEMBERS ARE PRINCIPAL OFFICERS UNDER *ARTHREX* BECAUSE THEIR DECISIONS ARE UNREVIEWABLE.

"[T]he exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate." *Arthrex*, 594 U.S. at 27. Whatever "direction and supervision" by a principal might entail, they *must* include the power to review and modify the substance of an inferior's decisions—that is, decisional reviewability—whether or not the principal actually exercises that power and reverses any decisions. *Id.*

"The similarities between the PTAB in *Arthrex* and the Task Force in this case are . . . dispositive." Pet. App. 24a. The Task Force "issue[s] legally binding decisions without any review by a higher-ranking officer," thereby binding private insurers, who are "legally required to cover its preventative-care recommendations." Pet. App. 25a. True, the Secretary has statutory authority to "establish a minimum interval," not to exceed one year, "between the date on which a recommendation . . . or a guideline . . . is issued and the plan year with respect to which the requirement . . . is effective." 42 U.S.C. § 300gg-13(b)(1)–(2); Pet. App. 23a. But such authority "extends to only *when* [the Task Force's nominal] recommendations become binding," and does not include any power to review or modify their contents. Pet. App. 23a.

Just as it was no answer in *Arthrex* that the PTAB's APJs could be influenced indirectly by the PTO Director's authority to punish them by taking them off a case, here too it is "no answer" that the Secretary

might "exercise indirect control over the Task Force's recommendations through his removal power." Pet. App. 25a. Indeed, there as here, such behind-the-curtain influence peddling compounds the constitutional problem by "blur[ring] the lines of accountability demanded by the Appointments Clause." *Arthrex*, 594 U.S. at 16.

Ultimately, the touchstone of inferiority is the ability of a higher-up, answerable to the President, to review and modify the officer's decisions before they bind the Executive Branch. In regard to the Task Force, such supervision is wholly lacking. Under the statute, the Secretary wields no authority to modify the Task Force's recommendations. Pet. App. 23a. It follows that the Secretary cannot compel the Task Force to adopt a recommendation that it elected not to adopt. Nor can the Secretary force the Task Force to abandon a recommendation that the Secretary or the President finds repugnant. Put simply, Task Force recommendations, once made, are binding on private industry and unreviewable.

This lack of reviewability renders the current Task Force members principal officers who must be appointed by the President and confirmed by the Senate. Because Task Force members are not so appointed, *Arthrex* tells us that their constitutionality can be saved only if a Senate-confirmed principal officer is given the power to review and modify their recommendations. But under the ACA, neither the Secretary nor any other principal wields such authority. Instead, the power to issue coverage rules binding on private insurers rests exclusively with the Task Force, notwithstanding its stated independence and political insulation. 42 U.S.C. § 299b-4(a)(6).

As in *Arthrex*, the statute's "restraint on the review authority of [principal officers]" is inconsistent with the Appointments Clause and the presidential accountability it seeks to guarantee. 594 U.S. at 27. The Court should therefore apply *Arthrex*'s Appointments Clause holding and affirm the Fifth Circuit.

III. WHETHER PRINCIPAL OR INFERIOR, TASK FORCE MEMBERS' APPOINTMENT BY REGULATION VIOLATES THE APPOINTMENTS CLAUSE.

Even if Task Force members occupy a validly created office, "questions remain as to whether the [Secretary] filled that office in compliance with the Appointments Clause." *Trump v. United States*, 603 U.S. 593, 649 (Thomas, J., concurring). Stipulating that Task Force members are inferior officers (an unlikely prospect under *Arthrex*),[11] "the [Secretary] could appoint [them] without Presidential nomination and senatorial confirmation *only if Congress by law vested the Appointment in the* [*Secretary*] *as a Head of Department*." *Id.* (emphasis added) (cleaned up); *see also Edmond v. United States*, 520 U.S. 651, 660 (1997) ("The prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers.").[12]

Here, Congress did not do so. Instead, Task Force members' secretarial mode of appointment appears to

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[11] *See* Section II, *supra*.

[12] This default rule stems from the plain text of the Excepting Clause. *See* U.S. CONST. art. II, § 2, cl. 2. ("*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.") (emphasis added).

be the creature of regulation. *See* Solicitation for Nominations for Members of the U.S. Preventive Services Task Force (USPSTF), 89 Fed. Reg. 379 (Jan 3, 2024).[13] The statute itself is silent as to how Task Force members are appointed, stating merely that "the Director [of the Agency for Healthcare Research and Quality ("AHRQ")] *shall convene* an independent Preventive Services Task Force." 42 U.S.C. § 299b-4(a)(1) (emphasis added); Pet. App. 5a. In theory, then, the statute permits—or at least does not discountenance—the appointment of Task Force members by the AHRQ Director (as was the case until recently), the Secretary (as is now the case by regulation), the President, or even entities or individuals outside of government.

To the extent that the Task Force's statutory role is advisory—and it clearly used to be[14]—all such means of appointment would be constitutionally permissible. That is because its members would no longer wield "significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), and thus, would no longer constitute "Officers" subject to the Appointments Clause. U.S. CONST. art. II, § 2, cl. 2. After the enactment of the ACA, however, the Task Force—armed with new powers, though still "convene[d]" by the Director, 42 U.S.C. § 299b-4(a)(1)—began to promulgate significant coverage rules binding on private insurance companies, thereby assuming the status of federal officers. *Id.* § 300gg-13(a)(1).

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[13] Available at https://tinyurl.com/bdfpd954.

[14] *See, e.g.*, Pub. L. No. 106-129, 113 Stat. 1653, 1659 (1999) (designating the Task Force as essentially a research support aid).

In this context, "convene" best means "to cause to assemble." *Convene*, MERRIAM-WEBSTER.[15] In causing the Task Force to assemble, the Director impliedly exercised the power of appointment, at least insofar as he "name[d]" members "officially." *Appoint*, MERRIAM-WEBSTER.[16] But such "shall convene" language lacks "the clarity typical of past statutes used for th[e] purpose" of vesting appointment powers in heads of departments. *Trump*, 603 U.S. at 648 (Thomas, J., concurring).[17] While the statute designates the Director as the Secretary's agent, 42 U.S.C. § 299(a), this "generic provision[]" cannot fairly be read to vest the power to appoint Task Force members in the Secretary. *Trump*, 603 U.S. at 648 (Thomas, J., concurring).

In any case, the AHRQ Director is not a "Head[] of Department," U.S. CONST. art. II, § 2, cl. 2, but rather is an inferior officer appointed by the Secretary. 42 U.S.C. § 299(a). Because the Director is "responsible to . . . [an]other officer of the department," the Director is not a department head and cannot constitutionally wield the appointment power. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010)

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[15] Available at https://tinyurl.com/4pz4cx9a (last visited Mar. 15, 2025).

[16] Available at https://tinyurl.com/9j7uracu (last visited Mar. 15, 2025).

[17] *See, e.g.*, 42 U.S.C. § 913 ("The Secretary is authorized to appoint … such officers and employees, . . . as may be necessary for carrying out the functions of the Secretary under this chapter."); 35 U.S.C. § 3(b)(2)(A) ("The Secretary of Commerce shall appoint a Commissioner for Patents and a Commissioner for Trademarks. . . "); 28 U.S.C. § 542(a) ("The Attorney General may appoint one or more assistant United States attorneys in any district when the public interest so requires.").

(internal quotation marks omitted). Therefore, Congress could not vest the appointment power in the Director, even if the statute's "shall convene" language, 42 U.S.C. § 299b-4(a)(1), was sufficiently clear for that purpose. *Cf. Trump*, 603 U.S. at 648 (Thomas, J., concurring).[18]

The government's position on the appointment of the Task Force has been inconsistent.[19] At the district court level, the government maintained that Task Force members were not "officers of the United States subject to the Appointments Clause." Pet. Cert. 8 n.3. Abandoning that argument, the government appears to have implemented a regulation providing for secretarial appointment of Task Force members. *See* Solicitation for Nominations for Members of the U.S. Preventive Services Task Force (USPSTF), 89 Fed. Reg. 379 (Jan 3, 2024).[20] Now, according to the Task

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[18] Because the AHRQ Director's appointments in this case were *ultra vires*, they are not properly ratifiable by the Secretary. *Cf. California Bank v. Kennedy*, 167 U.S. 362, 368 (1897) (asserting that *ultra vires* conduct "cannot be ratified" in the context of corporate affairs). The Director's appointments are also not ratifiable because the Secretary did not possess an appointment power for Task Force Members when the appointments relevant to this case were made; the provision for secretarial appointment came later by regulation. Because the Secretary did not "ha[ve] the capacity to bestow" the power of appointment, he could not "ratify and affirm the unauthorized act, and thus retroactively give it validity." *United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907).

[19] "Now that the statute's validity hangs in the balance, the Government has reversed" its stance on how Task Force members are appointed. *United States v. Hansen*, 599 U.S. 762, 809–10 & n.18 (2024) (Jackson, J., dissenting). The Court should approach such inconsistency with skepticism.

[20] Available at https://tinyurl.com/bdfpd954.

Force's website, members are appointed by the Secretary of Health and Human Services to serve four-year terms. *See* U.S. PREVENTATIVE CARE TASK FORCE, *Our Members*.[21] But this contradicts the government's representation that the AHRQ Director made the initial appointments in this case, thus necessitating the Secretary's ratification. Pet. Br. 9–10 (citing Secretary of HHS, *Ratification of Prior Appointment and Prospective Appointment: Appointment Affidavits* (June 28, 2023), https://perma.cc/8TAA-7AMN).

The government's argument is further undermined by the fact that the regulation providing for secretarial appointment sits somewhat in tension with the statute Congress wrote. *Compare* 89 Fed. Reg. 379, *supra* ("*Members are appointed by the Secretary* of the U.S. Department of Health and Human Services to serve four-year terms.") (emphasis added) *with* 42 U.S.C. § 299b-4(a)(1) ("*The Director shall convene* an independent Preventive Services Task Force.") (emphasis added). Arguably, the Director's power to convene the Task Force includes the power to appoint its members. While, as a constitutional matter, this statutory language is not sufficient to override the default rule for inferior-officer appointments, *see Trump*, 603 U.S. at 648 (Thomas, J., concurring), it nonetheless evinces a congressional intent that the Director, not the Secretary, play the primary role in assembling the Task Force. Because the regulation is inconsistent with the will of Congress as manifested in the statute's text, it is not entitled to judicial deference. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024); *see also Youngstown Sheet &*

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[21] Available at https://tinyurl.com/mv4vrm93 (last visited Mar. 15, 2025).

Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

The regulation is also not entitled to deference for another reason: it crosses constitutional boundaries. *Cf. Loper Bright*, 603 U.S. at 413 ("when a particular statute delegates authority to an agency *consistent with constitutional limits*, courts must respect the delegation . . . .") (emphasis added). It is without question the province of Congress to create offices and establish the method of appointment for officers. *See* U.S. CONST. art. II, § 2, cl. 2. "[B]y wresting from Congress its constitutionally prescribed role in the officer-appointing process," *United States v. Trump*, 740 F. Supp. 3d 1245, 1284 (S.D. Fla. 2024), the statute's implementation under 89 Fed. Reg. 379, *supra*, violates the Appointments Clause.

Therefore, regardless of whether Task Force members are principal or inferior officers, the vesting of their appointment in the Secretary by regulation offends the Constitution.

CONCLUSION

For the foregoing reasons, and those described by the Respondents, the Court should affirm the Fifth Circuit.

Respectfully submitted,

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