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 PACIFIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS


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## INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established to litigate matters affecting the public interest. PLF provides a voice for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF attorneys have participated as lead counsel or amici in several cases vindicating the individual interests protected by the structural protections of the Constitution and the legal principles that flow therefrom. *See*, *e.g.*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *Sackett v. EPA*, 598 U.S. 651 (2023) (application of Clean Water Act's "waters of the United States" provision to wetlands); *Seila L. LLC v. CFPB*, 591 U.S. 197 (2020) (restriction on President's ability to remove CFPB Director); *Kisor v. Wilkie*, 588 U.S. 558 (2019) (*Auer* deference); *Gundy v. United States*, 588 U.S. 128 (2019) (nondelegation doctrine); *Lucia v. SEC*, 585 U.S. 237 (2018) (SEC administrative law judge is an "officer of the United States" under the Appointments Clause); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same).

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[1] No party's counsel authored any part of this brief. No person or entity, other than Amicus Curiae and its counsel, paid for the brief's preparation or submission.

More specifically, PLF litigates Appointments Clause challenges to administrative adjudications. *See, e.g.*, *McConnell v. U.S. Dep't of Agric.*, No. 4:23-CV-24, 2023 WL 5963782 (E.D. Tenn. Sept. 13, 2023); *Manis v. U.S. Dep't of Agric.*, No. 24-1367 (4th Cir.). This brief draws on that experience in support of the Respondents' position that the members of the U.S. Preventative Services Task Force function as principal officers without a proper appointment. It presents a unique perspective tying together this Court's recent cases on officer status to demonstrate that principal officer review has been consistently required for decisions by inferior officers that would otherwise bind the Executive Branch. This review requirement was recently affirmed in *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021). This brief also points to Appointments Clause challenges to Executive Branch adjudications litigated by PLF in which lower courts have ignored *Arthrex* and permitted adjudications to proceed in the absence of principal officer review.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

*United States v. Arthrex, Inc.*, 594 U.S. 1, 23 (2021), established that only officers appointed as principal officers could make final, binding, and unreviewable adjudicative decisions for the Executive Branch. This case provides the Court with an opportunity to affirm its holding in *Arthrex* and extend that rule to all final, binding, and unreviewable decisions of the Executive Branch. For inferior officers making decisions that bind the Executive Branch, principal officer review is the

necessary means to ensure that the chain of command established by the Appointments Clause is observed.

*Arthrex* considered the officer status of inferior officer administrative patent judges ("APJ") who made binding decisions on patentability, but were removal protected and could not have their decisions reviewed by a principal officer. To determine the APJs' officer status, the Court evaluated whether they were sufficiently directed and supervised by a principal officer given the nature of their responsibilities. The Court concluded that, in adjudications, "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch." 594 U.S. at 23. Because no principal officer had the ability to review APJs' decisions, the APJs were not sufficiently supervised by a principal officer given their responsibilities. This same logic can be extended to all binding decisions made by inferior officers for the Executive Branch, which cannot be countermanded without the availability of principal officer review.

Petitioners emphasize the importance of at-will removal as a supervisory tool. But when binding decisions are at issue, the ability of a principal officer to remove an inferior officer at will is insufficient supervision without principal officer review. While removal is an essential tool to ensure the faithful execution of the laws, it does not sufficiently preserve the Appointments Clause's chain of command when binding decisions are involved. That is so because removal does not permit a principal officer to reverse a final, binding decision of an inferior officer; it only authorizes the termination of that inferior officer after the fact. So, removal is ultimately ineffective at ensuring that the binding decisions of the Executive

Branch are subject to the political accountability the Appointments Clause requires. Indeed, *Arthrex* rejected the elimination of a removal restriction as sufficient oversight for APJs, instead leaving the removal protection in place and removing the restriction on principal officer review.

At issue here are the members of the U.S. Preventative Services Task Force who make final, binding, decisions for the Executive Branch as to the preventative services that private health insurers must cover. But Task Force members are not appointed as principal officers.[2] And Congress did not provide a means for the Secretary to substantively review the Task Force's decisions. *Arthrex* effectively decides that this arrangement violates the Appointments Clause. Like the APJ decisions, Task Force decisions are binding on the Executive Branch and non-reviewable. As such, *Arthrex* requires that the official making these decisions be appointed as a principal officer. Since they are not, the Task Force members are unconstitutionally appointed. The U.S. Court of Appeals for the Fifth Circuit should be affirmed on this point.

Should the Court decide that *Arthrex* does not apply beyond Executive Branch adjudications, it should still take this opportunity to clarify that final, binding decisions in Executive Branch adjudications must be made by a principal officer or subject to principal officer review. In post-*Arthrex* Appointments Clause challenges to administrative adjudications, lower courts have cabined *Arthrex* to its facts and relied on *Edmond*'s consideration of removal

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[2] Amicus does not take a position on whether Task Force members were properly appointed as inferior officers.

and administrative oversight to uphold adjudication schemes that lack the dispositive requirement of principal officer review. Lower courts' evasion of *Arthrex* in adjudication cases should not be allowed to continue.

## ARGUMENT

### I. Decisions binding the Executive Branch must be made by a principal officer

#### A. The Appointments Clause establishes a chain of command for Executive Branch officers

The Appointments Clause sets out the means of appointment for Officers of the United States and in doing so establishes a two-tiered chain of command. The President is authorized to appoint "Officers of the United States" with the "Advice and Consent of the Senate". U.S. Const. art. II, § 2, cl. 2. This is the exclusive method of appointment for principal officers—officers who wield substantial executive power with no superior other than the President—and the default method of appointment for all officers. *Arthrex*, 594 U.S. at 12. The Appointments Clause provides an alternative method of appointment for inferior officers—less-powerful officers supervised by principal officers. *Id.* at 12-13; *Edmond v. United States*, 520 U.S. 651, 663 (1997). For inferior officers, Congress may "vest the[ir] Appointment" "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

The "clear and effective chain of command" established by the Appointments Clause provides legitimacy to the exercise of Executive Power and ensures "accountability to the public." *Arthrex*, 594

U.S. at 11 (citation omitted). Legitimacy, accountability, and quality are all essential for the exercise of the significant authority for which all officers are responsible. *See Arthrex*, 594 U.S. at 11-12.

For the chain of command to be maintained "the nature of [an officer's] responsibilities" must be "consistent with [his] method of appointment." *Arthrex*, 594 U.S. at 13. To evaluate this consistency, the Court considers an officer's method of appointment with his functions and with the supervision over him by other officers. *See, e.g.*, *id.* at 13-18. "An inferior officer must be 'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" *Id.* at 13. (quoting *Edmond*, 520 U.S. at 663). The requisite level of supervision for an inferior officer is determined by the type of responsibilities the officer carries out. *Ibid.*

### B. Binding decisions for the Executive Branch made by inferior officers must be subject to principal officer review

The officer-level function at issue in this case is the issuance of decisions that bind the Executive Branch. This type of decision was recently addressed in *Arthrex* in the context of Executive Branch adjudications. *Arthrex* concluded that, in adjudications, "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch." 594 U.S. at 23. The logic of *Arthrex* extends to all binding decisions of the Executive Branch, making *Arthrex* the relevant rubric for evaluating the sufficiency of supervision for any officer making such decisions.

*Arthrex* considered the officer status of APJs in the Patent and Trademark Office ("PTO"). *Id.* at 8. APJs were PTO adjudicators appointed as inferior officers by the Secretary of Commerce and authorized to issue final, binding decisions for the Executive Branch in adversarial inter partes patent review proceedings. *Id.* at 8-9. APJs could only be removed for cause. *Id.* at 17. And the PTO Director was statutorily prohibited from reviewing the APJs' patentability decisions. *Id.* at 14. The question before the Court was whether the APJs were sufficiently supervised by the principal officer PTO Director to make binding decisions on patent validity as inferior officers. *Id.* at 14-15.

To analyze this question, the Court turned to *Edmond*, the source of the direction-and-supervision test for determining whether an officer was a principal or inferior officer. *Arthrex*, 594 U.S. at 13. *Edmond* considered the inferior officer status of Coast Guard Court of Criminal Appeals judges by reviewing whether: (1) the judges were subject to procedural rules or other administrative oversight mechanisms controlled by a superior officer, (2) the judges were removable at will, and (3) the judges' decisions were reviewed by a superior officer such that they could not "render a final decision on behalf of the United States unless permitted to do so by other Executive officers." 520 U.S. at 664-65.

According to the Court, the Court of Criminal Appeals judges were administratively overseen and removable "without cause" by the Judge Advocate General, and certain of their decisions were reviewed by the Court of Appeals for the Armed Forces, which was composed of principal officers. *Ibid.* This arrangement provided sufficient supervision for the

judges to be constitutionally appointed as inferior officers. *Id.* at 666. Among the three considerations, "[w]hat [was] significant" for inferior officer status was that the judges' decisions were reviewable by a principal officer. *Id.* at 665.

In *Arthrex*, the Court applied *Edmond*'s conclusion that principal officer review was the paramount factor for determining inferior officer status, and made it a necessity for Executive Branch adjudications. *Arthrex*, 594 U.S. at 14-18. *Arthrex* singled out the availability of principal officer review for the judges in *Edmond* as the key difference with the APJs, noting that for APJs this "'significant'" factor was "absent." *Id.* at 14. Therefore, because the APJs' decisions were not reviewable by the PTO Director, the Court held that their final decisionmaking authority was inconsistent with their appointment as inferior officers. *Id.* at 14-15, 23.

The logic of *Arthrex* extends beyond inter partes review adjudications to all officers and government employees functioning as officers who make final, binding, and unreviewable decisions for the Executive Branch.[3] After all, the key feature of adjudicative decisions that drove the outcome in *Arthrex*—their binding nature on the Executive Branch—is not limited to adjudications. Legislative rules promulgated through the Administrative Procedure Act's notice-and-comment rulemaking process

[3] *Arthrex* declined to establish an "'exclusive criterion' for distinguishing between principal and inferior officers" when evaluating officers "outside the context of adjudication" where "decisions by inferior officers *do not bind* the Executive Branch to exercise power in a particular manner." *Id.* at 23 (emphasis added).

produce rules that have the "force and effect of law." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (citation omitted). And the Executive Branch is bound by such rules, the same as the regulated party, until the agency changes the rules through another round of notice-and-comment rulemaking. *See id.* at 95. The binding effect of these non-adjudicative final decisions of the Executive Branch similarly necessitates they be made by a principal officer. *See Arthrex*, 594 U.S. at 23.

The historical analysis in *Arthrex* confirms that its logic extends beyond adjudications. In 1792, Alexander Hamilton, as Secretary of the Treasury, announced the necessity of the principal officer's "right to judge and direct"—in this case the customs officials executing his instructions—to "ensur[e] that 'the responsibility for a wrong construction rests with the head of the department, when it proceeds from him.'" 594 U.S. at 18-19. Additionally, an "[e]arly congressional statute[]" subjected the issuance of liquor licenses "'to the superintendence, control and direction of the department of the treasury'" thereby "empower[ing a] department head[] to supervise the work of [his] subordinates." *Id.* at 19 (citation omitted). Both examples reflect an early focus on principal officer control of decisionmaking beyond adjudications.

### C. Removal is insufficient supervision for an inferior officer who makes final, binding, and unreviewable decisions

Petitioners emphasize at-will removal as the "most potent" supervision mechanism for inferior officers. Pet. Br. at 20. But while important, at-will removal cannot replace principal officer review as a

necessary supervisory tool for an inferior officer to issue binding decisions. *See Arthrex*, 594 U.S. at 26 (Roberts, C.J., plurality opinion). Principal officer review ensures that the "chain of command" established by the Appointments Clause in these circumstances is maintained by providing the principal officer a "means of countermanding" an inferior officer's decision. *Id.* at 16, 18. In contrast, removal is a blunt instrument that can only be used after the fact without effect on the inferior officer's decisions. *See id.* at 16-17.

This Court has consistently reasoned that removal does not provide sufficient supervision for an inferior officer to make binding decisions without review by a principal officer. *Edmond* itself "recognized" removal as "a powerful tool for control" over the inferior officer judges. 520 U.S. at 664. But the Court acknowledged that this control was "not complete." *Ibid.* The Judge Advocated General with at-will removal power was prohibited from influencing the judges' decisions through threats of removal and "ha[d] no power to reverse decisions of the court." *Ibid.* So, *Edmond* went on to evaluate whether there was a principal officer who had review authority. *Id.* at 664-65. Only after the Court determined there was did it conclude that the judges were properly appointed as inferior officers. *Id.* at 665-66.

*Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 485, 510 (2010), reapplied the relevance of principal officer review to the Public Company Accounting Oversight Board that issued rules and conducted its own disciplinary proceedings. There, the Court had "no hesitation in concluding that under *Edmond* the Board members [were] inferior officers" based on the ability of the Securities and Exchange Commission

(i.e., principal officers) to remove them at will and "given the Commission's *other oversight authority*." 561 U.S. at 510 (emphasis added). That other authority included the ability of the Commission to approve or alter the rules issued by and the sanctions imposed by the Board—in other words, principal officer review. *Id.* at 486, 504.

*Arthrex* continued this line of precedent. In holding that the APJs were functioning without a proper appointment, the Court repeatedly emphasized that the primary consideration for inferior officer status was whether they could issue binding decisions without review by anyone in the Executive Branch. *Arthrex*, 594 U.S. at 14; *id.* at 17 (APJ power "conflicts with the design of the Appointments Clause" because of "the insulation of [their] decisions from any executive review"); *id.* at 23 ("[T]he unreviewable authority wielded by APJs . . . is incompatible with their appointment by the Secretary to an inferior office."); *id.* at 27 (Roberts, C.J., plurality opinion) ("The Constitution [] forbids the enforcement of statutory restrictions on the Director that insulate the decisions of APJs from his direction and supervision.").

The Court's remedy in *Arthrex* confirmed the necessity of principal officer review for binding decisions. While below, the U.S. Court of Appeals for the Federal Circuit decided to eliminate the removal restriction on APJs, this Court disagreed and instead eliminated the statutory restriction on principal officer review. *Id.* at 24-26 (Roberts, C.J., plurality opinion). It adopted this remedy because "review by the Director better reflects the structure of supervision within the PTO and the nature of APJs' duties." *Id.* at 26; *see also id.* at 27 ("[T]he source of

the constitutional violation is the restraint on the review authority of the Director."). Notably, the Court left the APJs' removal restriction in place. *Id.* at 26. Three of the dissenting Justices concurred in this remedy, agreeing with the majority that the "statutory scheme is defective only because the APJ's decisions are not reviewable by the Director alone." *Id.* at 44 (Breyer, J., concurring in part and dissenting in part). This remedy is all but conclusive that, without principal officer review, removal is insufficient supervision for an inferior officer making binding decisions.

## II. Task Force members function as principal officers without a proper appointment

At issue here is the application of *Arthrex* to the members of the Task Force. The Task Force is nested within the Department of Health and Human Services as part of the Public Health Service's Agency for Healthcare Research and Quality ("AHRQ"). Pet. Br. at 5. The Task Force is "convene[d]" by the Director of AHRQ, 42 U.S.C. § 299b-4(a)(1), who is appointed by the Secretary, *id.* § 299(a). There is no statutory restriction on members' removal. *See id.* § 299b-4(a).

The Task Force is responsible for developing recommendations for "best practice" in clinical preventative services based on the "effectiveness, appropriateness, and cost-effectiveness" of such services. *Id.* § 299b-4(a)(1). These recommendations are "published in the Guide to Clinical Preventative Services." *Ibid.* Congress also required that the Task Force members and their recommendations "be independent and, to the extent practicable, not subject to political pressure. *Id.* § 299b-4(a)(6).

In 2010, Congress enacted the Affordable Care Act, which established for health insurers minimum coverage requirements for preventative services. 42 U.S.C. § 300gg-13. Among the services health insurers were required to cover were those given "a rating of 'A' or 'B'" by the Task Force, making Task Force recommendations binding decisions of the Executive Branch for purposes of the coverage requirement. *Id.* § 300gg-13(a)(1). Congress also empowered the States to impose these coverage requirements on health insurers and the Secretary of Health and Human Services to impose civil money penalties on plans that fail to meet them. 42 U.S.C. § 300gg-22. The Task Force recommendations are the law health insurers must follow and the Executive Branch must enforce until the Task Force undertakes another review to update its recommendations. *See* 42 U.S.C. § 299b-4(a)(2). Congress granted the Secretary only a limited role in these decisions to "establish a minimal interval" between the date of the Task Force's recommendation and its effective date for the coverage mandate. 42 U.S.C. § 300gg-13(b).

This arrangement violates the Appointments Clause because Task Force members are making binding decisions for the Executive Branch with neither a principal officer appointment nor the availability of principal officer review. *See Arthrex*, 594 U.S. at 23. It is indisputable that Task Force members are not appointed as principal officers because they are "convene[d]" by the AHRQ Director. 42 U.S.C. § 299b-4. The Secretary is also statutorily foreclosed from substantively reviewing the binding Task Force recommendations. *See id.* § 300gg-13(b). Congress included no substantive review mechanism for the Secretary. *Id.* The fact that Congress

proscribed a role for the Secretary in setting the timing of the recommendations' effective date demonstrates that this was intentionally omitted. *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 471 (2001). This conclusion is reinforced by Congress's pre-ACA command that Task Force members and their recommendations "shall be independent and, to the extent practicable, not subject to political pressure." 42 U.S.C. § 299b-4(a)(6). Through these two statutes, Congress designed the Task Force to be free of political influence through review of its recommendations by the Secretary, and Congress maintained that design when it made Task Force recommendations binding on health insurers without review by the Secretary.

Without principal officer review, removal is insufficient supervision for the non-principal officer Task Force members to make binding decisions for the Executive Branch. *See Arthrex*, 594 U.S. at 23. The Secretary has no ability to countermand the binding decisions of the Task Force members, the essential supervisory mechanism under these circumstances. *Id.* at 16-17; *see also supra* Part I.C. So, the Task Force members themselves are issuing "final decision[s] binding the Executive Branch," a function that "[o]nly an officer properly appointed to a principal office may" do. *Arthrex*, 594 U.S. at 23. This structure violates the Appointments Clause. *See ibid.*

## III. Lower courts have failed to apply *Arthrex* to other Executive Branch adjudications

Even if the Court concludes that *Arthrex* is inapplicable to the Task Force, it should preserve and clarify its applicability to Executive Branch adjudications. 594 U.S. at 19-23. When *Arthrex*

reserved for future cases the establishment of a criterion for inferior officer status, it specifically referred to cases "outside the context of adjudication." *Id.* at 23. *Arthrex* referred to principal officer review as the "traditional rule" for adjudication." *Id.* at 21. And during the oral argument, the government acknowledged that "it 'certainly is the norm' for principal officers to have the capacity to review decisions made by inferior adjudicative officers." *Id.* at 20. *Arthrex* at least stands for the proposition that final, binding decisions in Executive Branch adjudications must be made or subject to review by a principal officer. *Id.* at 23.

Since *Arthrex*, lower courts have failed to apply the requirement of principal officer review of otherwise binding decisions to other Executive Branch adjudications. For example, in Appointments Clause challenges to the structure of U.S. Department of Agriculture ("USDA") adjudications of alleged violations of the Horse Protection Act, two district courts have upheld the final, binding decisionmaking authority of USDA's Judicial Officer—who was not appointed as a principal officer—while acknowledging the unavailability of principal officer review. *McConnell v. U.S. Dep't of Agric.*, No. 4:23-CV-24, 2023 WL 5963782, at *4 (E.D. Tenn. Sept. 13, 2023); *Manis v. U.S. Dep't of Agric.*, 731 F.Supp.3d 685, 692-93 (M.D.N.C. 2024), *appeal docketed*, No. 24-1367 (4th Cir. Apr. 25, 2024).[4]

*McConnell* concluded that the Secretary of Agriculture's administrative oversight over and ability to remove at will the Judicial Officer was

[4] Pacific Legal Foundation was counsel for the plaintiff in each case.

sufficient supervision for the Judicial Officer not to have received a principal officer appointment. 2023 WL 5963782, at *3-4. The court concluded that because *Arthrex* had not overruled *Edmond*, it could rely on these two factors considered by *Edmond* in the absence of principal officer review. *Id.* at *4. *Manis* reached a similar conclusion that administrative oversight and removability were sufficient without principal officer review because *Edmond* was still good law. 731 F.Supp.3d at 692-93.

But *Arthrex* did not apply *Edmond* as a strict three-factor test for Executive Branch adjudications such that lower courts can simply weigh them up case-by-case. *Arthrex*, 594 U.S. at 13, 23. Both the majority and the dissent in *Arthrex* described the *Edmond* test as the broad principle that "[a]n inferior officer must be 'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" *Arthrex*, 594 U.S. at 13; *id.* at 49 (Thomas, J., dissenting); *see also Seila L.*, 591 U.S. at 217 n.3 ("More recently, we have focused on whether the officer's work is 'directed and supervised' by a principal officer."). *Arthrex* applied this broad test to an Executive Branch adjudication and concluded, consistent with *Edmond*, that inferior officers who make otherwise binding decisions for the Executive Branch must have those decisions reviewed by a principal officer. *Arthrex*, 594 U.S. at 14-15; *see also supra* Part I.B & C. The Court should take this opportunity to clarify its holding in *Arthrex* that final, binding decisionmaking in adjudications requires a principal officer or review of the decision by a principal officer to avoid further confusion in the lower courts.

## CONCLUSION

For the above reasons, the Court should affirm the Fifth Circuit's judgment as to the officer status of the Task Force members.

Respectfully submitted,

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