

**SUPREME COURT  
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT F. KENNEDY, JR., )  
SECRETARY OF HEALTH AND HUMAN )  
SERVICES, ET AL., )  
Petitioners, )  
v. ) No. 24-316  
BRAIDWOOD MANAGEMENT, INC., )  
ET AL., )  
Respondents. )

Pages: 1 through 114  
Place: Washington, D.C.  
Date: April 21, 2025

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6                                   Petitioners,           )

7                                   v.                        ) No. 24-316

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9   ET AL.,                                    )

10                                   Respondents.           )

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13                                   Washington, D.C.

14                                   Monday, April 21, 2025

15

16                   The above-entitled matter came on for oral

17   argument before the Supreme Court of the United

18   States at 10:03 a.m.

19

20   APPEARANCES:

21   HASHIM M. MOOPPAN, Principal Deputy Solicitor General,

22                   Department of Justice, Washington, D.C.; on behalf

23                   of the Petitioners.

24   JONATHAN F. MITCHELL, ESQUIRE, Austin, Texas; on

25                   behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 24-316,  
5 Kennedy versus Braidwood Management.

6 Mr. Mooppan.

7 ORAL ARGUMENT OF HASHIM M. MOOPPAN

8 ON BEHALF OF THE PETITIONERS

9 MR. MOOPPAN: Mr. Chief Justice, and  
10 may it please the Court:

11 Task Force members are inferior  
12 officers because they are subject to ample  
13 supervision by the Secretary in issuing  
14 recommendations that bind the public. Most  
15 importantly, the Secretary can remove Task Force  
16 members at will. His power to remove them flows  
17 from his power to appoint them acting through  
18 the director's authorities. And this Court has  
19 repeatedly recognized that at-will removal power  
20 is a powerful tool for control.

21 Moreover, the Secretary can review  
22 Task Force recommendations and prevent them from  
23 taking effect. During the minimum interval  
24 period, he can direct the Task Force to rescind  
25 a recommendation, and he can replace Task Force

1 members as needed to ensure that happens. In  
2 addition, he can require the Task Force to  
3 obtain his pre-approval before they issue any  
4 recommendation at all.

5           Given these collective powers of  
6 supervision, the Task Force cannot issue final  
7 recommendations that bind the public unless the  
8 Secretary permits them to do so.

9           Respondents' contrary argument rests  
10 entirely on the statutory language providing  
11 that the Task Force shall be independent and, to  
12 the extent practicable, not subject to political  
13 pressure. But, as this Court's cases make  
14 clear, that language does not create a  
15 restriction on removing the Task Force members,  
16 and it does not impose a bar on reviewing their  
17 recommendations.

18           It certainly does not do so clearly  
19 enough to overcome the canon of constitutional  
20 avoidance, especially since the language itself  
21 contemplates some amount of political  
22 involvement.

23           In all events, if that statutory  
24 language is the constitutional problem, then the  
25 solution is straightforward. This Court should

1 hold that the language is unenforceable and  
2 severable. It is neither necessary nor  
3 appropriate to hold instead that Task Force  
4 members must be appointed by the President and  
5 confirmed by the Senate.

6 I welcome this Court's questions.

7 JUSTICE THOMAS: Before we get to the  
8 constitutional problems, what's the statutory  
9 authority to appoint the Task Force?

10 MR. MOOPPAN: So there are two sources  
11 of authority, Your Honor. The first is that  
12 under the Reorganization Act, the Secretary has  
13 the power to exercise all functions and duties  
14 of the director, and the director, under 299,  
15 has the authority to convene the Task Force.

16 JUSTICE THOMAS: Isn't that an odd  
17 delegation? Normally, it would be the superior  
18 or the principal officer who would have the  
19 authority who would delegate it to subordinates.

20 MR. MOOPPAN: Well, it's not just a  
21 delegation, Your Honor. The Reorganization Act  
22 was in place when 299 was enacted. And so, when  
23 Congress passed 299 and said that the director  
24 could convene the Task Force, that meant that  
25 the Secretary could convene the Task Force.

1 JUSTICE THOMAS: So what -- so the  
2 word -- you're using the word "convene?"

3 MR. MOOPPAN: Yes, Your Honor.

4 JUSTICE THOMAS: Well, I think that  
5 normally connotes just calling a meeting or  
6 something. The -- court was convened this  
7 morning. The Chief didn't appoint any of us.

8 MR. MOOPPAN: So I agree, Your Honor,  
9 that "convene" doesn't necessarily connote  
10 appointment, but there's no other language in  
11 the statute that specifies who will appoint  
12 these members, and in that -- in light of that,  
13 "convene" is most naturally read to mean convene  
14 and select the people who will serve on the --  
15 on the board.

16 And that's clearly true before --  
17 before the ACA. Before the ACA was enacted,  
18 it's clear that the Secretary and the director  
19 had the power to convene these -- to appoint  
20 these individuals.

21 JUSTICE THOMAS: But appointment would  
22 not be an issue if they had no authority to  
23 require anything of -- of others. It's just  
24 advisory.

25 MR. MOOPPAN: Well, not as a

1 constitutional matter but as a statutory matter,  
2 and I took your question to be, where is the  
3 statutory authority to do this? Before the ACA,  
4 it had to be the case that the Secretary or the  
5 director had the authority. It would not be  
6 constitutional for the President to select and  
7 the Senate to confirm these individuals before  
8 the ACA because, before the ACA, everyone agrees  
9 they weren't officers. And the Senate has no  
10 constitutional power to have any role in the  
11 selection of a non-officer.

12 So the only way to construe the  
13 statute before the ACA is that the Secretary and  
14 the director had the ability, and nothing about  
15 the ACA changed that.

16 JUSTICE THOMAS: Can you give me an  
17 example of another body that's selected this way  
18 just with -- using the operative term "convene"  
19 and that had been and that the authority comes  
20 from -- through a subordinate to the principal?

21 MR. MOOPPAN: So not off the top of my  
22 head, Your Honor, but, again, the -- as a  
23 statutory matter, if we're just talking about  
24 the --

25 JUSTICE THOMAS: Yeah.



1                   MR. MOOPPAN:  -- how the statute  
2     should be construed, there is no other provision  
3     anywhere in the code that says who will pick  
4     these people.  So the most natural way of  
5     reading a provision that says that he shall  
6     convene the Task Force is to also select the  
7     people who will serve on the Task Force.

8                   JUSTICE SOTOMAYOR:  Don't you rely --

9                   CHIEF JUSTICE ROBERTS:  This is --

10                  JUSTICE SOTOMAYOR:  I'm sorry.

11                  CHIEF JUSTICE ROBERTS:  What the Task  
12     Force does is fairly technical medically and  
13     scientifically.  I mean, is the Secretary really  
14     supposed to -- the -- be in the position of  
15     going down the line and saying, yeah, I mean, I  
16     know you think we should use this particular  
17     thing with this atomic structure and all that  
18     kind of stuff, but I've got a different view on  
19     that?  Is -- is that -- is that a pertinent  
20     consideration in deciding whether they're  
21     adequately supervised?

22                  MR. MOOPPAN:  Well, Your Honor, the  
23     Secretary clearly has the authority to do so.  
24     Whether he chooses to exercise that authority or  
25     whether he instead chooses to defer to the

1 expert judgment of the -- of the Task Force  
2 isn't relevant to the constitutional question.  
3 As a constitutional matter and as a statutory  
4 matter, he has the authority to review the  
5 recommendations, and that's the critical point  
6 for here.

7 In addition, though, to take a step  
8 back, it's not just that he has the power to  
9 review their recommendations. He also has  
10 at-will removal power, which this Court has  
11 repeatedly said is a critical means of control.  
12 So, even before you get to the question of, if  
13 they issue a recommendation that they may or may  
14 not disagree with, is it going to get into the  
15 technical science of it, his mere ability to  
16 have at-will removal power is a powerful means  
17 of control. And that's what this Court has  
18 recognized in cases like Edmond and Free  
19 Enterprise Fund.

20 JUSTICE GORSUCH: Mr. Mooppan, on that  
21 score, the removal-at-will argument that the  
22 government makes hinges a lot on the assumption  
23 that the removal power comes with the  
24 appointment power and that because the Secretary  
25 has the power to appoint, he, therefore, has a

1 power to remove.

2 The Fifth Circuit didn't address the  
3 antecedent question whether the Secretary,  
4 indeed, has the power to appoint. What do we do  
5 about that? Should we -- should we remand the  
6 case to -- to assess that in the first instance?  
7 Just -- as Justice Thomas's questions point out,  
8 there seems to be some -- some reason to  
9 question that.

10 MR. MOOPPAN: Well, so I guess what I  
11 would say is the following: There is certainly  
12 no removal restriction in the statute, so  
13 whoever it is who has the ability to --

14 JUSTICE GORSUCH: Whoever it is --

15 MR. MOOPPAN: Right.

16 JUSTICE GORSUCH: -- is an important  
17 question, though, right?

18 MR. MOOPPAN: So I take the point,  
19 Your Honor, but -- in terms of the question of  
20 is there removal, at-will removal, there is  
21 at-will removal.

22 JUSTICE GORSUCH: I understand that.  
23 But -- but you say the Secretary has that  
24 at-will removal power. That's a pretty critical  
25 premise of your argument, and it's an untested

1 premise, one that the Fifth Circuit hasn't  
2 addressed and --

3 MR. MOOPPAN: So --

4 JUSTICE GORSUCH: -- and is being  
5 really addressed here for the first time, as you  
6 point out. And -- and, therefore, would you  
7 object to a -- a remand for that, consideration  
8 of that question?

9 MR. MOOPPAN: Well, we think it is  
10 fully briefed here, and we think the Court is  
11 capable of deciding it, but --

12 JUSTICE GORSUCH: Well, you also cite  
13 Cutter and tell us, you know --

14 MR. MOOPAN: Yeah.

15 JUSTICE GORSUCH: -- we're not  
16 normally a court --

17 MR. MOOPAN: Right.

18 JUSTICE GORSUCH: -- reminding us --

19 MR. MOOPPAN: So --

20 JUSTICE GORSUCH: -- as if we need it,  
21 that we're a court of review, not first view.

22 MR. MOOPPAN: So I won't object if  
23 this Court doesn't want to address that  
24 question, but we do think the answer is quite  
25 clear. For the reasons in my -- with my

1 colloquy Justice Thomas, I don't think the  
2 statute could plausibly be construed to vest the  
3 appointment in the President and confirm --  
4 confirmed by the Senate.

5 JUSTICE GORSUCH: I agree with that,  
6 but whether it appoint -- whether it -- whether  
7 it vests it in the director as opposed to the  
8 Secretary is -- is an interesting question.

9 MR. MOOPPAN: Well, but that's a very  
10 easy question because, if you agree with me it's  
11 at least in the director, the Reorganization  
12 Act, by --

13 JUSTICE GORSUCH: I understand you  
14 think it's easy. Counsel always thinks it's  
15 easy.

16 (Laughter.)

17 MR. MOOPPAN: Also --

18 JUSTICE GORSUCH: But -- but I -- I'm  
19 pretty sure Mr. Mitchell doesn't think it's  
20 quite as -- he probably thinks it's easy too,  
21 just the other way.

22 MR. MOOPPAN: Well, to be fair --

23 JUSTICE GORSUCH: And -- and -- and no  
24 court's passed on the question. And so --  
25 again, I ask: Do you have any objection if we

1       were to remand it?

2                   MR. MOOPPAN:   I -- we don't.   But, to  
3       be fair, I don't even hear Mr. Mitchell to  
4       disagree with what I'm about to say, which is  
5       that the Reorganization Act of 1966 clearly  
6       vests the Secretary with all the powers of the  
7       director.   So, if the director has the power,  
8       the Secretary has the power.

9                   JUSTICE SOTOMAYOR:   And that includes,  
10      doesn't it, subdivision (b)(2), which transfers  
11      to the Secretary the power to make such  
12      provisions as she shall deem appropriate,  
13      authorizing the performance of any of the  
14      functions of the director?

15                  MR. MOOPPAN:   That's correct, Your  
16      Honor.

17                  JUSTICE SOTOMAYOR:   And so, if they  
18      have to convene something and no one else is  
19      appointing them, then the director appoints  
20      them, right?

21                  MR. MOOPPAN:   That's right.   And,  
22      importantly --

23                  JUSTICE SOTOMAYOR:   And removes them?

24                  MR. MOOPPAN:   Correct.   And  
25      Mr. Mitchell's point about the Reorganization

1 Act, what he focused on is whether the Task  
2 Force is an advisory board. But that's  
3 irrelevant to the question we're talking about  
4 right now because that's a question about  
5 whether the Task Force powers have been vested  
6 in the Secretary.

7 JUSTICE SOTOMAYOR: Now the Chief  
8 asked you --

9 MR. MOOPPAN: The director --

10 JUSTICE SOTOMAYOR: -- the Chief asked  
11 you a question about supervising technical  
12 advice. That might be said -- be true of even  
13 us. We're given law clerks to help us on some  
14 of the things we don't know anything about.

15 That's the nature of an agency, isn't  
16 it, that they hire experts to help the  
17 decisionmakers come to a conclusion?

18 MR. MOOPPAN: Right. That was the --  
19 in -- essential reasoning and holding of Free  
20 Enterprise Fund, in fact --

21 JUSTICE SOTOMAYOR: All right.

22 MR. MOOPPAN: -- was that you can have  
23 bureaucrats but not be ruled by them.

24 So, yes, you have bureaucrats who  
25 contribute their expertise, but, ultimately,

1 the -- final decision power is in a politically  
2 accountable head of an agency.

3 JUSTICE SOTOMAYOR: And -- and that  
4 word "independent" could mean that people on the  
5 Task Force have an obligation to give their  
6 independent opinion, but that doesn't mean that  
7 the Secretary has to accept it, correct?

8 MR. MOOPPAN: That's exactly right.  
9 And I would point this Court to how this Court  
10 has described administrative law judges in -- in  
11 Butz versus Economou.

12 JUSTICE ALITO: I mean, that's an --  
13 an incredibly strained interpretation of the  
14 term "independent."

15 Are you independent of the President?

16 MR. MOOPPAN: No, Your Honor.

17 JUSTICE ALITO: I mean, he's -- he is  
18 counting on you to exercise a degree of  
19 independent judgment. But, if somebody's  
20 removable at will, that person is not in any  
21 ordinary sense of the term "independent."

22 MR. MOOPPAN: Well, with all due  
23 respect, Your Honor, in Your Honor's opinion for  
24 the Court in Collins, this Court held that there  
25 are many statutes that use the phrase



1 "independent" to describe an entity that is  
2 nevertheless not subject to a removal.

3 JUSTICE ALITO: All right. Well,  
4 maybe that's a little bit unfair. But, I  
5 mean -- maybe I was wrong in Collins. But  
6 explain to me --

7 (Laughter.)

8 JUSTICE ALITO: You know, explain to  
9 me how somebody can be independent and yet  
10 subject to removable on the whim of the  
11 President.

12 MR. MOOPPAN: Sure, it's -- as -- as  
13 Justice Sotomayor said, it's independent in the  
14 sense that they have both the duty and the power  
15 to exercise their own best judgment. That  
16 doesn't mean that once they've done so, they're  
17 free from accountability.

18 It just means that when they're making  
19 the decision, they have an obligation to  
20 exercise their best scientific judgment.

21 JUSTICE KAVANAUGH: So is -- go ahead.

22 JUSTICE ALITO: Well, let's say they  
23 are removable at will, okay, and "independent"  
24 means something. Well, it's like a precatory  
25 directive.

1                   Still, if the Task Force rates  
2           something A or B, then that's it. And you try  
3           to get -- and -- and even if the members are  
4           removable at will, the only way you can get  
5           around that is through a really -- some really  
6           jerry-built arguments.

7                   MR. MOOPPAN: I don't think so, Your  
8           Honor. Let me give you the most straightforward  
9           of them. Under the statute itself, no  
10          recommendation takes effect until the Secretary  
11          sets the minimum interval period.

12                  JUSTICE ALITO: Right, right.

13                  MR. MOOPPAN: And the minimum --  
14          interval period is at least one year.

15                  JUSTICE ALITO: Yeah.

16                  MR. MOOPPAN: So one year is more than  
17          adequate time for the Secretary, if he doesn't  
18          agree with the recommendation, to direct the  
19          board to rescind it, the force to rescind it  
20          and, if the Task Force doesn't rescind it, to  
21          replace them with people who will. That doesn't  
22          seem very jerry-built to me.

23                  In addition to that, the Secretary  
24          also has the power to create a pre-approval  
25          requirement. Under 300gg-92, he has rulemaking

1 power to implement the statute, and he can say:  
2 Before you issue any recommendations, submit it  
3 to me for my approval, and if and only if I  
4 approve it can you issue it in the first place.

5 Again, that's not all that  
6 jerry-built, and it perfectly preserves --

7 JUSTICE ALITO: And if -- if -- if  
8 Congress really wanted these Task Force members  
9 to do the bidding of the Secretary, isn't that  
10 an incredibly odd way to go about conferring  
11 that authority?

12 MR. MOOPPAN: No, because, critically,  
13 we are not saying that Congress wanted the Task  
14 Force to do the Secretary's bidding. We agree  
15 that the -- the Secretary cannot tell the Task  
16 Force to make a given recommendation.

17 If the Task Force doesn't want to make  
18 a recommendation, it doesn't have to make a  
19 recommendation. Our point is simply that if the  
20 Task Force does make a recommendation, the  
21 Secretary can block it.

22 It's -- to use an analogy, it's like  
23 bicameralism. The Senate can't force the House  
24 to pass a bill. But, if the Senate doesn't also  
25 agree with the bill, it doesn't become a law.

1 JUSTICE ALITO: Well, under the  
2 argument that you just made, why can't the  
3 Secretary demand that a particular  
4 recommendation be made using exactly the same  
5 authority that you just outlined?

6 What am I missing? The President  
7 says: I want you to make this recommendation,  
8 and if you don't make this recommendation, I'm  
9 going to remove you and replace you with  
10 somebody who will make the recommendation.

11 MR. MOOPPAN: So he can remove them,  
12 but we don't think he has the ability to force  
13 them to make the recommendation because we do  
14 think that that -- the phrase "independence"  
15 and, more importantly, the phrase "the  
16 recommendations made shall be independent" in  
17 299b-4(a)(6), we do think that that language  
18 does prevent that.

19 And that makes perfect sense. If you  
20 take a step back and think about the statutory  
21 scheme, Congress was, as it often does,  
22 balancing competing objectives. On the one  
23 hand, it wanted the benefits of an expert body.  
24 It wanted recommendations that reflected their  
25 best scientific judgment. But, on the other

1 hand, it recognized that you need to have  
2 political accountability.

3 And so the Secretary can block it,  
4 but -- and that solves the problem. It means  
5 that no final decision could be made that binds  
6 the public unless the Secretary approves it.

7 JUSTICE BARRETT: But, Mr. Mooppan,  
8 doesn't that make it difficult for you in your  
9 inferiority argument? Because what if it's a  
10 big priority of the President to have these  
11 AIDS-prevention drugs available and the Task  
12 Force says no, not -- not going to do it?

13 I mean, doesn't it seem then that that  
14 insulates them, especially if -- you know,  
15 Justice Alito said, well, what if you fire him  
16 and say: I'm going to appoint a Task Force who  
17 will approve these as preventative care?

18 MR. MOOPPAN: So two points about  
19 that, Your Honor. The first is I think this  
20 Court has already resolved that question in Free  
21 Enterprise Fund.

22 So, in Free Enterprise Fund, this  
23 Court held that once the PCAOB was made  
24 removable at will by the Commission, they were  
25 inferior officers. Even though it was conceded

1     there was no statutory authority whatsoever for  
2     the Commission to force the PCAOB --

3                 JUSTICE BARRETT:   So that's enough?  
4     Your position -- because it was a little bit  
5     difficult to tell in your brief.  You're saying  
6     that's enough?  At-will removal is all that's  
7     required?

8                 MR. MOOPPAN:   No, that's not what I'm  
9     saying, Your Honor.  We have said that it's both  
10    the at-will removal power plus the powers of  
11    supervision we've talked about.  But,  
12    critically, those are powers of supervision to  
13    block recommendations.

14                Your -- you asked me, well, what about  
15    forcing them to make a recommendation?

16                As to forcing them to make a  
17    recommendation, my -- our point is you don't  
18    need supervision in that respect.  Free  
19    Enterprise Fund already holds that as long as  
20    they're removable at will, the fact that you  
21    can't force them to take action is -- does not  
22    make them --

23                JUSTICE KAVANAUGH:  Can't you force --

24                JUSTICE KAGAN:  Why is this --

25                JUSTICE KAVANAUGH:  Go ahead.

1                   MR. MOOPPAN: I -- I -- I -- the last  
2                   thing I was going to say, which I -- perhaps  
3                   Justice Kavanaugh was about to say, is you do  
4                   still have at-will removal power in that  
5                   context, and so, therefore, you do have some  
6                   means of ensuring the recommendation gets made.  
7                   It's just the means is replacing them if they  
8                   won't do it, but you don't have statutory  
9                   authority to force them to start. And Free  
10                  Enterprise Fund already blesses that  
11                  arrangement.

12                 JUSTICE KAGAN: Well, why is it that  
13                  in your brief and again here you're reluctant to  
14                  say that the removal power is sufficient?

15                 MR. MOOPPAN: Well, we just don't  
16                  think your -- the Court needs to go that far.  
17                  This Court has always, in cases like Edmond and  
18                  Free Enterprise Fund, taken an incremental  
19                  approach to how it determines the line between  
20                  inferior and principal officers.

21                 And we think, in this case, where  
22                  there's both at-will removal plus abundant means  
23                  of back-end supervision, that's all this Court  
24                  needs do.

25                 And to be candid, I think there would

1 be harder questions if, for example, you had an  
2 officer who had the power to issue very  
3 important, very broad-ranging decisions that  
4 had -- took immediate effect, couldn't be  
5 stopped on the back end, and the only means of  
6 supervision was front-end removal.

7 We haven't taken a position one way or  
8 the other on that, but I do think that that's a  
9 harder question, and that's why we don't think  
10 this Court needs to go there.

11 But that said, you don't have to go  
12 very much further than that on the facts of this  
13 case because, here, it's -- you would -- not  
14 only do you have at-will removal, you have the  
15 critical difference that the recommendations  
16 don't take effect immediately. They don't take  
17 effect for at least a year, and within that year  
18 period, the Secretary has ample time to ensure  
19 they never take effect.

20 And so those two alone, we're  
21 perfectly comfortable saying that that's  
22 sufficient for inferior officers.

23 JUSTICE JACKSON: Mr. Mooppan, can I  
24 go back to Justice Gorsuch's questions about  
25 at-will removal? Because he at least suggested



1     that we may not have at-will removal here, and I  
2     guess I'm wondering about the presumptions in  
3     our law related to the removability of officers.

4             So do we really need to send it back  
5     for resolution of that if the law presumes that  
6     where there is no statement regarding this,  
7     at-will removal is at play?

8             MR. MOOPPAN:   So, again, Your Honor,  
9     I -- I agree.  I don't think there's any  
10    colorable argument that there's a removal  
11    restriction here.  The only colorable dispute  
12    is whether there's actually appointment  
13    authority --

14            JUSTICE JACKSON:  Right.  And what  
15    does our law say about that situation?  I mean,  
16    part of the problem here, I think, is that we  
17    are talking about a statute that doesn't speak  
18    to particular things.

19            MR. MOOPPAN:  I think what --

20            JUSTICE JACKSON:  And so, to the  
21    extent that the law doesn't speak to the  
22    removability of these people, I thought our  
23    presumption was that we do have at-will removal.

24            MR. MOOPPAN:  Yes.  The presumption is  
25    that there is at-will removal by whoever has

1     appointment authority. And I think the question  
2     with Justice Gorsuch is, who is the person who  
3     has appointment authority? I don't think  
4     there's any serious dispute that whoever it is  
5     has at-will removal power because --

6             JUSTICE JACKSON: And so do you think  
7     we need to get to the bottom of who it is --

8             MR. MOOPPAN: Well, yeah.

9             JUSTICE JACKSON: -- in this case?

10            MR. MOOPPAN: Either here or on  
11     remand, of course, if -- we need to be right  
12     that the Secretary does have appointment  
13     authority to defeat their claim. We think that  
14     the Secretary does have appointment authority.  
15     We think it's clear enough from the statute.

16            JUSTICE JACKSON: Who would it be if  
17     it isn't the Secretary?

18            MR. MOOPPAN: Well, I -- in my view,  
19     the only other colorable reading of the statute  
20     is that it would be the director because the  
21     statute says the director shall convene.

22            But, of course, that would render the  
23     statute unconstitutional because the director is  
24     not the head of the department. And so that's  
25     yet another reason why you should read the

1 statute the way we suggest, that when it says  
2 the director, under the backdrop of a statute  
3 that vests all powers in the director and the  
4 Secretary, the Secretary has the power.

5 My friend on the other side, his move  
6 is to say: No, no, no, it's the President who  
7 has the appointment authority confirmed by the  
8 Senate, invoking the backdrop principle that  
9 under the Appointments Clause, presidential  
10 appointment and Senate confirmation is the  
11 default rule for appointment.

12 But the reason that doesn't work, as I  
13 was discussing earlier, is, before the ACA,  
14 these were not officers. And if they were not  
15 officers, it would be unconstitutional for the  
16 Senate to have any role in their confirmation.  
17 So you cannot read the statute to have  
18 presidential appointment and Senate confirmation  
19 before the ACA, and nothing in the text of the  
20 statute changed after the ACA about who does the  
21 appointing.

22 JUSTICE KAVANAUGH: I think you said  
23 earlier that at-will removal gives the Secretary  
24 the power to influence the content of  
25 recommendations before they're made.

1                   Is that accurate?

2                   MR. MOOPPAN: I think that's correct,  
3           Your Honor.

4                   JUSTICE KAVANAUGH: And then --  
5           because that comes from the at-will removal  
6           power, correct?

7                   MR. MOOPPAN: Correct.

8                   JUSTICE KAVANAUGH: And how is that  
9           then square with the word "independent?"

10                  MR. MOOPPAN: Because it's still the  
11           Task Force ultimate judgment that matters. Yes,  
12           there will be -- they can consider what the  
13           Secretary wants, they may be even influenced by  
14           the fact that if they don't do what he wants,  
15           they might get removed, but it's still  
16           ultimately their call as a statutory matter. So  
17           I would point, for example, the Benefits Review  
18           Board --

19                  JUSTICE KAVANAUGH: That's an odd  
20           definition of "independent," I suppose. Does  
21           "independent" in this context have any different  
22           meaning because the folks in question are not  
23           government employees, that they have outside  
24           affiliations, their employers or wherever  
25           they're affiliated with?

1                   MR. MOOPPAN: Well, they -- well, we  
2     do think that they are officers of the United  
3     States, and we do think they're government  
4     employees. But your point that they have other  
5     affiliations as well, we do think that's part of  
6     why it uses --

7                   JUSTICE KAVANAUGH: They're not paid,  
8     right?

9                   MR. MOOPPAN: The -- yes, they -- they  
10    are volunteers. But we do think the fact --  
11    that's part of the reason why it uses the phrase  
12    "independent" to underscore that it's not just  
13    that they have the power to make the judgment  
14    based on their best scientific judgment; they  
15    have the duty. They have --

16                  JUSTICE KAGAN: But I hear you as not  
17    relying on the notion that "independence" in  
18    that provision means independent from, you know,  
19    your university or your think tank or something  
20    like that, that you think that the word  
21    "independent" here does mean independent from  
22    political influences and particularly from  
23    presidential ones?

24                  MR. MOOPPAN: Well, in making the  
25    recommendation, we think that they have to

1 exercise their best scientific judgment free  
2 from -- all of it. They shouldn't do what, you  
3 know, their university tells them to do. They  
4 shouldn't necessarily do what the Secretary  
5 tells them to do. They should exercise their  
6 independent judgment based on the science.

7 JUSTICE KAVANAUGH: But the Secretary  
8 might say -- and I think you acknowledged  
9 this -- if you don't make the following  
10 recommendation, I'm going to fire you.

11 MR. MOOPPAN: That's right. And so  
12 the analogy I would give, Your Honor --

13 JUSTICE KAVANAUGH: That's okay,  
14 right?

15 MR. MOOPPAN: Yes. The analogy I  
16 would give you is the Benefits Review Board in  
17 the Department of Labor. So the Benefits Review  
18 Board in the Department of Labor is an  
19 adjudicatory body that every -- is at-will  
20 removable. Because they adjudicate cases, they  
21 should adjudicate cases based on their view of  
22 the facts and the law. But it's true that if  
23 the Secretary tells them, look, you -- come out  
24 one way, you're going to get fired, they might  
25 get fired. But they should still exercise their

1 independent best judgment when they issue the  
2 ruling.

3 JUSTICE KAVANAUGH: And that --

4 JUSTICE KAGAN: Well, what's this  
5 language "to the extent practicable" doing?

6 MR. MOOPPAN: So, I -- look, I think  
7 that that -- it's not entirely clear, Your  
8 Honor, but I think that, if anything, it  
9 underscores our point that you should not read  
10 this statute, especially in light of  
11 constitutional avoidance, to say that the  
12 Secretary can't -- exercise the types of review  
13 we've said --

14 JUSTICE KAGAN: I mean, it does  
15 suggest that Congress was thinking, in some  
16 circumstances, it would not be practicable.

17 MR. MOOPPAN: Right. There's at  
18 least --

19 JUSTICE KAGAN: And what circumstances  
20 would Congress be thinking that about?

21 MR. MOOPPAN: Well, at a bare minimum,  
22 the circumstances where the statute would be  
23 unconstitutional if the Secretary couldn't  
24 engage in that level of supervision. So I --  
25 again, I think that that language just

1     underscores the constitutional avoidance point  
2     that the limited forms of review that -- on the  
3     back end that we've emphasized have got to be  
4     permissible under that statute both because it  
5     has that language in it and because the canon of  
6     constitutional avoidance says you should read it  
7     that way.

8             And, again, going back to the  
9     adjudicators, it's not just the Benefits Review  
10    Board. More generally, under the APA, the  
11    statutory scheme for adjudication has exactly  
12    this feature to it. You have adjudicators who  
13    are tasked with exercising independent judgment,  
14    but their actions on the back end can be  
15    reviewed.

16            JUSTICE KAVANAUGH: Yeah, I understand  
17    the analogy to adjudicators, and I thought  
18    that's what was in your brief, but, normally,  
19    you wouldn't say with adjudicators that the  
20    supervising officer can influence the content of  
21    the adjudication.

22            MR. MOOPPAN: Well, yes, and --

23            JUSTICE KAVANAUGH: That they can only  
24    review the adjudication after it's been made.

25            MR. MOOPPAN: Well, but they also --



1     you know, as the Benefits Review Board says, you  
2     can also influence -- you have at-will removal,  
3     and every one of these adjudicators knows --

4             JUSTICE KAVANAUGH:   Right.

5             MR. MOOPPAN:   -- that they're acting  
6     under the shadow of that.  So, you know, does  
7     that affect them?  Perhaps.  But their duty and  
8     their power is still to make the decision based  
9     on their best judgment.

10            Perhaps one way of making the point  
11   is --

12            JUSTICE KAVANAUGH:  And that's --  
13   so -- so you're making the analogy, though, to  
14   adjudicators here, right?

15            MR. MOOPPAN:  Yeah.

16            JUSTICE KAVANAUGH:  You think that's a  
17   good analogy?  And because their --  
18   recommendations can be reviewed before they take  
19   effect, it's similar to all the adjudication  
20   cases where there's been supervising --  
21   supervisor review of the ultimate decision?

22            MR. MOOPPAN:  That's right.  And one  
23   way of making the point is, for these  
24   individuals, if the Secretary tells them to do  
25   something and they don't do it, they do the

1     opposite and make a different recommendation,  
2     that's not insubordinate, right, because they  
3     have statutory power to make their independent  
4     best judgment.

5                 For most inferior officers, if the  
6     President -- or the head of -- of your agency  
7     tells to you do X and you do Y, that is  
8     insubordinate. So that's what the language  
9     does.

10                Now that doesn't mean that you need to  
11     be protected from removal on the back end. You  
12     can be independent, make your own statutory  
13     judgments, but then have to face the  
14     consequences if the head of the agency disagrees  
15     with those.

16                CHIEF JUSTICE ROBERTS: Thank you,  
17     counsel.

18                Justice Thomas, anything further?

19                JUSTICE THOMAS: Just briefly. What  
20     role did you say the Reorganization Act played  
21     with respect to the Task Force?

22                MR. MOOPPAN: So -- so several roles.  
23     The first is, on the appointment question, we  
24     think that the Reorganization Act is a way  
25     that -- to confirm that the -- the Secretary has

1 the direct appointment authority with respect to  
2 the Task Force members.

3 JUSTICE THOMAS: Now is the Task  
4 Force -- I thought the reorganization dealt with  
5 agencies within HHS.

6 MR. MOOPPAN: That's correct, Your  
7 Honor.

8 JUSTICE THOMAS: Is the Task Force an  
9 agency?

10 MR. MOOPPAN: We think the Task Force  
11 is within the AHRQ and within PHS, so it's  
12 within --

13 JUSTICE THOMAS: So what -- what  
14 supports that?

15 MR. MOOPPAN: Well, it is an entity  
16 that is convened by the Public Health Service,  
17 selected by the Public Health Service,  
18 supervised by the Public Health Service, and  
19 supported --

20 JUSTICE THOMAS: Now is it  
21 structurally -- is it -- is -- is it  
22 structurally or statutorily designated a part of  
23 an agency?

24 MR. MOOPPAN: Again, I -- there's not  
25 anything that says they are or aren't, but I

1 think the clear best reading of the statute is,  
2 when you have an entity that's convened by the  
3 Public Health Service, selected by the Public  
4 Health Service, supervised by the Public Health  
5 Service, and supported by the Public Health  
6 Service, it's part of the Public Health Service.

7 CHIEF JUSTICE ROBERTS: Justice Alito?

8 JUSTICE ALITO: No.

9 CHIEF JUSTICE ROBERTS: No?

10 Justice Sotomayor?

11 JUSTICE SOTOMAYOR: There are any  
12 number -- I think we mentioned them in our --  
13 the opinion in Collins I -- that are deemed  
14 independent, but the President still has the  
15 power to remove the leadership, correct?

16 MR. MOOPPAN: Correct.

17 JUSTICE SOTOMAYOR: I know that -- it  
18 seems to me that if the Task Force members are  
19 not paid, that that means that they would take  
20 their oath more seriously, wouldn't it, because  
21 they're not afraid of losing a government job?

22 MR. MOOPPAN: I -- I'm not sure I  
23 would get it -- psychoanalyze them that way.  
24 I -- I --

25 JUSTICE SOTOMAYOR: No, no, but my

1 colleagues are. They're saying that because  
2 they could be removed, they're going to  
3 automatically ignore their statutory duty.

4 MR. MOOPPAN: Look, I think that they  
5 will exercise their statutory duty, and I  
6 think --

7 JUSTICE SOTOMAYOR: Which is to give a  
8 recommendation --

9 MR. MOOPPAN: Right.

10 JUSTICE SOTOMAYOR: -- independently.

11 MR. MOOPPAN: But I -- I would say --  
12 I -- I wouldn't say that means that the removal  
13 power isn't a means of supervision and  
14 influence.

15 JUSTICE SOTOMAYOR: Obviously. But I  
16 go back to the examples I've made, which is my  
17 law clerks I ask to give me their independent  
18 judgment of what an answer should be, and  
19 they'll tell you there are some times -- a lot  
20 of times I don't accept it, and I certainly have  
21 the power to fire them, and they still do it.

22 (Laughter.)

23 MR. MOOPPAN: Correct, Your Honor.

24 JUSTICE SOTOMAYOR: All right. That's  
25 the nature of asking people to advise you,

1 correct?

2 MR. MOOPPAN: Yes.

3 JUSTICE SOTOMAYOR: Which some advice  
4 you'll accept, some you won't. And you can  
5 choose to ignore your obligation, but that's not  
6 something we presume you'll do?

7 MR. MOOPPAN: Correct.

8 JUSTICE SOTOMAYOR: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?  
10 Justice Gorsuch?

11 JUSTICE GORSUCH: So I understand that  
12 you -- you agree that they -- the -- the  
13 government -- the Secretary cannot force a  
14 recommendation but lean heavily on the fact it  
15 can -- the Secretary can stop recommendations.

16 I think your best authority for that  
17 may be Section 202 if I'm correct. You tell me  
18 if I'm wrong. And what in 202, if it is your  
19 best authority, gives the Secretary that power?

20 MR. MOOPPAN: Well, so it's -- not  
21 quite, Your Honor. I -- I -- the basis for the  
22 distinction is coming from 299b-4(a)(6). We  
23 think the statutory language says that they  
24 shall be independent in the recommendations  
25 made. And so we think that means that they get

1 to make their recommendations, but that doesn't  
2 necessarily mean that those recommendations have  
3 to take effect.

4 JUSTICE GORSUCH: Right. I understand  
5 that.

6 MR. MOOPPAN: Now the statutory  
7 power --

8 JUSTICE GORSUCH: Yeah.

9 MR. MOOPPAN: -- to block them, we  
10 agree, is both 202 --

11 JUSTICE GORSUCH: Yeah.

12 MR. MOOPPAN: -- and the  
13 Reorganization Act.

14 JUSTICE GORSUCH: Okay. And focusing  
15 on 202 in particular and putting aside the  
16 Reorganization Act for the moment, what in that  
17 empowers the Secretary to stop a recommendation  
18 from taking effect?

19 MR. MOOPPAN: Well, so the Assistant  
20 Secretary for Health, who is supervised and  
21 directed by the Secretary, shall administer the  
22 entire Public Health Service. And the ability  
23 to administer an agency is the language Congress  
24 generally uses to describe an agency head's  
25 power to control the whole agency.

1           As we cited in the reply brief, that's  
2   the language that govern -- allows the Secretary  
3   of State to administer the entire State  
4   Department, is the Secretary of State shall  
5   administer.

6           So we think that if it weren't for  
7   b-4(a)(6), there would be no question at all  
8   that the Assistant Secretary and, therefore, the  
9   Secretary could direct what the Task Force does  
10   root and branch, from front to end.

11           Because of b-4(a)(6), we acknowledge  
12   that the specific governs the general, and they  
13   have to be independent in making their  
14   recommendations.

15           JUSTICE GORSUCH: Yeah.

16           MR. MOOPPAN: But that doesn't mean  
17   that they can't be blocked on the back end.

18           JUSTICE GORSUCH: Appreciate that.  
19   Thank you.

20           CHIEF JUSTICE ROBERTS: Justice  
21   Kavanaugh?

22           JUSTICE KAVANAUGH: I might have  
23   misunderstood that, but I thought you were also  
24   relying on 300gg-13(b)(1) for the authority to  
25   reject a recommendation?



1           MR. MOOPPAN: Well, that gives the  
2     authority to delay the effective date. But then  
3     you need some other source of authority to then  
4     make the recommendation go away.

5           JUSTICE KAVANAUGH: So that's just the  
6     when, that's not the whether?

7           MR. MOOPPAN: Correct.

8           JUSTICE KAVANAUGH: Okay. Thank you.

9           CHIEF JUSTICE ROBERTS: Justice  
10    Barrett?

11          JUSTICE BARRETT: I just want to  
12    clarify what you mean by the word "independent"  
13    or how you understand it. I mean, Mr. Mitchell  
14    is reading it in a very maximalist way. You are  
15    taking a middle road.

16          I -- I -- I wonder -- I mean, I was  
17    thinking of a law clerk example myself. Does  
18    "independent" even have to mean independent of  
19    the Secretary? Because it seems to me that I  
20    could give my law clerk some advance direction.  
21    I could say: I want you to make an independent  
22    judgment and I want it to be free of political  
23    influence or free of outside influence. And by  
24    that, I would mean outside the Court, I might  
25    mean outside of our chambers, but I might not

1 mean for it to be apart from me, not independent  
2 of me.

3 And I could even do that ex ante. I  
4 could say: Give me your best understanding of  
5 this statute, which -- your -- your best take on  
6 its interpretation, seen through the lens of,  
7 you know, the way I interpret statutes, the way  
8 I see law.

9 So not entirely independent. If you  
10 see statutes -- I mean, so, you know, I -- I  
11 don't put a huge amount of stock in legislative  
12 history. So, if I say: You know, give me your  
13 best reading of the statute and that's what they  
14 bring back, that's not going to be very useful  
15 to me.

16 So they're not independent of me or my  
17 instruction even though I could say they were  
18 independent in a very real sense of the word.  
19 But I take it that you don't adopt that view?

20 MR. MOOPPAN: So, Your Honor, we could  
21 have taken an even narrower interpretation of  
22 "independence" along the lines you're  
23 suggesting. We thought the better reading of  
24 the statute in light of its context is the one  
25 we have articulated, where there is independence

1 in the recommendation made even vis-à-vis the  
2 Secretary.

3 JUSTICE BARRETT: Even vis-à-vis the  
4 Secretary.

5 MR. MOOPPAN: But it doesn't block the  
6 Secretary on the back end.

7 Of course, if you want to interpret  
8 the statute even more narrowly than that, then  
9 that just makes it -- it even harder for  
10 Mr. Mitchell.

11 JUSTICE BARRETT: Well, I mean, I  
12 think the fact that you could interpret it and,  
13 I think, give content to the word "independence"  
14 in an even narrower sense, I mean, you have a  
15 more middle of the road, and then, as I said, I  
16 think Mr. Mitchell has a really maximalist view,  
17 I mean, at a --

18 MR. MOOPPAN: Right.

19 JUSTICE BARRETT: -- at a minimum, I  
20 think it shows that the maximalist view isn't  
21 necessary.

22 MR. MOOPPAN: I -- I think that's  
23 right, Your Honor. And, again, ultimately, I  
24 think one way of thinking about this is this is  
25 an Appointments Clause challenge, so the

1 question is whether there is adequate  
2 supervision.

3 The Court doesn't necessarily need to  
4 get into the exact level of what "independent"  
5 means and does it mean what you said or what I  
6 said. All we -- the Court really needs to say  
7 is there's enough supervision that these are  
8 properly understood as inferior officers.

9 That's all you need to do to reject  
10 the claim here and reverse the decision below.

11 JUSTICE BARRETT: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Jackson?

14 JUSTICE JACKSON: And we also can rely  
15 on the constitutional avoidance canon. I mean,  
16 didn't you -- you mentioned it a couple times.  
17 So let me just invite you to explain how that  
18 would work in terms of deciding who has the  
19 better reading of "independence."

20 MR. MOOPPAN: Sure. And, so, you  
21 know, we do think we have the better reading.  
22 But, if you thought there was ambiguity here  
23 about what the scope of "independence" was or  
24 whether the appointment power was vested in the  
25 Secretary rather than just the director, this

1 Court obviously reads statutes to avoid  
2 constitutional problems rather than create them.

3 So you shouldn't read the phrase  
4 "independent" to impose a removal restriction  
5 that's not there, to impose a bar on review  
6 that's not there, to impose restrictions on who  
7 can appoint that aren't there.

8 You should read the statute to  
9 reinforce that the Secretary has adequate  
10 supervision so that the statute, as written by  
11 Congress, can continue to operate.

12 And Mr. Mitchell's only real response  
13 to all of that is, again, to say, well, the  
14 statute's actually perfectly constitutional on  
15 even his theory because he thinks the President  
16 can appoint and the Senate can confirm.

17 But that doesn't work as a statutory  
18 matter for the reasons we discussed. And once  
19 you take that off the table, his reading does  
20 create serious constitutional problems with the  
21 statute that you can void if you adopt our  
22 reading.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Mr. Mitchell.

2 ORAL ARGUMENT OF JONATHAN F. MITCHELL

3 ON BEHALF OF THE RESPONDENTS

4 MR. MITCHELL: Mr. Chief Justice, and  
5 may it please the Court:

6 The court of appeals correctly held  
7 that Task Force members are principal officers  
8 who must be appointed by the President and the  
9 Senate, as required by Article II. They cannot  
10 be inferior officers because their task --  
11 because their preventive care coverage mandates  
12 are neither directed nor supervised by the  
13 Secretary of Health and Human Services or by  
14 anyone else who has been appointed as a  
15 principal officer.

16 The governing statutes make this  
17 clear. Section 300gg-13(a)(1) gives the Task  
18 Force alone the prerogative to impose preventive  
19 care coverage mandates on insurers regardless of  
20 whether the Secretary approves or disapproves a  
21 Task Force recommendation.

22 And Section 299b-4(a)(1) and (a)(6)  
23 require the Task Force members and their  
24 recommendations be kept independent and, to the  
25 extent practicable, protected from any type of

1 political pressure.

2           These statutes cannot co-exist with a  
3 regime in which the Secretary can overrule the  
4 Task Force coverage recommendations or deny them  
5 binding effect.

6           The Court also has no authority to  
7 sever Section 299b-4(a)(6), as proposed by the  
8 government. The remedy prescribed by this Court  
9 must take the form of a final judgment to be  
10 entered by the district court on remand.

11           And a federal district court has no  
12 authority and no ability to formally revoke or  
13 cancel a statutory provision when entering  
14 judgment for a party. More importantly, a  
15 remedy from this Court must, to the maximum  
16 possible extent, respect the will of Congress as  
17 reflected in its enacted laws.

18           Congress has chosen to create an  
19 independent Task Force and shield it from  
20 political pressure, and the plaintiffs' proposed  
21 remedy honors that congressional decision.

22           The government's proposed remedy would  
23 rewrite the statute into something  
24 unrecognizable by the Congress that enacted the  
25 ACA. And it is not even clear that Congress

1 would have approved a regime in which  
2 politicians, rather than an independent Task  
3 Force, decide the preventive care that insurers  
4 must cover.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Mr. Mitchell, your  
7 argument depends on a much broader reading of  
8 "independent" than the government's. Would you  
9 address the government's -- more limited view of  
10 "independence?"

11 MR. MITCHELL: Well, there are two  
12 different words in play here. It's not just the  
13 word "independent," which appears in both  
14 Section 299b-4(a)(1) and (a)(6). It's also the  
15 phrase in subsection (a)(6) that says the Task  
16 Force is to be protected from political pressure  
17 to the extent practicable.

18 And we don't see any way that  
19 statutory language can be squared with the  
20 regime envisioned by the government, where the  
21 Secretary can come in and influence the Task  
22 Force decisions on the front end, which  
23 Mr. Mooppan once again acknowledged at oral  
24 argument he believes the Secretary can do that.  
25 And we don't see how that can be squared with



1 the actual statutory language.

2 Mr. Mooppan suggests invoking the  
3 canon of constitutional avoidance in a way to  
4 bend subsection (a)(6) to make it more  
5 accommodating of his view of secretarial power.  
6 But the constitutional avoidance canon is  
7 inapplicable here for many reasons.

8 Number one, Mr. Mooppan's proposed  
9 reading of subsection (a)(6) does not avoid any  
10 of the constitutional problems that occurred.

11 Under the government's interpretation  
12 of subsection (a)(6), the Task Force members are  
13 still principal officers because they have  
14 unreviewable discretion when deciding not to  
15 recommend A or B ratings on a particular  
16 preventive care or service or when they decide  
17 to withdraw a previous A or B rating that they  
18 have conferred prior to their decision to  
19 withdraw. That means they have final  
20 decisionmaking authority that's not subject to  
21 direction and supervision.

22 The second point --

23 JUSTICE JACKSON: I -- I don't -- I'm  
24 sorry, I don't understand that. The -- can you  
25 help?

1 MR. MITCHELL: Yes.

2 JUSTICE JACKSON: What -- what do you  
3 mean, they have unreviewable authority? I --  
4 first of all, I thought there was an interval  
5 period that the statute imposed.

6 MR. MITCHELL: That's right.

7 JUSTICE JACKSON: What -- what  
8 function is that if not to have some  
9 consideration of what these recommendations are?  
10 That's one question.

11 MR. MITCHELL: Sure.

12 JUSTICE JACKSON: And then another is:  
13 What -- what do you mean about them having  
14 unreviewable discretion not to make a  
15 recommendation?

16 MR. MITCHELL: So the test for  
17 principal officer status is whether the officer  
18 in question is directed and supervised in his  
19 decisionmaking. On the government's reading of  
20 Section 299b-4(a)(6), if the Court were to adopt  
21 that view, the Secretary would have the ability  
22 to overrule Task Force decisions to confer A or  
23 B ratings on preventive care. But the Secretary  
24 would not have any authority to overrule the  
25 Task Force --

1 JUSTICE JACKSON: But why is that?

2 MR. MITCHELL: -- if it decides --

3 JUSTICE JACKSON: Why is that? I

4 mean, the -- the year --

5 MR. MITCHELL: There's --

6 JUSTICE JACKSON: They make a

7 recommendation --

8 MR. MITCHELL: Mm-hmm.

9 JUSTICE JACKSON: -- and they have

10 rejected other recommendation -- or --

11 MR. MITCHELL: Right.

12 JUSTICE JACKSON: -- other options.

13 The Secretary puts into place the interval

14 period, reviews what they did and didn't do --

15 MR. MITCHELL: Mm-hmm.

16 JUSTICE JACKSON: -- and says I'm

17 going to remove you as a result. I, you know, I

18 don't like what you did or didn't do and you're

19 out.

20 MR. MITCHELL: That doesn't make them

21 into inferior officers. And Arthrex holds as

22 much because Arthrex acknowledges situations in

23 which a principal officer can, through informal

24 means, influence the decisionmaking of a

25 subordinate official. And Arthrex says that's

1 still not good enough. There has to be a formal  
2 authority to review the decisions that are being  
3 made. And what --

4 JUSTICE JACKSON: But what about all  
5 the -- what about all the adjudicatory cases?  
6 Mr. Mooppan says --

7 MR. MITCHELL: Right.

8 JUSTICE JACKSON: -- this is more like  
9 Edmond.

10 MR. MITCHELL: Right.

11 JUSTICE JACKSON: This is -- this is  
12 independent in the sense that people are making  
13 recommendations using their own best judgment,  
14 but they're still at-will removable, and we've  
15 found that is okay.

16 MR. MITCHELL: But they are -- also  
17 have all their decisions subject to review by a  
18 principal officer. What this Court said in  
19 Edmond was that the reason those judges were  
20 deemed inferior was because they could not issue  
21 any final decision on behalf of the United  
22 States without being allowed to do so by a  
23 principal officer. That is --

24 JUSTICE GORSUCH: Mr. Mitchell, I -- I  
25 take that point, and the government concedes

1     that a -- a decision not to list something is  
2     unreviewable --

3                 MR. MITCHELL:   Yes.

4                 JUSTICE GORSUCH:  -- but says that  
5     Free Enterprise Fund blessed that arrangement  
6     already.

7                 MR. MITCHELL:   No.

8                 JUSTICE GORSUCH:  What are your  
9     thoughts?

10                MR. MITCHELL:   The difference in Free  
11     Enterprise Fund was the SEC had all sorts of  
12     supervisory authority over the PCAOB, the Public  
13     Accounting -- the Public Company Accounting  
14     Oversight Board that is not present here.  The  
15     SEC could review and alter any rulemaking done  
16     by the board.  The SEC could review and overrule  
17     any sanction that was being imposed by the  
18     board.  And if you look at page --

19                JUSTICE GORSUCH:  But what about a  
20     non-action by the board?

21                MR. MITCHELL:   Well, if you look at  
22     page 504 of the Court's opinion in Free  
23     Enterprise Fund, it lists all the ways in which  
24     the SEC had these oversight authorities.  And  
25     this is not -- with all respect, Your Honor,

1     this is not a situation of non-action. When the  
2     Task Force decides to issue a C, D, or I rating  
3     rather than an A or B rating, that is action.  
4     It's not inaction. If the Task Force decides to  
5     withdraw an A or B rating that it previously  
6     conferred, that is also action and -- rather  
7     than inaction.

8             So the government's brief tries to  
9     rely on the act/omission distinction. It just  
10    doesn't hold up here. There will be situations  
11    in which the Task Force can take affirmative  
12    actions that cause a certain type of preventive  
13    care not to receive the A or B rating. And the  
14    government concedes that's unreviewable, so that  
15    means they're still principal officers.

16            But there's a second problem as well.  
17    Even if this Court were to think that Task Force  
18    members become inferior officers under the  
19    government's interpretation of the statute, they  
20    are still unconstitutionally appointed because  
21    Congress has not vested the Secretary of Health  
22    and Human Service with the authority to appoint  
23    the Task Force.

24            And the court of appeals did not reach  
25    this question, as Justice Gorsuch noted during

1 the questioning of Mr. Mooppan. But the Court  
2 would have to conclude that there was vesting of  
3 this authority in the Secretary before it can  
4 say that they're constitutionally appointed now.

5 JUSTICE BARRETT: So are you saying we  
6 should remand to the Fifth Circuit to let them  
7 address that for the first time?

8 MR. MITCHELL: The Court should not  
9 remand unless it disagrees with our principal  
10 officer argument or if the Court wants to impose  
11 the severance remedy suggested by the  
12 government. If the Court --

13 JUSTICE BARRETT: So, if we disagreed  
14 with your principal officer argument, you would  
15 say, say that you disagree with our principal  
16 officer argument but then remand to the Fifth  
17 Circuit to give them a crack at the appointment?

18 MR. MITCHELL: I think there would  
19 have to be a remand in that situation, Justice  
20 Barrett, unless the Court thought the issue was  
21 so open and shut.

22 JUSTICE SOTOMAYOR: You think -- why  
23 do you think the Fifth Circuit didn't reach it?  
24 I saw that this --

25 MR. MITCHELL: Right.

1 JUSTICE SOTOMAYOR: -- was a huge part  
2 of the briefing before the Fifth Circuit.

3 MR. MITCHELL: It was.

4 JUSTICE SOTOMAYOR: It seems to me  
5 that the -- it -- it wasn't merely an  
6 assumption; it was a conclusion.

7 MR. MITCHELL: But the --

8 JUSTICE SOTOMAYOR: In their whole  
9 reasoning, the conclusion was --

10 MR. MITCHELL: Well, if I can defend  
11 the court of appeals for a moment, Justice  
12 Sotomayor.

13 JUSTICE SOTOMAYOR: Yes.

14 MR. MITCHELL: They did not need to  
15 reach that question because they concluded,  
16 number one, the Task Force members are principal  
17 officers. So there's no need to decide whether  
18 Congress vested the appointment authority in the  
19 Secretary. You only need to reach that question  
20 if you think they're inferior officers because  
21 even inferior officers still need to be  
22 appointed by the President and the Senate unless  
23 Congress has affirmatively opted out of the  
24 default rule. But, if you think they're  
25 principal officers, you don't need to reach that



1 question at all.

2 The second reason I think the court of  
3 appeals refused to rule on it was because they  
4 rejected the government's proposed severance  
5 remedy.

6 And the Court will also need to  
7 address this point if it wants to sever Section  
8 299b-4(a)(6) because the severance remedy  
9 proposed by the government is premised on the  
10 idea that the Secretary has constitutional  
11 authority vested by Congress to appoint the Task  
12 Force. If the Secretary doesn't have that power  
13 because Congress hasn't vested the power in the  
14 Secretary, then the government's severance  
15 remedy does not work because the inferior  
16 officers would still have to be appointed by the  
17 President and the Senate even if they're  
18 considered inferior officers.

19 JUSTICE SOTOMAYOR: Thank you.

20 JUSTICE JACKSON: I guess I don't  
21 understand why you're separating the principal  
22 officers and the removability. I thought  
23 whether or not they are principal officers in  
24 part turns on whether or not they are removable  
25 at will. You seem to have --

1 MR. MITCHELL: It's --

2 JUSTICE JACKSON: -- separated them in  
3 a way that is confusing to me, so can you help?

4 MR. MITCHELL: Well, we don't mean to  
5 separate the inquiry. Removability is a factor  
6 to consider. It's not the be all and end all of  
7 principal officer status, and this Court has  
8 never held that that --

9 JUSTICE JACKSON: I understand, but  
10 you said the -- the --

11 MR. MITCHELL: -- is the only factor,  
12 but it's one --

13 JUSTICE JACKSON: -- you said the  
14 Fifth Circuit didn't have to really go into  
15 appointments or removability because they  
16 determined that they're principal officers. And  
17 I thought the -- you can only reach the issue of  
18 whether or not they are principal officers by  
19 examining such things as how they are appointed  
20 and how they are removed.

21 MR. MITCHELL: The question Justice  
22 Sotomayor asked was why didn't the Fifth Circuit  
23 rule on whether Congress had vested --

24 JUSTICE JACKSON: Hmm.

25 MR. MITCHELL: -- the Secretary of

1 Health and Human Services with appointment  
2 authority over the Task Force. That was the  
3 question I was answering.

4 And the Fifth Circuit had no need to  
5 reach that issue. And this Court also has no  
6 need to reach this issue unless it disagrees  
7 with our argument on principal officers or  
8 unless the Court wants to impose the  
9 government's proposed severance --

10 JUSTICE KAVANAUGH: In the reply  
11 brief --

12 JUSTICE KAGAN: Why -- no, please.

13 JUSTICE KAVANAUGH: In the reply  
14 brief, the government came back with Hartwell.  
15 Do you want to address that case?

16 MR. MITCHELL: Yeah. Hartwell is not  
17 on point because, in Hartwell, the statute  
18 required the Secretary of the Treasury to  
19 specifically approve the appointment of that  
20 inferior officer. So Hartwell concluded that  
21 was enough to vest the appointment power in the  
22 Secretary of the Treasury.

23 We don't have anything like that in  
24 these statutes. Nothing in any of the statutes  
25 here requires the Secretary of Health and Human

1 Services to affirmatively approve the  
2 appointment of Task Force members.

3 Now --

4 JUSTICE KAVANAUGH: And I guess the  
5 government comes back there and says but they  
6 have broader authority to -- to -- the Secretary  
7 has broader authority to carry out the  
8 provisions -- 299(a) and the Reorg Act, they say  
9 those together give the Secretary the authority  
10 to essentially stand in the shoes, I -- I  
11 suppose, would be one way to characterize their  
12 argument --

13 MR. MITCHELL: The --

14 JUSTICE KAVANAUGH: -- of the  
15 director. You want to respond to that.

16 MR. MITCHELL: Sure. The Secretary is  
17 allowed to appoint the Task Force. We  
18 acknowledge that. Anyone is allowed to appoint  
19 the Task Force under the statute. The question  
20 is, under the Constitution, who can appoint.  
21 The statute doesn't say anything about who  
22 appoints. So anybody can appoint them. The  
23 AHRQ director appointed them for a time, and  
24 that was --

25 JUSTICE KAVANAUGH: Well, if you lose

1 your principal -- I think that's important. If  
2 you lose your principal officer argument --

3 MR. MITCHELL: Mm-hmm.

4 JUSTICE KAVANAUGH: -- so that's the  
5 premise, not saying you will --

6 MR. MITCHELL: Right.

7 JUSTICE KAVANAUGH: -- but, if you do,  
8 and you just said then you could read the  
9 statute to allow the Secretary to appoint,  
10 that's kind of the end of it.

11 MR. MITCHELL: No, I don't think so.  
12 That's not vesting, all right? Anyone can  
13 appoint under the statute. The Secretary of  
14 Energy could appoint. The President could  
15 appoint. The AHRQ director could appoint.  
16 Someone from the private sector could appoint.  
17 The statute doesn't say anything at all about  
18 who appoints. No one is vested with the  
19 authority because the statute takes no position  
20 on who appoints. So --

21 JUSTICE KAVANAUGH: Yeah. Okay. And  
22 I think I understand your argument. Your  
23 argument's something's got to speak specifically  
24 to appointment. The general authorities in the  
25 Reorganization Act and 299 are not enough to --

1 MR. MITCHELL: That's right.

2 JUSTICE KAVANAUGH: And that's why  
3 Hartwell's different, because Hartwell --

4 MR. MITCHELL: That's right.

5 JUSTICE KAVANAUGH: Yeah. I've got  
6 it.

7 MR. MITCHELL: We have a specific  
8 reference in the statute in Hartwell to the  
9 Secretary of the Treasury, who must approve the  
10 appointment before it can take effect.

11 JUSTICE KAGAN: But is -- is -- is --

12 MR. MITCHELL: We don't have anything  
13 remotely like that here.

14 JUSTICE KAGAN: -- is your view that  
15 Congress actually wrote a statute without saying  
16 who should appoint?

17 MR. MITCHELL: Yes, because they  
18 didn't need to work --

19 JUSTICE KAGAN: Without even thinking  
20 that it was saying who should appoint?

21 MR. MITCHELL: Yes.

22 JUSTICE KAGAN: That Congress was  
23 leaving this, like, just to the what -- whatever  
24 they come up with?

25 MR. MITCHELL: Yes, because this was

1 initially established as a purely advisory body.  
2 So it didn't matter under -- under the  
3 Constitution who appointed them. The  
4 Appointments Clause didn't apply to the Task  
5 Force when it was first created because it only  
6 had advisory powers.

7 JUSTICE KAVANAUGH: But, even if  
8 purely advisory, it -- to pick up on Justice  
9 Kagan's point, it's unlikely that Congress just  
10 was throwing it out there in terms of who  
11 would -- who would --

12 JUSTICE KAGAN: I mean, usually  
13 Congress thinks that it does things like that,  
14 right? I mean, it would be an odd statute. I  
15 doubt you could find another where Congress has  
16 set up a board and said, you know -- just not  
17 said who should -- who should --

18 MR. MITCHELL: Well, all they said --

19 JUSTICE KAGAN: -- who should make up  
20 the board?

21 MR. MITCHELL: -- all they said is  
22 that the AHRQ director shall convene the Task  
23 Force. And "convene" does not mean appoint, as  
24 Justice Thomas mentioned earlier.

25 JUSTICE KAGAN: No.

1 JUSTICE JACKSON: But it could.

2 JUSTICE KAGAN: But, in the absence of  
3 anything else, it would be a natural reading to  
4 say: When you're looking at one person and  
5 saying he can convene the board, that means --  
6 and there's nobody else out there to actually  
7 pick the board members, that means he should  
8 also pick the board members.

9 MR. MITCHELL: He's certainly allowed  
10 to pick the board members, Justice Kagan. What  
11 we're saying is the statute doesn't forbid other  
12 people from appointing.

13 The President could appoint the A --  
14 the members of the Task Force. He could have  
15 done that prior to the ACA, and he can do it  
16 after the ACA. In fact, we think he's  
17 constitutionally compelled now, after the ACA,  
18 to appoint them, with the advice and consent of  
19 the Senate. There is no statute that forbids  
20 the President to appoint.

21 JUSTICE GORSUCH: Well, if "convene"  
22 does mean appoint, then -- then we do have a  
23 problem on -- on an inferior officer theory,  
24 don't we?

25 MR. MITCHELL: There is a problem,



1     yes, because now we have a statute that's  
2     requiring the appointment of a principal  
3     officer --

4             JUSTICE GORSUCH:   Well, even on the  
5     inferior --

6             MR. MITCHELL:   -- by someone who's not  
7     even a head of department.

8             JUSTICE GORSUCH:   Yeah, but even if --  
9     even if you should lose that argument, again,  
10    and we're talking about inferior officers,  
11    Mr. Mitchell, if we read "convene" to mean  
12    vesting the appointment power in the director,  
13    that -- that's -- that's a problem.

14            MR. MITCHELL:   That's a big problem.  
15    It means the statute is unconstitutional, and  
16    the Court should, therefore, reject any  
17    interpretation of the word "convene" that makes  
18    it synonymous with "appoint" because that would  
19    create not simply a constitutional question but  
20    a constitutional violation even --

21            JUSTICE KAVANAUGH:   Well, that's where  
22    you -- that's where you --

23            JUSTICE JACKSON:   But wait.   Why?

24            JUSTICE KAVANAUGH:   -- pull in 299a,  
25    which says the Secretary can carry out -- shall

1     carry out the statutory provisions acting  
2     through the director. I mean, that's their  
3     response to that, right?

4             MR. MITCHELL: Maybe -- maybe that  
5     works, but, again, the question Justice Gorsuch  
6     was asking me is, if (a)(1) is construed to vest  
7     the appointment power in the AHRQ director, even  
8     the government would agree with us that's  
9     unconstitutional.

10            JUSTICE KAVANAUGH: That -- yeah, that  
11     alone would be a problem, I totally agree. But  
12     then maybe to -- you have to figure out how to  
13     fix that problem. And one way that the  
14     government points out is, well, the statute  
15     itself essentially fixes that problem because it  
16     says that the Secretary can carry out the duties  
17     of the director.

18            MR. MITCHELL: Maybe that works. But  
19     the question, again, under the Article II is  
20     where has Congress vested the appointment power.

21            And if Congress has vested it in the  
22     AHRQ director, who is not even a head of  
23     department, the AHRQ director can't even appoint  
24     inferior officers. And the government agrees  
25     with us on this much, right?

1           One thing we all agree on is that the  
2   Task Force was unconstitutionally appointed for  
3   the 13-year period that began in March of 2010,  
4   when the Affordable Care Act was first enacted  
5   into law, through June of 2023, when Secretary  
6   Becerra reappointed the Task Force.

7           Everyone agrees that those were  
8   unconstitutional appointments, and everyone  
9   agrees, I would think, that the recommendations  
10   that issued during that 13-year period cannot be  
11   enforced until the Task Force reissues those  
12   recommendations after receiving a constitutional  
13   appointment.

14           So it's hard for me to understand why  
15   the government's suggesting a remedy of  
16   severance when, at the very least, we should be  
17   entitled to an injunction that restrains the  
18   enforcement of --

19           JUSTICE KAVANAUGH:   Well --

20           MR. MITCHELL:   -- the previously  
21   issued Task Force recommendations.

22           JUSTICE KAVANAUGH:   -- I don't want to  
23   belabor it, but I think --

24           MR. MITCHELL:   Yeah.

25           JUSTICE KAVANAUGH:   -- to Justice

1 Gorsuch's point, which is a good one, they're  
2 saying constitutional avoidance would say:  
3 Well, don't read it to be the director in  
4 isolation. Read the other provisions which give  
5 the Secretary authority over the director so  
6 that the Secretary can do the  
7 convening/appointing, and that solves the -- the  
8 constitutional problem.

9 MR. MITCHELL: Yeah, Justice  
10 Kavanaugh, I agree that the Secretary is allowed  
11 to appoint the Task Force.

12 JUSTICE KAVANAUGH: Right.

13 MR. MITCHELL: And we've never  
14 disputed that. The question is --

15 JUSTICE KAVANAUGH: And so it's  
16 vesting by law under Article II. That's your  
17 key point there.

18 MR. MITCHELL: Right. Vested by  
19 Congress. Where has Congress by law vested that  
20 authority? And if the statute is vesting the  
21 authority in the AHRQ director, that is  
22 unconstitutional even if they're inferior  
23 officers. And that's why the Court, I think,  
24 has to reject an interpretation of the word  
25 "convene" that equates it to "appoint"

1     because --

2                   JUSTICE GORSUCH:   And -- and you're  
3     saying as well, as I understand it, that if  
4     Congress didn't vest it in the director but  
5     vested it in the director and the Secretary and  
6     15 other people in between, that's a problem  
7     too?

8                   MR. MITCHELL:   It's a problem too  
9     because these are principal officers.   So  
10    Congress can't --

11                  JUSTICE GORSUCH:   Well, even if  
12    they're inferior officers, would it be a  
13    problem?   If an -- if the -- if -- if Congress  
14    vested the power to appoint an inferior officer  
15    in the Secretary plus 15 people, is that  
16    permissible?

17                  MR. MITCHELL:   I'm not sure.   It  
18    would -- at the very least, if they have vested  
19    it in the Secretary and they also go on to say  
20    in the statute but other people can also  
21    exercise the power, it still has to be, I think,  
22    ultimately, a head of department that exercises  
23    that power, so --

24                  JUSTICE KAVANAUGH:   How do --

25                  JUSTICE KAGAN:   But what if it's --

1     what if it's vesting it in the director subject  
2     to the supervision and control of the Secretary?  
3     So there aren't 14 other people wandering  
4     around. It's in the director because he's the  
5     person who convenes, subject to the Secretary,  
6     because the statute otherwise gives the -- the  
7     Secretary supervisory control over the director.

8                 MR. MITCHELL: I -- I don't think  
9     that's good enough, Justice Kagan. I think the  
10    statute would have to say the Secretary must  
11    affirmatively approve the Assistant Secretary or  
12    the director's recommendation. That was  
13    Hartwell.

14                JUSTICE BARRETT: But doesn't --

15                MR. MITCHELL: If the statute went  
16    that far, I would agree that's vesting.

17                JUSTICE KAVANAUGH: What if it says --

18                JUSTICE BARRETT: But doesn't that --

19                MR. MITCHELL: I don't think it's a --  
20    I'm sorry.

21                JUSTICE BARRETT: Go ahead, Justice  
22    Kavanaugh.

23                What -- but doesn't that prove the  
24    point there are all of these questions, and  
25    shouldn't we leave this to the Fifth Circuit --

1 MR. MITCHELL: Yeah.

2 JUSTICE BARRETT: -- on remand if you  
3 lose the principal officer point?

4 MR. MITCHELL: Yes, I do believe that  
5 should be remanded if the Court thinks it  
6 necessary to reach this question.

7 We don't think the Court should reach  
8 this question or any court should reach this  
9 question because --

10 JUSTICE KAVANAUGH: What -- what if --  
11 just to stay on this point --

12 MR. MITCHELL: Yes.

13 JUSTICE KAVANAUGH: -- what if --  
14 Justice Kagan's point, what if it said Secretary  
15 or director may appoint?

16 MR. MITCHELL: If -- it says the  
17 Secretary or director may appoint, then Congress  
18 has vested the appointment authority in a head  
19 of department. But we would still say that's  
20 unconstitutional because they're principal  
21 officers. So, if the Court --

22 JUSTICE KAVANAUGH: Putting that  
23 aside.

24 MR. MITCHELL: If the Court disagrees  
25 with us, if they reject our principal officer

1 argument, that's the question that would have to  
2 be resolved by the Fifth Circuit on remand,  
3 Justice Kavanaugh.

4 JUSTICE GORSUCH: I mean, that's --  
5 it's a curious thing just to -- just to continue  
6 to say -- you're -- it's vested in two places.  
7 One is constitutional, and the other's  
8 unconstitutional.

9 MR. MITCHELL: But at least Congress  
10 has made the vesting in a head of department.

11 JUSTICE GORSUCH: Well, but --

12 MR. MITCHELL: And I think the head of  
13 department would have to exercise that  
14 authority, first of all.

15 JUSTICE GORSUCH: Well, what if --  
16 what if he didn't, though? What if the  
17 Secretary didn't exercise that authority, but  
18 the other person did? I mean, I -- I --

19 MR. MITCHELL: And --

20 JUSTICE GORSUCH: We've never had a  
21 case like that.

22 MR. MITCHELL: I don't think there  
23 has, but it's -- I think the Secretary would  
24 have to approve the appointment for it to be  
25 valid under Hartwell, and --



1 JUSTICE GORSUCH: Yeah, no -- I --  
2 I -- yeah. So -- so you're saying that -- under  
3 any circumstance -- vest it in 15 different  
4 places, but, ultimately, for it to be  
5 constitutional, it has to be the Secretary who  
6 acts?

7 MR. MITCHELL: The Secretary has to  
8 act some in some way, and it may be --

9 JUSTICE SOTOMAYOR: I'm sorry,  
10 you're -- you're --

11 JUSTICE KAVANAUGH: Hartwell --

12 JUSTICE SOTOMAYOR: -- you're  
13 requiring -- if I have an employee and they do  
14 something and if I don't like it, I tell them,  
15 and if I like it, I leave it alone.

16 MR. MITCHELL: Mm-hmm.

17 JUSTICE SOTOMAYOR: You want the  
18 Secretary to sign a piece of paper that says the  
19 director took this action, I saw the -- I saw  
20 the Task Force, I saw the recommendations, I saw  
21 him leaving them in place, and that doesn't mean  
22 that the Secretary agrees?

23 MR. MITCHELL: No. We don't think the  
24 Secretary has the authority to do any of that.

25 JUSTICE SOTOMAYOR: You think that the

1 Constitution requires him -- giving Justice  
2 Kagan's example -- that the director is subject  
3 to the supervision of the Secretary?

4 MR. MITCHELL: Is -- is Your Honor's  
5 question asking whether the Secretary has to  
6 approve the Task Force's recommendations, or are  
7 you -- is Your Honor asking about whether the  
8 Secretary has to approve an appointment to the  
9 Task Force?

10 JUSTICE SOTOMAYOR: Both. Both.

11 MR. MITCHELL: All right. So, if --  
12 this is a hypothetical I was being asked from  
13 Justice Gorsuch. If there's a statute that  
14 vests the appointment power in the Secretary and  
15 another person, the Secretary needs to sign off  
16 on the ultimate appointment if these are  
17 inferior officers -- and we reject that  
18 premise -- in order for the appointment to be  
19 constitutional.

20 JUSTICE SOTOMAYOR: All right. Thank  
21 you.

22 MR. MITCHELL: Now the -- the other --

23 JUSTICE SOTOMAYOR: I -- I just --  
24 I -- I'm having a difficult time understanding.

25 JUSTICE KAVANAUGH: Do -- do -- do

1     you -- you accept Hartwell. You just say this  
2     doesn't fall within Hartwell?

3             MR. MITCHELL: That's right. That's  
4     right.

5             JUSTICE KAVANAUGH: Okay.

6             MR. MITCHELL: And, again, all these  
7     issues probably should be remanded to the Fifth  
8     Circuit if the Court thinks it necessary to  
9     reach this point because, number one, the Fifth  
10    Circuit didn't resolve the question below.  
11    There's very little briefing on this issue. We  
12    barely discussed this in our brief. There's a  
13    little bit of -- of a more robust discussion in  
14    the Solicitor General's reply brief. But  
15    also --

16            JUSTICE KAVANAUGH: Two pages.

17            MR. MITCHELL: Yeah. This Court has  
18    said --

19            JUSTICE KAVANAUGH: I was agreeing  
20    with you.

21            MR. MITCHELL: And this Court has said  
22    many times: We are a court of review, not of  
23    first view.

24            JUSTICE KAVANAUGH: Yeah.

25            MR. MITCHELL: So I don't think it

1     would be prudent for the Court to rule on that  
2     question in the first instance if it thinks it  
3     necessary to reach that. And, of course, we  
4     believe it's not necessary for the Court to  
5     reach that.

6                 JUSTICE BARRETT: Can I -- can I ask  
7     you about your -- your principal argument, the  
8     independence point?

9                 MR. MITCHELL: Mm-hmm. Yes.

10                JUSTICE BARRETT: I mean, I guess one  
11     thing that I'm struggling with is, you know, as  
12     I was suggesting to Mr. Mooppan, your  
13     interpretation is very maximalist, and, you  
14     know, normally, as Mr. Mooppan said, we try to  
15     construe statutes to avoid constitutional  
16     questions, not create them.

17                MR. MITCHELL: Right.

18                JUSTICE BARRETT: And I feel like, you  
19     know, there is a way, and during the colloquy  
20     with your friend on the other side, a lot of us  
21     were asking, you know, ways that you can  
22     construe "independence" more narrowly.

23                Why wouldn't we do that for the sake  
24     of constitutional avoidance? I mean, I assume  
25     you're going to say, oh, it's not plausible. Is

1     that the --

2                 MR. MITCHELL: Well -- that's part of  
3     the answer. I mean, it's not just the word  
4     "independence," but it's also the provision that  
5     says that the Task Force members have to be  
6     protected from political pressure to the extent  
7     practicable. So that -- that is a maximalist  
8     interpretation that's in the statute itself.  
9     That language appears there.

10                But I think, secondly, the statute  
11     is --

12                JUSTICE KAGAN: Well, I don't know.  
13     I -- I mean, "to the extent practicable"  
14     actually seems non-maximalist to me.

15                MR. MITCHELL: Mm-hmm.

16                JUSTICE KAGAN: It suggests that there  
17     are limits and --

18                MR. MITCHELL: Sure.

19                JUSTICE KAGAN: -- we understand that  
20     sometimes it's not going to be possible.

21                MR. MITCHELL: It may not be possible.  
22     You -- you can't censor people from talking, for  
23     example. And if you really wanted to make them  
24     completely immune from political pressure, you  
25     might have to sequester them the way jurors get

1 sequestered during a trial and not allow them to  
2 read the newspaper or something to that effect.

3           The -- it's not saying that we should  
4 go to these types of extreme measures. But  
5 the -- the reason I don't think constitutional  
6 avoidance is even relevant here, Justice  
7 Barrett, is because the statute is  
8 constitutional no matter how it's construed.  
9 Even if the Court were to adopt our view of the  
10 meaning of "independent," there is no  
11 constitutional problem with the statute. It  
12 does not violate the Constitution for Congress  
13 to give the Task Force authority to make these  
14 preventive care coverage decisions as long as  
15 the President and the Senate appoint them --

16           JUSTICE KAVANAUGH: Well, I guess --

17           MR. MITCHELL: -- as principal  
18 officers.

19           JUSTICE KAVANAUGH: I don't mean to  
20 interrupt.

21           MR. MITCHELL: Yes. Please.

22           JUSTICE KAVANAUGH: Just coming from a  
23 different Article II direction, we usually don't  
24 interpret statutes to create independent  
25 agencies without some indication that's stronger

1     than what we have here that this is really  
2     protected from presidential or someone else's,  
3     Secretary, head of department, removal power.

4             MR. MITCHELL: I don't know how the  
5     language could be stronger, though, Justice  
6     Kavanaugh. It's not just the word  
7     "independent," which is what we had in Collins  
8     against Yellen, and the Court said that's not  
9     good enough to make it independent from  
10    presidential removal. It's --

11            JUSTICE KAVANAUGH: Well, it could be  
12    stronger if it had for-cause protection, and it  
13    could be stronger if it didn't have the phrase  
14    that Justice Kagan --

15            MR. MITCHELL: True.

16            JUSTICE KAVANAUGH: -- identified, "to  
17    the extent practicable." Those are two big  
18    differences from what you would see normally  
19    with an independent agency. And, normally, with  
20    an independent agency -- correct me if I'm  
21    wrong -- the statutes usually say the President,  
22    by and with the consent of the Senate, shall  
23    appoint.

24            MR. MITCHELL: Right. And there's no  
25    specified --

1 JUSTICE KAVANAUGH: And that's usually  
2 in the statute.

3 MR. MITCHELL: It is, that's right,  
4 because it has to be in the statute.  
5 Otherwise --

6 JUSTICE KAVANAUGH: And then it  
7 says --

8 MR. MITCHELL: -- there's an  
9 Appointments Clause problem.

10 JUSTICE KAVANAUGH: And -- and many of  
11 them, although not all, say the for-cause  
12 removal protection too.

13 MR. MITCHELL: Right. But I think the  
14 reason we don't have --

15 JUSTICE KAVANAUGH: Right. So all  
16 that's missing here.

17 MR. MITCHELL: That's true, but I  
18 think there are -- it's easy to explain why it's  
19 missing. This was initially established as a  
20 purely advisory body that had no real powers.  
21 So that's why they didn't initially say in the  
22 statute that the President has to appoint these  
23 people with the Senate's advice and consent. It  
24 was only when the Affordable Care Act for the  
25 first time gave the Task Force real powers as



1 officers of the United States --

2 JUSTICE JACKSON: Can you speak to  
3 the --

4 JUSTICE KAGAN: Well, point taken as  
5 to what the history is, but still, I mean, we --  
6 we don't go around just creating independent  
7 agencies. More -- more -- more often we destroy  
8 independent agencies.

9 (Laughter.)

10 MR. MITCHELL: That seems to be --

11 JUSTICE KAGAN: You know, the idea  
12 that we would take a statute which doesn't set  
13 up an independent agency and declare it one  
14 strikes me as pretty inconsistent with  
15 everything that we've done in this area.

16 MR. MITCHELL: In terms of construing  
17 statutes --

18 JUSTICE KAGAN: In terms of --

19 MR. MITCHELL: -- to maximize  
20 presidential influence over the -- over the  
21 independent official.

22 JUSTICE KAGAN: Yeah. I mean, that,  
23 you know, we've -- we've basically said we're  
24 not going to read something as putting  
25 restrictions on removal power unless it puts

1 restrictions on removal power.

2 MR. MITCHELL: Right. But -- but the  
3 problem here, it's not really a question of  
4 removal power, Justice Kagan. The test for  
5 principal officer status turns on whether the  
6 Secretary can direct and supervise the decisions  
7 of these Task Force members. It's the question  
8 whether the principal --

9 JUSTICE KAGAN: Well, why isn't  
10 removal power enough? Suppose that there  
11 were --

12 MR. MITCHELL: Right.

13 JUSTICE KAGAN: -- clear at-will  
14 removal power here.

15 MR. MITCHELL: Mm-hmm.

16 JUSTICE KAGAN: I mean, we've gone to  
17 such lengths to say that that's pretty much --  
18 somebody said it's not the end all and the be  
19 all. I think Mr. Mooppan said that.

20 MR. MITCHELL: Right.

21 JUSTICE KAGAN: And I don't know. If  
22 you read this Court's decisions, it seems often  
23 to be the end all and the be all, that the Court  
24 has suggested on many occasions that removal  
25 power is really the essence of control. If you

1 have it, you have control. If you don't have  
2 it, you don't -- have control.

3 Now, as you know I'm sure, on -- on a  
4 number of occasions, I've said that that  
5 understanding of removal power is not  
6 realistic --

7 MR. MITCHELL: Right.

8 JUSTICE KAGAN: -- at least in certain  
9 contexts. But the Court has said it again and  
10 again. So why doesn't it get you, if not a  
11 hundred percent of the way there in a context  
12 like this, pretty near there?

13 MR. MITCHELL: I think that argument  
14 would have more force if it weren't for the  
15 opinion in Arthrex. And if we were litigating  
16 this case 10 years ago before the Arthrex  
17 opinion, I think that would have a lot of --  
18 that would be a very powerful reason to say  
19 these could be inferior officers.

20 But, if you look at the Arthrex  
21 opinion, pages 15 and 16, where Arthrex catalogs  
22 all the ways in which the PTO Director can  
23 influence the decisionmaking of these  
24 administrative patent judges in an informal way,  
25 without the formal ability to review their

1 decisions, and then the Court says not only is  
2 that not good enough, it actually says that  
3 aggravates the problem. This is not the  
4 solution; it is the problem because it blurs the  
5 lines of accountability and it undermines the  
6 transparency that the Appointments Clause is  
7 supposed to provide.

8           You know, again, if Arthrex wasn't  
9 there, I think we would have an interesting  
10 discussion about whether the test for principal  
11 officer status should be this formalistic test  
12 that Arthrex sets forth or whether we should  
13 have more of a hard-nosed legal realist look at  
14 the actual powers that the Secretary can exert  
15 to influence the Task Force. But Arthrex  
16 really, I think, makes it hard for that argument  
17 to get off the ground.

18           JUSTICE JACKSON: Mr. Mitchell, can I  
19 ask you about the interval?

20           MR. MITCHELL: Yes.

21           JUSTICE JACKSON: Because we don't  
22 just have potential at-will removal power here.  
23 We have something in this statute that seems to  
24 me to be fairly unusual, which is the  
25 requirement that the Secretary establish this

1     minimal interval after the recommendation is  
2     made before they come -- it comes into effect.

3             MR. MITCHELL:   Right.

4             JUSTICE JACKSON:  So can you speak to  
5     why that doesn't have some indicia of  
6     secretarial control that we can look to when we  
7     try to understand the relationship between the  
8     Secretary and these members and their  
9     recommendations?

10            MR. MITCHELL:  I think it -- it has  
11     the opposite implication, Justice Jackson,  
12     because 300gg-13 specifically addresses the  
13     Secretary's role vis-à-vis the Task Force, and  
14     as Justice Kavanaugh suggested earlier, it only  
15     allows the Secretary to determine when these  
16     preventive care provisions are to take effect.

17            JUSTICE JACKSON:  No, I understand --

18            MR. MITCHELL:  So --

19            JUSTICE JACKSON:  -- but it does so  
20     for a reason.  I mean, if you're right that  
21     these are principal officers who are making  
22     binding recommendations, I guess I'm struggling  
23     to understand what the point of deferring them  
24     or allowing the Secretary to intervene and defer  
25     them for at least a year, what is -- what is the

1 point of that?

2 MR. MITCHELL: The point of that is  
3 it's very hard for insurers to change their  
4 coverage requirements in the middle of a plan  
5 year. So the minimum interval is set at one  
6 year. That's the minimum so the insurance  
7 companies can plan ahead for the next --

8 JUSTICE JACKSON: But Congress could  
9 have done that by statute without the Secretary  
10 being involved. They gave the Secretary some  
11 authority to establish an interval, so the  
12 Secretary's doing work.

13 MR. MITCHELL: Right.

14 JUSTICE JACKSON: Mr. Mooppan says,  
15 during that interval, the Secretary can not only  
16 delay the recommendations but can also, in his  
17 view, take some steps as to the constitution of  
18 the Task Force, perhaps even in communication  
19 with them regarding those steps having been done  
20 because they made certain recommendations  
21 with -- with respect to which the Secretary  
22 disagrees.

23 So I guess I'm just trying -- I -- I  
24 mean, it doesn't necessarily suggest that really  
25 this is only a time-related thing. The

1 Secretary's getting involved. He's making  
2 decisions. Why doesn't that give us some basis  
3 for interpreting this to be a statute in which  
4 there is secretarial control?

5 MR. MITCHELL: Well, we dispute all  
6 those claims Mr. Mooppan made about what the  
7 Secretary can do during that minimum time  
8 interval because the statutes guarantee the Task  
9 Force's independence. What Mr. Mooppan is  
10 describing where the Secretary can put pressure  
11 on the Task Force to pull down a previously  
12 issued A or B rating is not consistent with the  
13 statutory guarantee.

14 JUSTICE JACKSON: But the statute  
15 doesn't have specific blocks, and so what I'm --  
16 what I guess I'm -- I'm going back to this  
17 notion of how should we be reading this statute.

18 You dispute that the Secretary can do  
19 all of those things, but the statute doesn't say  
20 he can't. And so why would we read the statute  
21 to prevent the Secretary from exercising the  
22 control that is necessary to make it  
23 constitutional in this situation?

24 MR. MITCHELL: Because it doesn't make  
25 the statute constitutional for all sorts of

1 reasons.

2 May -- may I answer, Mr. Chief  
3 Justice?

4 CHIEF JUSTICE ROBERTS: Sure.

5 MR. MITCHELL: It doesn't make the  
6 statute constitutional, Justice Jackson,  
7 because, number one, they're still principal  
8 officers because they have unreviewable  
9 discretion when it comes to decisions not to  
10 impose an A or B rating.

11 Number two, even if Your Honor's  
12 proposed reading of the statute makes the Task  
13 Force members into inferior officers, Congress  
14 has not vested the Secretary with appointment  
15 power over the Task Force, so they're still  
16 unconstitutionally appointed.

17 And, number three, Your Honor's  
18 proposed reading of the statute still does not  
19 fix the problem that occurred from March of 2010  
20 to June of 2023 when even the government  
21 acknowledges the Task Force was  
22 unconstitutionally appointed during that 13-year  
23 window of time. And all the preventive care  
24 coverage mandates that were issued during that  
25 time should not be enforceable until the Task



1 Force members receive a new appointment that is  
2 constitutional and they reissue the A or B  
3 ratings in response to that constitutional  
4 appointment.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Justice Thomas?

8 Justice Alito?

9 JUSTICE ALITO: Would you comment on  
10 Mr. Mooppan's just -- argument that a  
11 distinction can be made under his understanding  
12 of what the Secretary can do between pressure to  
13 get rid of a recommendation and pressure to  
14 adopt a recommendation in the first place?

15 MR. MITCHELL: I -- any kind of  
16 pressure, Justice Alito, is incompatible in our  
17 view with the statutory guarantees of  
18 independence. I don't see how that distinction  
19 can be reconciled with the text of a statute  
20 that not only guarantees the independence of the  
21 Task Force members and their recommendations but  
22 also says that the Task Force and their  
23 recommendations has to be immunized from  
24 political pressure to the extent practicable. I  
25 just don't see how that distinction could be

1 squared with anything in the text of the  
2 statute.

3 I think what Mr. Mooppan is trying to  
4 do is salvage some role for 299b-4(a)(6) because  
5 it's not plausible, I think, even on the  
6 government's view to allow the earlier enacted  
7 statutes, such as Section 202 and the  
8 Reorganization Plan, to completely swallow up  
9 these later-enacted guarantees of independence.

10 So they're trying to draw some line.  
11 But there's nothing in the text of the statute  
12 that can provide an anchor for the distinction  
13 he -- that he's trying to draw.

14 JUSTICE ALITO: Suppose it were  
15 ultimately -- suppose it is ultimately decided  
16 that the statute implicitly confers the  
17 appointment power on the Secretary and that --  
18 and then how much more of the statute would have  
19 to be jettisoned in order to make it  
20 constitutional?

21 MR. MITCHELL: I don't think any --

22 JUSTICE ALITO: Like the setup  
23 constitutional?

24 MR. MITCHELL: Yeah. None of the  
25 statute needs to be jettisoned in order to make

1     it constitutional even under our reading of the  
2     statute. If the Court decides that Congress has  
3     vested the Secretary with appointment power over  
4     the Task Force, the appointments are still  
5     unconstitutional in our view because they're  
6     principal officers. They have to be appointed  
7     by the President and the Senate no matter what.

8             But, if the Court even rejects that  
9     view, there's still the problem that the Task  
10    Force was appointed by the AHRQ director for 13  
11    years between 2010 in March and June of 2023,  
12    and there has to be some remedy issued for those  
13    admitted constitutional violations.

14            JUSTICE ALITO: So that would be --  
15    that would be for the -- what was done before  
16    Secretary Becerra. What about going forward?  
17    What would need to be done?

18            MR. MITCHELL: Going forward, it will  
19    depend on whether the Court thinks these are  
20    principal officers. If the Court thinks they're  
21    principal officers, then they have to be  
22    appointed by the President and the Senate as  
23    well.

24            JUSTICE ALITO: Suppose we thought  
25    that they were inferior officers.

1                   MR. MITCHELL: If the Court thinks  
2 they're inferior officers, there should be a  
3 remand, in our view, to the Fifth Circuit to  
4 rule on the question whether Congress has vested  
5 the Secretary of Health and Human Services with  
6 appointment power.

7                   I don't think it's appropriate for the  
8 Court to decide that issue based on how cursory  
9 the briefing is.

10                  JUSTICE ALITO: Well, suppose that --  
11 suppose we do that, the Fifth Circuit goes back  
12 and says that, or we tackle the question and we  
13 say that it -- the statute vests -- vests the  
14 appointment power in the Secretary. Then what?

15                  MR. MITCHELL: -- then there has to be  
16 some remedy or --

17                  JUSTICE ALITO: And what -- that's  
18 what I'm asking. What would the remedy be?

19                  MR. MITCHELL: The remedy would have  
20 to be an injunction that restrains the Secretary  
21 from enforcing any of the Task Force coverage  
22 recommendations that issued between March of  
23 2010 and June of 2023.

24                  Even the government concedes the Task  
25 Force was unconstitutionally appointed during

1     that time.  So I don't see how the government  
2     can deny that we're entitled to at least that  
3     much.

4                 JUSTICE ALITO:  And what would be the  
5     remedy going forward if we went along that --

6                 MR. MITCHELL:  If the -- the remedy  
7     going forward if the Court concludes that  
8     they're inferior officers and that the  
9     Secretary's been vested with appointment power,  
10    there should be no remedy going forward.  We  
11    only can get a remedy for those past -- that  
12    13-year window.

13                JUSTICE ALITO:  Okay.  Thank you.

14                CHIEF JUSTICE ROBERTS:  Justice  
15    Sotomayor?

16                JUSTICE SOTOMAYOR:  I can look this up  
17    later, but I thought that at a certain point the  
18    Secretary had issued or -- something saying that  
19    he was accepting --

20                MR. MITCHELL:  He did, yes.

21                JUSTICE SOTOMAYOR:  He did?

22                MR. MITCHELL:  Yes.

23                JUSTICE SOTOMAYOR:  So --

24                MR. MITCHELL:  It's on page --

25                JUSTICE SOTOMAYOR:  -- why do we need

1 a remedy if you're not questioning that he was  
2 entitled to do that?

3 MR. MITCHELL: Oh, we are --  
4 absolutely are questioning that he's entitled to  
5 do that. The Fifth Circuit --

6 JUSTICE SOTOMAYOR: Well, for the same  
7 grounds. But, if we say that they're inferior  
8 officers, that --

9 MR. MITCHELL: Right. So here's why  
10 that doesn't work. This is the ratification  
11 memo. It appears on pages 34 to 35A of the  
12 Joint Appendix.

13 Fifth Circuit specifically held that  
14 Secretary Becerra had no authority to issue that  
15 ratification memo. That's on pages 27A to 28A  
16 of the petition.

17 JUSTICE SOTOMAYOR: Is that because  
18 he -- why?

19 MR. MITCHELL: -- because he has no  
20 authority to impose preventive care coverage  
21 mandates. Only the Task Force can do that.

22 The government -- the government did  
23 not seek certiorari on that question. They have  
24 not asked and they are not asking this Court to  
25 reverse that part of the Fifth Circuit's ruling.

1 So that is a closed issue.

2 Even if it were properly --

3 JUSTICE SOTOMAYOR: Then I'm going to  
4 let the SG answer that --

5 MR. MITCHELL: All right.

6 JUSTICE SOTOMAYOR: -- okay? Thank  
7 you.

8 MR. MITCHELL: But, even if it were  
9 properly before this Court, that document is  
10 invalid because the Fifth Circuit's right,  
11 Secretary Becerra doesn't have the authority.  
12 But, even if he did, that needs to go through  
13 notice-and-comment rulemaking because it's a  
14 substantive rule, it's a legislative rule that  
15 imposes binding obligations on private insurers,  
16 and it's implementing delegated authority that's  
17 been given to one of the agencies in the federal  
18 government. So it has to go through notice and  
19 comment under Section 553, and it didn't.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 JUSTICE KAGAN: It -- it -- it does  
22 seem, Mr. Mitchell, as though, putting aside the  
23 vesting issue for now, that your argument really  
24 does rise and fall on how we read that  
25 "independence" language.

1                   And, you know, just an alternative  
2   view of that language is something along the  
3   lines of: Look, the members of this Task Force  
4   are going to be subject to some kinds of  
5   influence because somebody can remove them --

6                   MR. MITCHELL: Mm-hmm.

7                   JUSTICE KAGAN: -- and also because  
8   they're subject to supervision.

9                   MR. MITCHELL: Mm-hmm.

10                  JUSTICE KAGAN: But we want them to  
11   approach their jobs with a spirit of  
12   independent-ness.

13                  MR. MITCHELL: Right.

14                  JUSTICE KAGAN: And -- and also,  
15   Congress is saying to the people who -- you  
16   know, who -- who do supervise and who have  
17   discharge powers over them: You too should  
18   think about the fact that this system works best  
19   if the Task Force members are treated as  
20   independent, but it's -- it's hortatory. It's  
21   not saying that nobody can fire them. It's not  
22   saying that nobody can supervise them and nobody  
23   can, you know, prevent their recommendations  
24   from going forward. It's hortatory.

25                  So why shouldn't I read the statute



1     that way?

2                   MR. MITCHELL:   Well, even if Your  
3     Honor reads the statute that way, they're still  
4     principal officers under Arthrex because --  
5     under that view that Your Honor is describing of  
6     "independence," there's no authority in the  
7     Secretary to formally review and formally  
8     reverse the decisions the Task Force is making  
9     in either direction.

10                  And that's what Arthrex says is key.  
11     There may be informal ways the Secretary can  
12     influence the Task Force, such as removal or  
13     threatened removal or other types of tactics,  
14     but Arthrex discusses all these types of  
15     informal means of influence -- again, pages --  
16     15 and 16 of the opinion -- and it says that's  
17     not good enough.

18                  JUSTICE KAGAN:   Okay.   So then I'm  
19     going to say then it -- then your argument  
20     depends on a pretty aggressive read of  
21     Arthrex --

22                  MR. MITCHELL:   I --

23                  JUSTICE KAGAN:   -- because I thought  
24     Arthrex said:   We're dealing here with  
25     adjudicators.   We're not dealing with every

1     circumstance, every scenario. You know, we're  
2     dealing here with a particular kind of officer.

3             MR. MITCHELL: I just -- I don't think  
4     that's an aggressive reading at all because  
5     Arthrex says the touchstone for principal  
6     officer status is whether there is formal review  
7     available of the relevant official's  
8     decisionmaking.

9             And even under the government's  
10    construction of the statutes, the only formal  
11    review that they're providing is formal review  
12    of an affirmative decision by the Task Force to  
13    issue an A or B rating.

14            They admit that the Secretary can't  
15    reverse the Task Force if it makes a decision in  
16    the opposite direction, a decision not to impose  
17    an A or B rating. I mean, that alone is enough  
18    to make them principal officers even under the  
19    SG's view and even under Your Honor's proposed  
20    interpretation of the word "independent."

21            At the end of the day, when you go  
22    back to Section 300gg-13(a)(1), it is the Task  
23    Force recommendation that matters. That is what  
24    is binding on insurers. It is not the  
25    Secretary's decision that can bind insurers.

1                   So, even if the Secretary were to say:  
2   I hereby disapprove this Task Force  
3   recommendation, that's useless when it comes to  
4   Section 300gg-13(a)(1) because what matters is  
5   what the Task Force says. It's not what the  
6   Secretary says.

7                   JUSTICE KAGAN: Thank you.

8                   CHIEF JUSTICE ROBERTS: Justice  
9   Gorsuch?

10                  JUSTICE GORSUCH: If I understood your  
11   exchange with Justice Sotomayor -- and I just  
12   want to make sure I do, Mr. Mitchell --

13                  MR. MITCHELL: Mm-hmm.

14                  JUSTICE GORSUCH: -- your view is,  
15   if -- if you should win either on the view that  
16   they're principal officers or if we should  
17   remand on the basis that they're -- inferior  
18   officers who may not have been appointed by the  
19   Secretary --

20                  MR. MITCHELL: Mm-hmm.

21                  JUSTICE GORSUCH: -- that the  
22   ratification of the Secretary of the -- of the  
23   Task Force past actions must fall for a couple  
24   of reasons.

25                  One, he has no authority. I want you

1 to spell that out a little further.

2 MR. MITCHELL: Right. That's correct.

3 JUSTICE GORSUCH: And second, there  
4 was no notice and comment.

5 And -- and I understand that one. I  
6 want you to spell out the first one a little bit  
7 further, make sure I -- I --

8 MR. MITCHELL: Sure.

9 JUSTICE GORSUCH: -- I've summarized  
10 it correctly first of all.

11 MR. MITCHELL: And just to be clear,  
12 there's a third reason, which is that issue is  
13 not properly before this Court. That's not --

14 JUSTICE GORSUCH: That was my -- that  
15 was my next question --

16 MR. MITCHELL: Right. I mean, it's  
17 not within the scope of the question presented.

18 JUSTICE GORSUCH: -- which is I didn't  
19 see that in -- in this case.

20 MR. MITCHELL: Right.

21 JUSTICE GORSUCH: So what do we do  
22 about it?

23 MR. MITCHELL: Well, I'm happy to  
24 answer Your Honor's question, but, again, it's  
25 not properly before this Court because it's not

1 in the scope of the QP. The government did not  
2 seek certiorari on the question. And at no  
3 point anywhere in the briefing or in  
4 Mr. Mooppan's oral presentation today has the  
5 government asked this Court to reverse that part  
6 of the Fifth Circuit's ruling.

7 But the ruling is nonetheless correct  
8 because the only entity that has the power to  
9 impose preventive care coverage mandates is the  
10 Task Force.

11 The Secretary's role is only to  
12 determine when those coverage mandates take  
13 effect. So for the Secretary to go out and say:  
14 I hereby ratify the Task Force recommendations,  
15 that has no more legal force than if I were to  
16 produce a memo that says I ratify the Task Force  
17 recommendations.

18 I don't have any authority to impose  
19 preventive care coverage mandates either.  
20 Neither does the Secretary. So the document has  
21 no force -- that's what the Fifth Circuit said  
22 in its opinion, and that's completely right.

23 The other reason is notice and  
24 comment. The Fifth Circuit did not reach that  
25 issue. But this is undoubtedly a substantive

1 rule. It's clearly a rule. And it's a  
2 substantive rule as well because it's imposing  
3 binding legal obligations on private insurers.  
4 It's prescribing law and policy. So it has to  
5 go through notice and comment unless some  
6 exception applies. Maybe the good cause  
7 exception if the government wants to argue for  
8 that.

9 But, again, they've waived this entire  
10 issue, so I don't think they can possibly make  
11 that type of argument now about how an exception  
12 to notice and comment might kick in.

13 JUSTICE GORSUCH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Kavanaugh?

16 JUSTICE KAVANAUGH: Your theory, I  
17 think, depends on us treating the Task Force as  
18 this massively important agency that operates  
19 with unreviewable authority --

20 MR. MITCHELL: Mm-hmm.

21 JUSTICE KAVANAUGH: -- to make really  
22 critical decisions that are going to affect the  
23 economy --

24 MR. MITCHELL: Yeah, it is.

25 JUSTICE KAVANAUGH: -- and without any

1 supervision or direction by the Secretary. And,  
2 normally, before that kind of thing would  
3 happen, Congress would have provided stronger  
4 indications that this Task Force is enormously  
5 important in the American economy and would have  
6 treated it such.

7 And I just don't see indications of  
8 that. And it's a big-picture question  
9 related --

10 MR. MITCHELL: Yeah.

11 JUSTICE KAVANAUGH: -- related to my  
12 earlier question. But I just don't see the  
13 indicators that: Oh, this Task Force, called a  
14 Task Force, is more powerful than the Secretary  
15 of HHS or the President in terms of how these  
16 recommendations are going to affect the  
17 healthcare industry.

18 MR. MITCHELL: No -- it is -- it is  
19 more powerful than both of those individuals you  
20 mentioned because that's --

21 JUSTICE KAVANAUGH: Under your  
22 theory -- under your theory, yeah.

23 MR. MITCHELL: -- that is how -- it's  
24 not my theory, Justice Kavanaugh. It's how the  
25 statute is written.

1 JUSTICE KAVANAUGH: Well, I -- I --

2 MR. MITCHELL: It says -- it says the  
3 Task Force shall be independent and --

4 JUSTICE KAVANAUGH: Yeah.

5 MR. MITCHELL: -- shielded from  
6 political pressure to the extent practicable.  
7 It's hard for me to see stronger language than  
8 that if Congress is trying to create an --

9 JUSTICE KAVANAUGH: This goes back to  
10 the history. You're -- I mean, when that was  
11 originally drafted, that -- they weren't  
12 binding.

13 MR. MITCHELL: Right. And I -- I  
14 don't think Your Honor should be surprised that  
15 Congress would write the statute this way  
16 because it's perfectly consistent with this  
17 Court's current doctrine.

18 They are not exercising executive  
19 power. So Myers and those line of -- and all  
20 those lines of cases about how the President has  
21 to remove executive officers --

22 JUSTICE KAVANAUGH: What are -- what  
23 are they exercising?

24 MR. MITCHELL: They're exercising  
25 quasi-legislative power. It's not



1 quasi-judicial. They're not adjudicating  
2 anything. But they cannot enforce the law  
3 against anyone. They are making recommendations  
4 that have binding effect under another statute.  
5 That's quasi-legislative power.

6 And it's a multi-member agency. It's  
7 not headed by a single director. So the  
8 holdings of Seila Law, Collins against Yellen,  
9 none of that applies here. This is perfectly  
10 constitutional under the Court's current  
11 doctrine --

12 JUSTICE KAVANAUGH: Okay. Thank you.

13 MR. MITCHELL: -- with respect to  
14 Article II and the Vesting Clause. Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Barrett?

17 Justice Jackson?

18 JUSTICE JACKSON: So I think your  
19 argument might be circular, and I'm sitting here  
20 trying to figure out how that is happening, and  
21 it's a little frustrating, but maybe you can  
22 help me to untangle it.

23 It goes -- it starts with Justice  
24 Kagan's point, which is we're looking at the  
25 independence provision, and she says, okay, I'm

1 not reading that as independent of supervision.  
2 I'm reading that as independent duty to make  
3 your own judgment.

4 MR. MITCHELL: Right.

5 JUSTICE JACKSON: Your response in  
6 your discussion with her was: Well, even if  
7 that's the case, it doesn't matter because these  
8 folks are principal officers.

9 MR. MITCHELL: Right.

10 JUSTICE JACKSON: And you point to  
11 Arthrex.

12 MR. MITCHELL: Right.

13 JUSTICE JACKSON: And you say that the  
14 test in Arthrex is that there is -- there has to  
15 be -- formal review available, and we don't have  
16 that in the statute. Now Mr. --

17 MR. MITCHELL: Right.

18 JUSTICE JACKSON: -- Mooppan says,  
19 well, we do have the provisions that make the  
20 Secretary over this entire thing, and he says  
21 that counts. You say it doesn't.

22 MR. MITCHELL: Right.

23 JUSTICE JACKSON: To resolve that  
24 issue, who's right about whether there actually  
25 is formal review available, I took you to say

1 the reason why you're right is because of the  
2 independence provision.

3 MR. MITCHELL: Well, it's more than  
4 just that.

5 JUSTICE JACKSON: No, but wait.

6 MR. MITCHELL: Okay.

7 JUSTICE JACKSON: This is important.

8 MR. MITCHELL: Please.

9 JUSTICE JACKSON: Because this is the  
10 circularity, right?

11 MR. MITCHELL: Right.

12 JUSTICE JACKSON: That if you come  
13 back and you say the reason why I'm right that  
14 there's not formal review under Arthrex is  
15 because we have an independence provision that  
16 has these people operating independent of the  
17 Secretary or political pressure, then I'm back  
18 to Justice Kagan, but that's not what the  
19 independence provision means.

20 So you both can't, I think, disclaim  
21 it on the front end, independence, it doesn't  
22 matter, Justice Kagan might be right, and then  
23 pick it up on the back end to say, ah, but it's  
24 the independence provision that resolves the  
25 debate between and you Mr. Mooppan over whether

1     there's sufficient control by the Secretary in  
2     this statute.

3                 MR. MITCHELL:   That's not our  
4     argument, Justice Jackson.

5                 JUSTICE JACKSON:   Okay.

6                 MR. MITCHELL:   We are not relying on  
7     the word "independence" to preclude secretarial  
8     review.  We're relying on Section  
9     300gg-13(a)(1), which says that it's the  
10    recommendations of the Task Force that must be  
11    given legal force and effect, not the  
12    recommendations of the Secretary.

13                So, if we were to adopt Justice  
14    Kagan's proposed interpretation of the word  
15    "independent," the Task Force will make its  
16    independent recommendations, but the Secretary  
17    has no ability to veto them.  He can try to veto  
18    them.  He can issue a document saying:  I,  
19    Secretary Kennedy, disapprove.  But --

20                JUSTICE JACKSON:   But why do you say  
21    he has no ability?  Because --

22                MR. MITCHELL:   Because --

23                JUSTICE JACKSON:   -- of the one --  
24    because you read "independent" in one as  
25    saying -- there's nothing in the statute that

1 says the Secretary can't veto. So where do you  
2 get that construct?

3 MR. MITCHELL: We get it from  
4 300gg-13(a)(1) because it -- the statute says  
5 that it's the A or B ratings of the Task Force  
6 that must be followed when determining what  
7 preventive care insurers must cover.

8 JUSTICE JACKSON: Okay.

9 MR. MITCHELL: It is not the  
10 recommendations of the Secretary.

11 JUSTICE JACKSON: Thank you.

12 MR. MITCHELL: So -- thank you, Your  
13 Honors.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Rebuttal, Mr. Mooppan?

17 REBUTTAL ARGUMENT OF HASHIM M. MOOPPAN

18 ON BEHALF OF THE PETITIONERS

19 MR. MOOPPAN: So I'll pick up right  
20 there. So, on the question of whether the  
21 Secretary has the power to review, gg-13 just  
22 says that recommendations that are -- are -- in  
23 effect are binding. It doesn't say one word  
24 about whether the Secretary could prevent the  
25 recommendation from taking effect by directing

1 the Task Force to withdraw it.

2 His only argument on that is to rely  
3 on the language "independent," -- interpreting  
4 "independent" way more broadly than necessary,  
5 and creating constitutional problems rather than  
6 solving it. He recognizes that, and so he falls  
7 back on the point that even we agree that the  
8 Secretary can't force the Task Force to make  
9 recommendations.

10 But, as Justice Gorsuch pointed out,  
11 that was already decided in Free Enterprise  
12 Fund. And my friend pointed out that in Free  
13 Enterprise Fund, the -- the Commission had lots  
14 of power over the PCAOB, which is true, but, if  
15 you look at page 504 of Free Enterprise Fund,  
16 this is what the Court said: The Act nowhere  
17 gives the Commission effective power to start,  
18 stop, or alter individual board investigations.

19 That is exactly the argument he's  
20 making here, that because they didn't have that  
21 power in this case, they are principal officers.  
22 And Free Enterprise Fund says, even though they  
23 didn't have that power, they were inferior  
24 officers.

25 Turning to the removal question, I

1     didn't really hear any argument for why, as a  
2     statutory matter, you should read "independent"  
3     to create a removal restriction even though that  
4     creates lots of constitutional problems. The  
5     best he did was to suggest, well, maybe it's  
6     just a question of timing.

7             But, actually, the timing cuts against  
8     him too. b -- b-4(a)(6), the provision that has  
9     the "independence" language, it was added to the  
10    statute with the ACA at the time that Congress  
11    gave the Task Force these powers. That's when  
12    they added the language about "independent" and  
13    "free from political pressure to the maximum  
14    extent possible."

15            So, if they wanted to impose a removal  
16    restriction, they would have done it using all  
17    the language that Justice Kagan and Justice  
18    Kavanaugh suggested. That's how they normally  
19    say impose removal restrictions. They wouldn't  
20    have just used the word "independent."

21            And Arthrex doesn't solve this problem  
22    either because, as -- the case makes clear,  
23    there was not at-will removal restriction --  
24    power in Arthrex. In Arthrex, the APJs were  
25    only subject to removal for the efficiency of

1 the service. They had cause protection. So  
2 Arthrex doesn't solve it for him either.

3 Turning to the appointments question,  
4 I agree that it wasn't decided below and it  
5 could be remanded, but I think the colloquy here  
6 today makes clear why the answer is quite clear  
7 and why it would be better to just resolve it  
8 now. My friend says that the statute is  
9 agnostic about who can appoint. I believe he  
10 even said that the Secretary of Energy or a  
11 private party could appoint these people.

12 That is obviously wrong on its face.  
13 Among other things, it doesn't answer what  
14 happens if three different people all purport to  
15 appoint the same -- appoint different people to  
16 the Task Force. You cannot possibly read this  
17 statute to say it's agnostic about who picks the  
18 members of the Task Force. And given that  
19 someone has to pick them, the word "convened"  
20 must suggest that the person doing the convening  
21 is the one who's doing the picking.

22 So then now all we have left is, is it  
23 the director or is it the Secretary? And on  
24 that, we have two points. The first is that  
25 under the Reorg Act, all of the director's



1 powers are the Secretary's powers.

2 The second point we have is, as  
3 Justice Kavanaugh pointed out, under 299, the  
4 Secretary exercises all the powers of that  
5 agency through the director. So we think that  
6 that is pretty clear evidence that the -- it is  
7 vested by law in the Secretary.

8 To use an -- a hypothetical that came  
9 up earlier, if the statute just said it shall be  
10 appointed by either the director or the  
11 Secretary, it would -- plainly be constitutional  
12 if the Secretary was the one that did the  
13 appointing. We agree that if the director did  
14 it instead and the Secretary had nothing to do  
15 with it and didn't approve it on the back end or  
16 on the front end, that would be unconstitutional  
17 as applied.

18 But there's no question that the  
19 statute would be permissible if it purported to  
20 vest the appointment authority in both the head  
21 of the department permissibly and someone else.  
22 And that's exactly what this statute does two  
23 different ways.

24 And if there was any doubt about this,  
25 Hartwell -- this is an easier case for us than

1 Hartwell. In Hartwell, as you pointed out,  
2 there was an inferior officer who had the  
3 ability to make the appointment with the  
4 Secretary's approval on the back end. But the  
5 decision in the first instance was vested in  
6 someone who wasn't the head of the department.  
7 And yet the Court still said that that was  
8 enough to satisfy the Appointments Clause.

9 Here, the Secretary can and, in fact,  
10 has exercised the appointment authority in the  
11 first instance. So, if Hartwell is okay, this  
12 is a fortiori from that.

13 So, for all those reasons, there's  
14 just no real good reason to remand this to the  
15 Fifth Circuit on this appointments question.  
16 There is no way you can read this statute to  
17 vest the appointment in anyone other than the  
18 director/Secretary, and the Secretary has  
19 complete control in that situation.

20 Final point on remedy, we agree with  
21 Mr. Mitchell on this: If we are right that  
22 these are inferior officers, prospectively, he's  
23 not entitled to any remedy, and retrospectively,  
24 there will need to be a remand to figure out  
25 whether the old recommendations either have to

1 be enjoined or can be ratified by the Task  
2 Force. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 The case is submitted.

6 (Whereupon, at 11:30 a.m., the case  
7 was submitted.)

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## Official

<p><b>1</b></p> <p><b>10</b> <sup>[1]</sup> 82:16  <b>10:03</b> <sup>[2]</sup> 1:18 3:2  <b>108</b> <sup>[1]</sup> 2:10  <b>11:30</b> <sup>[1]</sup> 114:6  <b>13</b> <sup>[1]</sup> 90:10  <b>13-year</b> <sup>[4]</sup> 66:3,10 87:22  <b>92:12</b>  <b>14</b> <sup>[1]</sup> 69:3  <b>15</b> <sup>[5]</sup> 68:6,15 72:3 82:21  <b>96:16</b>  <b>16</b> <sup>[2]</sup> 82:21 96:16  <b>1966</b> <sup>[1]</sup> 13:5</p>	<p>15 26:13,19,20 46:25 63:  15,16,17 110:10  <b>accept</b> <sup>[4]</sup> 15:7 36:20 37:4  74:1  <b>accepting</b> <sup>[1]</sup> 92:19  <b>accommodating</b> <sup>[1]</sup> 48:5  <b>accountability</b> <sup>[3]</sup> 16:17  20:2 83:5  <b>accountable</b> <sup>[1]</sup> 15:2  <b>Accounting</b> <sup>[2]</sup> 52:13,13  <b>accurate</b> <sup>[1]</sup> 27:1  <b>acknowledge</b> <sup>[2]</sup> 39:11 59:  18  <b>acknowledged</b> <sup>[2]</sup> 29:8  47:23  <b>acknowledges</b> <sup>[2]</sup> 50:22  87:21  <b>Act</b> <sup>[16]</sup> 5:12,21 12:12 13:5  14:1 33:20,24 38:13,16 59:  8 60:25 66:4 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