No. 24-316

In the Supreme Court of the United States

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

v.

BRAIDWOOD MANAGEMENT, INC., ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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Members of the United States Preventive Services Task Force are inferior officers because their "work is directed and supervised at some level" by the Secretary of Health and Human Services. *Edmond* v. *United States*, 520 U.S. 651, 663 (1997). To be sure, Task Force members have some discretion in independently formulating preventive-services recommendations. See 42 U.S.C. 299b-4(a)(6). But if the Secretary deems a recommendation unsound, he may delay the date upon which it binds private parties, 42 U.S.C. 300gg-13(b)(1), thus giving him time to direct the Task Force to withdraw the recommendation or else face removal and replacement by members who will do so. Moreover, the Secretary's ability to remove Task Force members after the fact provides a powerful tool to influence their recommendations in the first place. Taken together,

those controls give the Secretary, not the Task Force, ultimate responsibility for whether Task Force recommendations become final, binding decisions.

Respondents have no persuasive answer to that straightforward analysis. They begin with an argument that both lower courts rejected—that Congress enacted for-cause removal protections through the requirement that Task Force members "be independent." 42 U.S.C. 299b-4(a)(6). But as this Court recently reaffirmed in *Collins* v. *Yellen*, 594 U.S. 220 (2021), Congress must speak clearly if it wishes to insulate executive officers from at-will removal, and merely describing an executive entity as "independent" does not suffice. *Id.* at 249-250. Respondents thus fall back on the assertion that Task Force "independen[ce]" must mean unreviewable autonomy. But that assertion ignores Congress's longstanding practice of vesting independent decision-making authority in an inferior officer while subjecting that officer's decisions to principal-officer review. The statutory framework here accords with that tradition.

Even if Section 299b-4(a)(6) unduly insulated Task Force "A" and "B" recommendations from secretarial oversight, the fix would be simple: declare that Section 299b-4(a)(6)'s application to those recommendations is unenforceable and severable. Indeed, that is the cure the Court adopted in *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 26 (2021). Respondents cannot escape this Court's severability precedents so instead ask the Court to disregard them. But severability doctrine "has been firmly established since *Marbury* v. *Madison*," *Barr* v. *American Ass'n of Political Consultants, Inc.*, 591 U.S. 610, 626 (2020) (opinion of Kavanaugh, J.), and respondents offer no sound basis for abandoning it now.

I. TASK FORCE MEMBERS ARE INFERIOR OFFICERS

Task Force members are the Secretary's subordinates, not principal officers in their own right. The Secretary may remove Task Force members at will and determine whether their preventive-services recommendations take binding effect. Both lower courts correctly rejected respondents' claim that Congress indirectly established for-cause removal protections through the requirement that Task Force members be "independent." And respondents do not explain why the Secretary's supervisory authorities—particularly in combination—are insufficient to render Task Force members inferior officers.

A. The Secretary May Remove Task Force Members At Will, Which Provides An Important Means Of Supervision

The relevant statutory provisions do not restrict the Secretary from removing Task Force members for any reason. And that plenary removal power gives the Secretary substantial control over the Task Force—though the Court need not resolve whether that control alone is constitutionally sufficient for inferior-officer status, given the Secretary's additional supervisory powers described in Part I.B.

1. The Secretary has unfettered authority to remove Task Force members

Respondents acknowledge that removal "is a powerful tool for control." Br. 17 (quoting *Edmond*, 520 U.S. at 664). But they maintain (*ibid.*) that "[i]f the Secretary could remove Task Force members at will, then the Task Force and its recommendations would no longer be 'independent'" for purposes of Section 299b-4(a)(6). Thus, respondents argue (Br. 20) that by using the term

"independent," Congress enacted for-cause removal protections for the Task Force.

Both lower courts correctly rejected that argument. See Pet. App. 18a; *id.* at 119a. "The right of removal * * * inheres in the right to appoint" and may be limited only through "very clear and explicit language." *Shurtleff* v. *United States*, 189 U.S. 311, 315-316 (1903); see *Collins*, 594 U.S. at 250 (citing *Shurtleff*). "[M]ere inference or implication" does not suffice. *Shurtleff*, 189 U.S. at 315; see *In re Hennen*, 38 U.S. (13 Pet.) 230, 259-260 (1839). Here, the statute empowers the Secretary to appoint Task Force members, see pp. 16-19, *infra*, and includes no text—let alone clear and explicit language—limiting the Secretary's right to remove those members. Accordingly, the Secretary "may remove members of the Task Force at will." Pet. App. 18a.

The term "independent" is not the type of clear language necessary to restrict the Secretary's removal power. As the Court recently explained when rejecting a similar argument, "describing an agency as independent would be an odd way to signify that its head is removable only for cause because even an agency head who is shielded in that way would hardly be fully 'independent' of Presidential control." *Collins*, 594 U.S. at 248-249. Indeed, "Congress has described many agencies as 'independent' without imposing any restriction on the President's power to remove the agency's leadership." *Ibid.*; see *ibid.* (citing examples). Meanwhile, "[i]n other statutes, Congress has restricted the President's removal power without referring to the agency as 'independent.'" *Ibid.* And here, Congress restricted the Secretary's power to remove members of a different entity within the Public Health Service without using the term "independent." See 42 U.S.C. 289a-1(b)(5)(E) ("A member of an ethics board shall be subject to re-

moval from the board by the Secretary for neglect of duty or malfeasance or for other good cause shown.”). “That combination of provisions” shows that the term “independent” does not clearly connote independence from *secretarial control*; as in *Collins*, the Court should “refuse to read that connotation into” the statute here. 594 U.S. at 249.

Task Force members can be “independent” and “not subject to political pressure” more than is “practicable,” 42 U.S.C. 299b-4(a)(6), while still being removable at will. These requirements at most mean that Task Force members must exercise their own expert and impartial judgment when making recommendations. Gov’t Br. 31-32. The Secretary may then “consider the [Task Force’s] decision after its rendition as a reason for removing [members], on the ground that the discretion regularly entrusted to [them] by statute has not been on the whole intelligently or wisely exercised.” *Myers* v. *United States*, 272 U.S. 52, 135 (1926). The Secretary’s power to remove Task Force members based on what he perceives as unsound recommendations does not prevent the members from forming those recommendations independently in the first place, even if that power may influence their decisions. Section 299b-4(a)(6)’s requirements are thus fully consistent with Task Force members’ susceptibility to at-will removal.

At minimum, the constitutional-avoidance canon precludes reading for-cause removal protections into the term “independent.” Restricting the Secretary’s ability to remove Task Force members would create a serious constitutional question by extending beyond “the outermost constitutional limits of permissible congressional restrictions on the President’s removal power” that this Court has recognized. *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 218 (2020) (citation omitted). Especially where the

statute expressly contemplates that some "political pressure" may be "practicabl[y]" necessary, there is no basis for interpreting the term "independent" to restrict the Secretary's authority to remove Task Force members. 42 U.S.C. 299b-4(a)(6).

2. The Secretary may supervise Task Force members through his at-will removal authority

To determine whether a particular officer qualifies as inferior, this Court "apprais[es] * * * how much power [that] officer exercises free from control by a superior." *Arthrex*, 594 U.S. at 17. And at least where the officer's duties are limited, his susceptibility to at-will removal by a principal officer may suffice to render him an inferior officer, given that the removal authority itself "is a powerful tool for control." *Edmond*, 520 U.S. at 664.

Like the court of appeals, respondents identify no instance in which at-will removability by a superior officer was held to be constitutionally insufficient to render an officer inferior. Nor have respondents cited any examples, either in statute or judicial precedent, of officials who were removable at will by someone other than the President and yet were themselves principal officers. And respondents do not address the many examples, cited in our opening brief, "where Congress historically has provided for appointment of an executive officer by the Head of a Department" and made "clear that the officer was inferior to that principal officer—because Congress did not prevent the principal officer from removing that inferior officer at will." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 705 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), aff'd in part, rev'd in part, and remanded, 561 U.S. 477 (2010); see Gov't Br. 23-25.

Here, the Task Force exercises "significant authority pursuant to the laws of the United States" in only one respect, *Arthrex*, 594 U.S. at 13 (citation omitted)—issuing "A" and "B" recommendations. Gov't Br. 35-36. The Secretary's plenary power to remove Task Force members prevents them from exercising that authority "free from control by a superior." *Arthrex*, 594 U.S. at 17. The Secretary need only monitor the Task Force's consideration and issuance of "A" and "B" recommendations—which is a public process, Gov't Br. 6-7—and may then remove and replace Task Force members who vote to issue (or refuse to withdraw) recommendations that the Secretary deems unsound. Thus, while the Court need not reach the question given the Secretary's other oversight authorities, see pp. 8-14, *infra*, "[r]emovability at will carries with it" "power to direct and supervise" that may alone be constitutionally sufficient under the statutory framework here, *Free Enter. Fund*, 537 F.3d at 707 (Kavanaugh, J., dissenting).

Respondents are incorrect (Br. 22) that "*Arthrex* explicitly rejects th[e] idea" that at-will removability may sometimes suffice to render an officer inferior. *Arthrex* suggested that "the threat of removal from federal service entirely" *would have* allowed a superior officer to "'meaningfully control[]'" administrative patent judges (APJs). 594 U.S. at 17 (citation omitted). But the Court emphasized that such control was missing there "because the Secretary can fire [APJs] after a decision only 'for such cause as will promote the efficiency of the service.'" *Ibid.* (quoting 5 U.S.C. 7513(a)). The control that was missing in *Arthrex* is present here.

The Court also recognized the potency of at-will removal in *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). There,

the Court "ha[d] no hesitation in concluding" that Public Company Accounting Oversight Board (PCAOB) members were inferior officers after it invalidated "the statutory restrictions on the [Securities and Exchange] Commission's power to remove Board members" at will. *Id.* at 510. To be sure, the Commission also had "other oversight authority," *ibid.*—but even so, the PCAOB was "empowered to take significant enforcement actions * * * largely independently of the Commission," *id.* at 504. The Commission's at-will removal authority thus provided the critical tool for supervision—and the same is true for the Secretary here.

B. The Secretary May Also Review Task Force "A" and "B" Recommendations And Determine Whether They Will Bind Private Parties

The Secretary has other significant authorities for supervising the Task Force's work, such as delaying recommendations' effectiveness, directing the Task Force to reconsider or withdraw recommendations, and regulating Task Force procedures. These additional means of supervision both reinforce, and are reinforced by, the Secretary's at-will removal power.

1. The Secretary may delay the binding effect of recommendations, thus affording him time to use other means of supervision

Section 300gg-13(b)(1) empowers the Secretary to "establish a minimum interval" before "A" and "B" recommendations become "effective"—and thus binding on health insurance issuers and group health plans. 42 U.S.C. 300gg-13(b)(1). That authority would allow the Secretary to delay the effectiveness of any "A" or "B" recommendation. Indeed, respondents agree (Br. 33) that "Section 300gg-13(b)(1) empowers the Secretary to

decide *when* Task Force recommendations will bind insurers." And during the relevant interval, the Secretary could use his other ample means of supervision, such as directing the Task Force to reconsider a recommendation and, if it proved necessary, removing and replacing Task Force members who refused to do so.

By invoking those authorities, the Secretary can prevent the Task Force from "render[ing] a final decision on behalf of the United States" without his review. *Edmond*, 520 U.S. at 665. In *Arthrex*, by contrast, the APJs issued immediately binding decisions "without any * * * review" by a principal officer. 594 U.S. at 14. Unlike here, no principal officer could delay the APJs' decisions from taking effect and, in the meantime, direct APJs to reconsider their decisions under threat of removal.

Respondents maintain (Br. 33) that if the Secretary were to establish a lengthy interval, "his action would be set aside as arbitrary, capricious, and an abuse of discretion." But even if there were a judicially enforceable outer bound on how long the Secretary may extend the effective date beyond the one-year minimum, 42 U.S.C. 300gg-13(b)(2), there is no reason to suppose it would be so stringent as to prevent the Secretary from exercising his other means of supervision before the recommendation became binding. Indeed, given that the Secretary has plenary removal and appointment authority, he could easily replace Task Force members as needed within the one-year minimum interval.

2. *The Secretary's background authorities provide for additional supervision*

a. 42 U.S.C. 202 grants the Secretary general authority to "supervis[e] and direct[]" the Assistant Secretary's "administ[ration]" of the Public Health Service,

which includes the Task Force. And Reorganization Plan No. 3 of 1966, Pub. L. No. 89-810, §§ 1(a), 2, 80 Stat. 1610 (Reorganization Plan), authorizes the Secretary to perform "all functions of the Public Health Service" and to "make such provisions as he shall deem appropriate authorizing the performance" of such functions. Those supervisory powers extend to the Task Force's "A" and "B" recommendations. If the Secretary disagrees with such a recommendation, he can (acting through the Assistant Secretary) "direct[]" the Task Force to reconsider or withdraw it. 42 U.S.C. 202. And as noted, he can establish a minimum interval that ensures such reconsideration or withdrawal will occur before the recommendation becomes binding.

Respondents try to minimize (Br. 34-35) the power to "supervis[e] and direct[]" the "administ[ration]" of the Public Health Service. 42 U.S.C. 202. But the ordinary meaning of "administer" is broad: "to direct or superintend the execution, use, or conduct of." *Webster's Third New International Dictionary* 27 (1976). Congress regularly provides expansive supervisory authority through similar statutory language. See, *e.g.*, 22 U.S.C. 2651a(a)(1) ("The Department of State shall be administered * * * under the supervision and direction of the Secretary of State"); 42 U.S.C. 7131 (similar for Secretary of Energy).

Respondents also contend (Br. 35) that the Task Force is an "advisory council, board, or committee," Reorganization Plan § 1(b), 80 Stat. 1610, and thus exempt from the Reorganization Plan's conferral of secretarial control. As an initial matter, even if the Reorganization Plan exempted the Task Force, the Secretary could still supervise and direct the Task Force under Section 202. See *ibid.* (exemption applies only to "th[at] section" of the Reorganization Plan). In any event, the Task Force

is not an "advisory" entity within the meaning of the Reorganization Plan. After all, the Task Force's "A" and "B" recommendations bind private issuers and plans (if the Secretary allows them to take effect). 42 U.S.C. 300gg-13(a)(1). Respondents offer no plausible textual or contextual basis for reading the exemption for an "advisory council, board, or committee" to include a body so long as it provides *any* advice—even where, as here, it *also* can promulgate binding requirements.

To be sure, the Secretary's background authorities do not empower him "to exercise *all* of the Task Force's functions." Resp. Br. 37. If that were the case, then the Task Force and its recommendations would not be "independent." 42 U.S.C. 299b-4(a)(6). But Congress reconciled the Secretary's authorities with the Task Force's independence by empowering the Task Force to formulate recommendations *ex ante*, while authorizing the Secretary to review and effectively veto those recommendations *ex post*. Gov't Br. 31-34. That straightforward reading "harmonize[s]" the "two statutes"; it does not suggest that Section 299b-4(a)(6) "repeal[ed]" Section 202 or the Reorganization Plan "by implication." *Epic Systems Corp.* v. *Lewis*, 584 U.S. 497, 510 (2018). Contra Resp. Br. 38.

b. The Secretary may also use his general regulatory authority to provide for additional supervision over Task Force recommendations. See 42 U.S.C. 202, 216(b); 42 U.S.C. 300gg-92; Reorganization Plan §§ 1(a), 2, 80 Stat. 1610. Among other things, the Secretary could require the Task Force to submit proposed recommendations for his approval or rejection before they become binding. Gov't Br. 29.

Respondents assert (Br. 39-40) that the Secretary lacks authority to prescribe such procedures. But the Reorganization Plan authorizes the Secretary to "make

such provisions as he shall deem appropriate authorizing the performance of any of the functions" of the Public Health Service. § 2, 80 Stat. 1610. And Section 202 authorizes the Secretary to "direct[]" the Public Health Service, including through the Surgeon General's promulgation of "regulations necessary to the administration of the Service." 42 U.S.C. 202, 216(b).

Nor can respondents cast aside 42 U.S.C. 300gg-92, which allows the Secretary to "promulgate such regulations as may be necessary or appropriate to carry out the provisions of this subchapter." See Resp. Br. 39-40. The subchapter includes Section 300gg-13(a)(1)—the provision requiring issuers and plans to offer coverage without cost sharing for "items and services that have in effect a rating of 'A' or 'B' in the current recommendations of the * * * Task Force," 42 U.S.C. 300gg-13(a)(1). The Secretary could properly find that a regulation requiring his approval before a recommendation becomes binding is "necessary or appropriate to carry out" that provision. 42 U.S.C. 300gg-92. After all, if without such a regulation, the Task Force *could not* constitutionally make recommendations with binding effect, then the regulation would plainly be "necessary" and "appropriate" to "carry[ing] out" Section 300gg-13(a)(1)'s coverage requirement. *Ibid.* And contrary to respondents' implication (Br. 40), such a regulation would not target "the process by which the Task Force makes recommendations," but instead the process by which such recommendations become binding on private parties—which is the province of Section 300gg-13(a)(1) and (b).

c. At minimum, the constitutional-avoidance canon supports our reading of the Secretary's additional authorities. If more secretarial oversight and less Task Force independence were needed to avoid an Appoint-

ments Clause problem, then the statute should be interpreted to provide for it. See *Edmond*, 520 U.S. at 658. Respondents argue (Br. 41) that "[e]ven if section 299b-4(a)(6) immunizes Task Force recommendations from principal-officer review, the *statute* remains constitutional so long as it allows the president to appoint Task Force members with the Senate's advice and consent." But as explained below, the statute vests appointment authority in the Secretary—not the President. See pp. 16-19, *infra*.

3. Respondents' general objections to the Secretary's supervisory authority lack merit

In addition to attacking the Secretary's specific authorities, respondents offer three general arguments against the Secretary's power to supervise Task Force recommendations. Each lacks merit.

First, respondents maintain (Br. 29) that secretarial supervision of Task Force "A" and "B" recommendations "is incompatible with" the statutory requirements of independence and freedom from political pressure to the extent practicable. But as our opening brief explains, Congress has long vested independent decision-making authority in inferior officers—such as administrative law judges, immigration judges, and special trial judges —while still subjecting their decisions to principal-officer review. Gov't Br. 32-34. That tradition shows that Congress may permissibly provide for an initial "impartial decision by a panel of experts," followed by a final "transparent decision for which a politically accountable officer must take responsibility." *Arthrex*, 594 U.S. at 16.

Second, respondents observe (Br. 30) that Section 300gg-13(a)(1) "gives binding effect to the Task Force's recommendations and not the Secretary's actions." But

the actions described above—such as delaying the effective date of a recommendation while directing the Task Force to reconsider it—would not entail the Secretary's "[a]nnouncement *becom[ing]* the Task Force's recommendation." *Ibid.* Those actions would thus accord with Section 300gg-13(a)(1).

Third, respondents assert (Br. 30) that any secretarial actions to prevent Task Force recommendations from becoming binding would "qualify as a substantive or legislative rule" under the Administrative Procedure Act (APA), 5 U.S.C. 553. That is wrong. As already discussed, the core secretarial supervisory authorities are delaying a recommendation's effective date, see 42 U.S.C. 300gg-13(b)(1), directing the Task Force to reconsider or withdraw a recommendation, see 42 U.S.C. 202, and removing and replacing Task Force members. None of those actions would constitute "an agency statement of general or particular applicability and future effect" for purposes of APA rulemaking procedures. 5 U.S.C. 551(4).

C. The Appointments Clause Does Not Require That The Secretary Have Power To Review Task Force Decisions Declining To Issue "A" And "B" Recommendations

Respondents further contend (Br. 42) that Task Force members are principal officers "because no one can countermand" their "decision *not* to adopt an 'A' or 'B' recommendation." But when the Task Force decides not to adopt an "A" or "B" recommendation, that decision requires no action by any private party—issuers and health plans can simply continue doing their business as they otherwise would. Respondents cite no authority suggesting that the Constitution requires principal-officer review of subordinates' decisions not to act. Ordinarily, "when the Executive Branch elects *not*" to

"exercise coercive power over an individual's liberty or property," such inaction "does not infringe upon interests that courts often are called upon to protect." *United States* v. *Texas*, 599 U.S. 670, 678 (2023).

Respondents do not even attempt to square their position with *Free Enterprise Fund*. As explained above, the Court there found no Appointments Clause violation once it determined that the Commission could remove PCAOB members "at will" and exercise "other oversight" of PCAOB actions. *Free Enter. Fund*, 561 U.S. at 510; see *id.* at 504. The Court did not suggest that the Commission must also have power to review PCAOB decisions *not* to initiate investigations; in fact, the Court acknowledged that the relevant statute "nowhere g[ave] the Commission effective power to start, stop, or alter individual Board investigations." *Id.* at 504.

Similarly, in *Edmond*, the Court of Appeals for the Armed Forces (CAAF) did not have plenary authority to review Coast Guard Court of Criminal Appeals decisions. The CAAF could "not reevaluate the facts" underlying such decisions "so long as there [wa]s some competent evidence in the record to establish each element of the [relevant] offense beyond a reasonable doubt." *Edmond*, 520 U.S. at 665. Nonetheless, the Court held that "[t]his limitation upon review" did not "render the judges of the Court of Criminal Appeals principal officers," *ibid.*, and emphasized that inferior officers' work need only be "directed and supervised *at some level*" by principal officers, *id.* at 663 (emphasis added).

Nor are respondents correct (Br. 42) that "*Arthrex* requires that a principal officer hold power to review *all* of the inferior officer's decisions, not just some of them." The Court there asked only whether a principal

officer may supervise the decisions that "make[] the [relevant] officers exercis[e] 'significant authority' in the first place." 594 U.S. at 14 (citation omitted). And it addressed only the superior officer's review of *those* decisions, not "supervision over other types of adjudications conducted by the" APJs. *Id.* at 26. Here, the only relevant Task Force decisions are "A" and "B" recommendations, because only those decisions may bind private parties. The Task Force's other decisions—like "its 'C,' 'D,' or 'I' recommendations or its refusal to recommend coverage of items or services," Resp. Br. 42—bind no one. The Secretary need not have authority to review those purely advisory decisions, especially since the Secretary may supervise even those decisions through his at-will removal power.

D. Congress Vested Appointment Of Task Force Members In The Secretary

Respondents alternatively argue (Br. 44) that even "[i]f this Court concludes that Task Force members are 'inferior officers,'" Congress has not "'vested'" the Secretary with power to appoint those members. That argument raises an Appointments Clause issue that is distinct from whether Task Force members are inferior officers. See *Edmond*, 520 U.S. at 655-656 (treating the same two issues separately). The Fifth Circuit did not address that distinct issue. And the Court did not grant certiorari on it. See Pet. i. Accordingly, this Court need not resolve the issue here. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

In any event, Congress did vest the Secretary with power to appoint Task Force members. Congress provided that "[t]he Secretary shall carry out" the statutory provisions governing the Agency for Healthcare Research and Quality (AHRQ) by "acting through the

[AHRQ] Director," who is himself appointed and removable at will by the Secretary. 42 U.S.C. 299(a). In turn, the same statutory framework provides that "[t]he Director shall convene" the Task Force, which shall be "composed of individuals with appropriate expertise." 42 U.S.C. 299b-4(a)(1). Together, those provisions empower the Secretary to personally appoint Task Force members while acting through the AHRQ Director—and at minimum, to approve (or reject) the Director's selections. Either way, Congress "vest[ed] the Appointment of" Task Force members "by Law" in the "Head[] of [the] Department[]," U.S. Const. Art. II, § 2, Cl. 2—the Secretary.

This Court's precedent confirms the point. In *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868), the Court considered a statute "authoriz[ing] the assistant treasurer, at Boston, with the approbation of the Secretary of the Treasury, to appoint a specified number of clerks." *Id.* at 393. The Court held that such clerks were "appointed by the head of a department within the meaning of the" Appointments Clause. *Id.* at 393-394. Under *Hartwell*, Congress properly vests the appointment power in a head of a department where, as here, it gives that department head ultimate authority over the appointment—even if a subordinate officer also plays a role in the appointment process. See *Free Enter. Fund*, 561 U.S. at 512 n.13 (citing *Hartwell* and explaining that the Court "ha[s] previously found that the department head's approval satisfies the Appointments Clause").[1]

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[1] That method of appointing inferior officers traces back to the Founding era. See Act of Mar. 2, 1799, ch. 22, § 21, 1 Stat. 642 (1799) (authorizing customs officers to appoint customs inspectors "with the approbation of the principal officer of the treasury depart-

The Reorganization Plan also reinforces the Secretary's authority to appoint Task Force members. As explained, that Plan authorizes the Secretary to perform "all functions of the Public Health Service" and its "officers"—including the AHRQ Director—and to "make such provisions as he shall deem appropriate authorizing the performance of any of the functions * * * of the Public Health Service." §§ 1(a), 2, 80 Stat. 1610. That "broad language" vests the Secretary "with ample authority" to "appoint [Task Force] members." *Willy* v. *Administrative Review Bd.*, 423 F.3d 483, 491-492 (5th Cir. 2005); see *ibid.* (holding that a similar Reorganization Plan for the Department of Labor authorized the Secretary of Labor to appoint certain inferior officers).

Even if the Secretary's appointment authority were ambiguous, this Court should adopt the government's "reasonable interpretation" recognizing such authority. *Edmond*, 520 U.S. at 658. The only other arguably plausible interpretation is that Congress vested appointment authority in the AHRQ Director alone by directing him to "convene" the Task Force. 42 U.S.C. 299b-4(a)(1). But the Court "must of course avoid" that interpretation because it would "render [the statute] clearly unconstitutional" by empowering one inferior officer to appoint a different inferior officer. *Edmond*, 520 U.S. at 658.

Respondents contend (Br. 22) that "Section 299b-4 is agnostic on who appoints the Task Force" and thus permits presidential appointment with Senate confirmation. But Section 299b-4(a)(1) provides that the AHRQ Director "shall convene" the Task Force. 42 U.S.C.

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ment"); 4 Op. Att'y Gen. 164 (1843) (concluding that customs inspectors were "inferior officers" whose appointment was vested in the Treasury Secretary).

299b-4(a)(1). And Congress would not have contemplated the President appointing members to a Task Force that has not been convened, or the Director convening a Task Force whose members must then be appointed by the President and confirmed by the Senate. Instead, the power to convene and to appoint must reside with the Secretary through the Director. Nor is it relevant that Congress did not use the precise term "appoint[]." Contra Resp. Br. 22. "Around the time of the framing, the verb 'appoint'" meant "[t]o allot, assign, or designate." *NLRB* v. *SW Gen., Inc.*, 580 U.S. 288, 312-313 (2017) (Thomas, J., concurring) (citation omitted; brackets in original). Here, Section 299b-4 allows the Secretary to convene a Task Force with members he designates—meaning that he can appoint them for purposes of the Appointments Clause.

II. ANY APPOINTMENTS CLAUSE VIOLATION MAY BE CURED BY SEVERING SECTION 299b-4(a)(6)

If this Court were to conclude that the Task Force is unduly insulated from secretarial supervision, the Court should declare the provision creating such insulation unenforceable and severable. Respondents scarcely try to reconcile their alternative approach with this Court's jurisprudence. The Court should reject respondents' effort to upend longstanding severability doctrine.

A. Severing Section 299b-4(a)(6) Would Eliminate The Alleged Constitutional Flaw

"'Generally speaking, when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" *Free Enter. Fund*, 561 U.S. at 508 (citation omitted). In *Arthrex*, after finding that APJs impermissibly possessed "unreviewa-

ble authority," the Court "sever[ed]" the provision "shielding" APJs' decisions "from review" by the Patent and Trademark Office (PTO) Director. 594 U.S. at 23-24. Here, as in *Arthrex*, respondents argue that Section 299b-4(a)(6) unconstitutionally "eliminate[s] any possibility of 'statutory authority to review' Task Force decisions." Br. 13 (quoting *Arthrex*, 594 U.S. at 15). But if so, then also as in *Arthrex*, this Court should sever Section 299b-4(a)(6) insofar as it precludes such review.

Respondents maintain (Br. 46 n.41) that severing Section 299b-4(a)(6) would not solve the constitutional problem because the Secretary would still lack authority to "approv[e] or disapprov[e] an 'A' or 'B' rating." But *Arthrex* held that, with the review-bar severed, the PTO Director's review authority stemmed from a general provision "vest[ing] the Director with the 'powers and duties' of the [PTO]." 594 U.S. at 24-25 (citation omitted). That provision mirrors the provisions (discussed above) empowering the Secretary to "supervis[e] and direct[]" the Public Health Service, 42 U.S.C. 202, and to perform "all functions of the Public Health Service" and its "officers" and "agencies," Reorganization Plan § 1(a), 80 Stat. 1610. Here, the Fifth Circuit held that those same "fallback powers" properly subject members of the Health Resources and Services Administration to the Secretary's "supervisory authority," even though those members also issue guidelines that may bind issuers and plans. Pet. App. 45a; see 42 U.S.C. 300gg-13(a)(3) and (4). Thus, if Section 299b-4(a)(6) is severed, the same should be true for Task Force members.

Even if the Secretary still could not *formally* approve or disapprove "A" and "B" recommendations, severing Section 299b-4(a)(6) at least would ensure that he could direct the Task Force to withdraw such recom-

mendations before they become binding under the effective date he imposes—or else be fired. On respondents' view (Br. 20), Section 299b-4(a)(6) is what currently constrains the Secretary from exercising such authorities. Severing Section 299b-4(a)(6) would eliminate that constraint.

B. Respondents' Proposed Approach Departs From The Court's Severability Jurisprudence

Respondents' remaining arguments seek a departure from the Court's severability jurisprudence. This Court has rejected such arguments in recent cases, and it should do the same here. See, *e.g.*, *Arthrex*, 594 U.S. at 24; *Seila Law*, 591 U.S. at 237.

This Court's separation-of-powers cases have followed "a tailored approach," *Arthrex*, 594 U.S. at 25: identify the constitutional defect, identify the cure, and then remand for consideration of any remaining remedial issues. In *Seila Law*, the Court identified the "constitutional defect" as the agency head's "insulation from removal," "severed" the "removal provision," and then "remand[ed] for the Court of Appeals to consider whether the civil investigative demand" at issue had been "validly ratified." 591 U.S. at 234, 238. In *Collins*, the Court found a removal restriction unconstitutional, severed the restriction, and then remanded for the lower courts to consider "in the first instance" whether "the unconstitutional removal provision inflicted harm." 594 U.S. at 260. And in *Arthrex*, the Court found a restriction on principal-officer review unconstitutional, severed the restriction, and then "remand[ed] to the Acting Director [of the PTO] for him to decide whether to rehear the petition" at issue. 594 U.S. at 26. To the extent the Court identifies an Appointments Clause problem here, the same "tailored approach is the appropriate one." *Id.* at 25.

Respondents seek to distinguish (Br. 50) *Arthrex* on the ground that it involved "an appeal from an agency adjudication," rather than a district-court suit. But *Collins*, *Seila Law*, and *Free Enterprise Fund* arose from district-court suits—and yet the Court in those cases severed the offending provisions and remanded for remedial proceedings. See *Collins*, 594 U.S. at 235-236, 260; *Seila Law*, 591 U.S. at 208, 238; *Free Enter. Fund*, 561 U.S. at 487, 514.

Respondents contend (Br. 47) that "[a] federal district court has no power and no ability to revoke section 299b-4(a)(6)." But this Court's severability decisions do not "formally repeal the [relevant] law from the U.S. Code or the Statutes at Large." *American Ass'n of Political Consultants*, 591 U.S. at 627 n.8. Rather, they "recognize[] that the Constitution is a 'superior, paramount law,' and that 'a legislative act contrary to the constitution is not law' at all." *Ibid.* (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Applying those principles, the Court here would declare Section 299b-4(a)(6) "unenforceable as applied to the [Secretary] insofar as it prevents the [Secretary] from reviewing the ['A' and 'B' recommendations] of the [Task Force]." *Arthrex*, 594 U.S. at 26.

Respondents maintain (Br. 47) that such an approach would "fail[] to redress [their] injuries." But if Section 299b-4(a)(6) is unenforceable and severable, then it has not been "part of the body of governing law" since Section 300gg-13 was enacted in 2010. *Collins*, 594 U.S. at 259. At that "moment," the "Constitution automatically displace[d]" Section 299b-4(a)(6), *ibid.*—meaning that Task Force members have been inferior officers subject to secretarial supervision since then. And although it is "possible for an unconstitutional provision to inflict compensable harm," *ibid.*, respondents have not shown

why that would be so here. Thus, contrary to respondents' suggestion (Br. 50), severance is not a "remedy," see *American Ass'n of Political Consultants*, 591 U.S. at 627 n.8—instead, it establishes that respondents were not injured in the first place. At most, respondents may be "entitled to declaratory relief sufficient to ensure that" the preventive-services requirements "to which they are subject will be enforced only by a constitutional agency." *Free Enter. Fund*, 561 U.S. at 513.[2]

In the end, respondents "would have [the Court] junk [its] settled severability doctrine and start afresh." *Seila Law*, 591 U.S. at 237. But "[t]he Court's power and preference to partially invalidate a statute * * * has been firmly established since *Marbury* v. *Madison*." *American Ass'n of Political Consultants*, 591 U.S. at 626. The Court should follow that course again here.

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For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

APRIL 2025

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[2] Respondents argue (Br. 52-53) that severing Section 299b-4(a)(6) would not "salvage the post-ACA Task Force recommendations issued before * * * the date on which Secretary Becerra reappointed the Task Force." But if this Court were to sever Section 299b-4(a)(6) and then remand, the Task Force could decide whether to ratify or reissue any prior recommendations, subject to the Secretary's review and any challenges respondents may raise on remand. See *Seila Law*, 591 U.S. at 238.