No. _____

In the Supreme Court of the United States

BRAIDWOOD MANAGEMENT, INC., ET AL., CROSS-PETITIONERS

v.

XAVIER BECERRA, ET AL.

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

CONDITIONAL CROSS-PETITION

GENE P. HAMILTON
America First Legal Foundation
611 Pennsylvania Ave SE #231
Washington, DC 20003
(202) 964-3721
gene.hamilton@aflegal.org

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

Counsel for Cross-Petitioners

QUESTION PRESENTED

The Affordable Care Act requires private health insurers to cover "preventive health services" without cost-sharing arrangements. *See* 42 U.S.C. § 300gg-13(a). But the statute does not specify or delineate the "preventive" care that private insurers must cover. Instead, section 300gg-13(a)(1)–(4) delegates this authority to the U.S. Preventive Services Task Force (the Task Force), the Advisory Committee on Immunization Practices (ACIP), and the Health Resources and Services Administration (HRSA)—and it empowers these bodies to unilaterally determine the preventive care that private health insurance must cover. The question presented in this cross-petition is:

> Does 42 U.S.C. § 300gg-13(a)(1)–(4) violate the non-delegation doctrine by empowering agencies to unilaterally decree the preventive care that private health insurers must cover, while failing to provide an "intelligible principle" to guide the discretion of those agencies?

PARTIES TO THE PROCEEDING

Cross-petitioners Braidwood Management Inc., John Kelley, Kelley Orthodontics, Ashley Maxwell, Zach Maxwell, Joel Starnes, Joel Miller, and Gregory Scheideman were the plaintiffs-appellees/cross-appellants in the court of appeals. For simplicity and ease of exposition, this brief will refer to the cross-petitioners as "the plaintiffs."

Cross-respondents Xavier Becerra, in his official capacity as Secretary of Health and Human Services; Janet Yellen, in her official capacity as Secretary of the Treasury; Julie A. Su, in her official capacity as Acting Secretary of Labor; and the United States of America were defendants-appellants/cross-appellees in the court of appeals. For simplicity and ease of exposition, this brief will refer to the cross-respondents as "the defendants."

Neither Braidwood Management Inc. nor Kelley Orthodontics has a parent or publicly held company that owns 10% or more of the corporation's stock. *See* Sup. Ct. R. 29.6.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

Braidwood Management, Inc. v. Becerra, No. 20-cv-283 (Mar. 30, 2023)

United States Court of Appeals (5th Cir.):

Braidwood Management, Inc. v. Becerra, No. 23-10326 (June 21, 2024)

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Recent opinions from members of this Court have expressed discomfort with standardless delegations of lawmaking powers to administrative agencies. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 676–79 (2020); *Gundy v. United States*, 588 U.S. 128, 148–49 (2019) (Alito, J., concurring in the judgment); *id.* at 149–79 (Gorsuch, J., dissenting). In *Little Sisters*, a majority of this Court called out 42 U.S.C. § 300gg-13(a)(4) for conferring "virtually unbridled discretion" on the Health Resources and Services Administration to decide which (if any) preventive-care coverage mandates should be imposed on private health insurers. *Little Sisters*, 591 U.S. at 676. The Court, however, declined to reach or resolve the non-delegation

problems with 300gg-13(a)(4) because "no party ha[d] pressed a constitutional challenge to the breadth of the delegation involved." *Id.* at 679.

This cross-petition presents the constitutional challenge to 42 U.S.C. § 300gg-13(a)(4) that was never raised in the *Little Sisters* litigation. It also challenges the remaining subsections of 42 U.S.C. § 300gg-13(a) for failing to provide an "intelligible principle" to guide the discretion of agencies that have been empowered to dictate the preventive care that private health insurers must cover. The Court should grant the petition and hold that each of the four subsections of 42 U.S.C. § 300gg-13(a)(1)–(4) fails to supply the "intelligible principle"[1] required in statutes that vest administrative agencies with lawmaking powers.

OPINIONS BELOW

The opinion of the court of appeals is reported at 104 F.4th 930 and reprinted in the appendix to the Solicitor General's petition at Pet. App. 1a–48a. The opinions of the district court are reported at 666 F. Supp. 3d 613 and 627 F. Supp. 3d 624 and reprinted in the appendix to the Solicitor General's petition at Pet. App. 49a–84a and Pet. App. 85a–136a.[2]

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1. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

2. Throughout this brief, we will use "Pet. App." to refer to the appendix to the petition filed by the Solicitor General in No. 24-316. We will use "App." to refer to the appendix attached to this conditional cross-petition.

JURISDICTION

The court of appeals entered its judgment on June 21, 2024. The Solicitor General timely petitioned for certiorari on September 19, 2024. The Court has jurisdiction under 28 U.S.C. 1254(1). This conditional cross-petition is timely under Supreme Court Rule 12.5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Most of the relevant constitutional and statutory provisions are reprinted in the appendix to the Solicitor General's petition at Pet. App. 137a–143a.

In addition to the provisions that appear in the petition appendix, the cross-petition implicates Article I's vesting clause, which provides that:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. I, § 1.

STATEMENT

I. THE AFFORDABLE CARE ACT'S PREVENTIVE-CARE COVERAGE REQUIREMENTS

The Affordable Care Act requires most private health insurers to cover certain forms of preventive care without any cost-sharing arrangements such as deductibles, co-pays, or out-of-pocket expenses. *See* 42 U.S.C.

§ 300gg-13(a) (Pet. App. 142a–143a).[3] The statute does not specify or delineate the preventive care that private insurers must cover. Instead, the statute delegates this authority to the U.S. Preventive Services Task Force (the Task Force), the Advisory Committee on Immunization Practices (ACIP), and the Health Resources and Services Administration (HRSA)—and it empowers these bodies to unilaterally determine the "preventive care" that should be covered and impose their compulsory-coverage edicts on private insurers. *See* 42 U.S.C. § 300gg-13 (Pet. App. 142a–143a).

Section 300gg-13(a) contains four subsections that confer these powers on the Task Force, ACIP, and HRSA.[4] The statute reads as follows:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—
>
> (1) evidence-based items or services that have in effect a rating of "A" or "B" in the current

3. The Affordable Care Act exempts "grandfathered" plans from this requirement. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. Short-term limited-duration insurance plans are also exempt from these requirements. *See* Department of Health and Human Services, *Short-Term, Limited-Duration Insurance*, 83 Fed. Reg. 38,212 (2018).

4. The fifth subsection of section 300gg-13(a) establishes a special rule regarding coverage of breast-cancer screenings. *See* 42 U.S.C. § 300gg-13(a)(5).

recommendations of the United States Preventive Services Task Force;

(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[5]

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[6]

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[7]

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most cur-

5. So in original. The word "and" probably should not appear.
6. So in original. The period probably should be a semicolon.
7. So in original. The period probably should be a semicolon.

> rent other than those issued in or around November 2009.

42 U.S.C. § 300gg-13(a).

The "recommendations" and "guidelines" issued by the Task Force, ACIP, and HRSA do not immediately compel private insurers to cover the relevant care or services. Instead, the Affordable Care Act requires the Secretary of Health and Human Services to establish a "minimum interval" of at least one year between the issuance of a "recommendation" or "guideline" and the plan year in which it becomes binding on private insurers:

> **(1) In general**
>
> The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) or (a)(2) or a guideline under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.
>
> **(2) Minimum**
>
> The interval described in paragraph (1) shall not be less than 1 year.

42 U.S.C. § 300gg-13(b). The "minimum interval" requirement does not apply to HRSA's guidelines regarding preventive care and screenings for women. *See id.*; 42 U.S.C. § 300gg-13(a)(4).

Since the Affordable Care Act's enactment, these entities have issued numerous decrees that force health-insurance issuers and self-insured plans to cover certain forms of preventive care without cost-sharing. In 2011, for example, the Health Resources and Services Administration issued a highly controversial pronouncement that compels private insurance to cover all FDA-approved contraceptive methods, including contraceptive methods that some regard as abortifacients—and to do so without requiring the beneficiary to pay anything in copays or out-of-pocket expenses, and without allowing the expenses to count toward an annual deductible. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014). In June of 2019, the U.S. Preventive Services Task Force issued an equally controversial diktat that requires all private insurers to cover pre-exposure prophylaxis (PrEP) drugs such as Truvada and Descovy starting in 2021. These drugs, like contraception, must be covered without any cost-sharing arrangements and must be funded entirely by premiums paid by others, without any marginal costs imposed on the beneficiary.

II. THE AGENCIES THAT HOLD DELEGATED POWERS UNDER 42 U.S.C. § 300gg-13(a)

42 U.S.C. § 300gg-13(a) empowers three different agencies to determine the preventive care that private health insurers must cover—the U.S. Preventive Services Task Force (the Task Force), the Advisory Committee on Immunization Practices (ACIP), and the Health Resources and Services Administration (HRSA).

A. The U.S. Preventive Services Task Force

The U.S. Preventive Services Task Force was created in 1984, and the statute governing the Task Force is codified at 42 U.S.C. § 299b-4(a) (Pet. App. 138a–141a). The Task Force's statutory mandate is to "review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community, and updating previous clinical preventive recommendations[.]" 42 U.S.C. § 299b-4(a)(1); *see also* 42 U.S.C. § 299b-4(a)(2) (listing other "duties" of the Task Force).

The statute requires the Director of the Agency for Healthcare Research and Quality (AHRQ) to "convene" an "independent Preventive Services Task Force" for these purposes, which must be "composed of individuals with appropriate expertise." 42 U.S.C. § 299b-4(a)(1). The statute also guarantees the independence of the Task Force by specifying that:

> All members of the Task Force convened under this subsection, and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure.

42 U.S.C. § 299b-4(a)(6).

Although the statute does not specify the number of Task Force members and is silent about their tenure, there are currently 16 Task Force members and each of

them has been appointed to a four-year term.[8] Until June of 2023, Task Force members were appointed by the Director of the Agency for Healthcare Research and Quality (AHRQ).[9] In response to this lawsuit, however, the Task Force members received new appointments from Secretary Becerra in an effort to blunt the plaintiffs' Appointments Clause challenge to 42 U.S.C. § 300gg-13(a)(1).[10]

B. The Advisory Committee on Immunization Practices

The Advisory Committee on Immunization Practices (ACIP) was created in 1964 as a federal advisory committee.[11] It was initially composed of eight members and

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8. *See* http://bit.ly/48cdU9X [https://perma.cc/7DJS-5VAF]; *see also* Pet. at 4.

9. *See* http://bit.ly/3Nrntbo [https://perma.cc/B68B-VTMW] (archived website taken on September 28, 2023) ("Task Force members are appointed by the Director of AHRQ to serve 4-year terms.").

10. *See* Secretary of HHS, *Ratification of Prior Appointment and Prospective Appointment: Appointment Affidavits* (June 28, 2023), http://bit.ly/3Yt94C0 [https://perma.cc/8TAA-7AMN]; *see also* http://bit.ly/4dR3xK7 (archived website taken on December 20, 2023) ("Task Force members are appointed by the Secretary of HHS to serve 4-year terms."); Opening Br. for the Federal Defendants, *Braidwood Management Inc. v. Becerra*, No. 23-10326 (5th Cir.), ECF No. 159, at 30, available http://bit.ly/40b9IFt ("Although the existing Task Force members have not yet received an appointment consistent with the Appointments Clause, the Secretary has authority to appoint Task Force members and is in the process of providing them with a constitutional appointment.").

11. *See* Jean Clare Smith, et al., *History and Evolution of the Advisory Committee on Immunization Practices—United States,*

(continued…)

chaired by the director of the CDC.[12] ACIP was established by the Surgeon General pursuant to a statute that authorized him to "appoint . . . advisory committees . . . as he deems desirable for the purpose of advising him in connection with any of his functions." Pub. L. 87-839 § 3, 76 Stat. 1072, 1073 (1962).

ACIP now has 15 voting members responsible for making vaccine recommendations.[13] In addition to these 15 voting members, ACIP also includes 8 "ex officio members who represent other federal agencies with responsibility for immunization programs in the United States," as well as 30 "non-voting representatives of liaison organizations that bring related immunization expertise."[14] The CDC director no longer chairs or serves as a member of the Advisory Committee on Immunization Practices, but the CDC director will still approve ACIP's recommendations before they are published in the CDC's Morbidity and Mortality Weekly Report. Pet. App. 87a–88a; 45 C.F.R. § 147.130(a)(1)(ii) ("[F]or th[e] purpose [of 42 U.S.C. § 300gg-13(a)(2)], a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by

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1964–2014, 63 Morbidity & Mortality Weekly Report 955, 955 (2014), available at http://bit.ly/402B94k

12. *Id.* at 955. The CDC at that time was known as the Communicable Disease Center; it has since been renamed to the Centers for Disease Control and Prevention.

13. *See* https://www.cdc.gov/acip/membership [https://perma.cc/XD2B-4F2Z]

14. *Id.*

the Director of the Centers for Disease Control and Prevention.").[15]

Each of ACIP's 15 voting members is appointed by the Secretary of Health and Human Services and serve four-year terms.[16] The current CDC director was appointed by President without the Senate's advice and consent,[17] but Congress recently enacted legislation to require Senate confirmation for the CDC director beginning on January 20, 2025.[18]

C. The Health Resources and Services Administration

The Health Resources and Services Administration (HRSA) was created in 1982 when the Secretary of Health and Human Services merged the Health Resources Administration with the Health Services Administration. *See* Health Resources and Services Admin-

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15. *See also* https://www.cdc.gov/acip/vaccine-recommendations [https://perma.cc/735C-2S2V] ("The Committee's recommendations are forwarded to CDC's Director and once adopted become official CDC policy. These recommendations are then published in CDC's Morbidity and Mortality Weekly Report (MMWR).").
16. *See* https://www.cdc.gov/acip/membership [https://perma.cc/XD2B-4F2Z]
17. *See* http://bit.ly/402hVvH [https://perma.cc/6X74-9GR5] (announcement of President Biden's intent to appoint Dr. Mandy Cohen as director the CDC).
18. *See* Consolidated Appropriations Act, 2023 § 2101, Pub. L. 117-328, 136 Stat. 4459, 5706 (2022), available at: http://bit.ly/4e6fRX3 (enacting a new law to be codified at 42 U.S.C. § 305(a), providing that the CDC director "shall be appointed by the President, by and with the advice and consent of the Senate.").

istration; Statement of Organization, Functions, and Delegations of Authority, 47 Fed. Reg. 38,409 (Aug. 31, 1982). HRSA is led by an administrator who oversees a variety of offices and bureaus.[19] When HRSA was first established its administrator reported to the Assistant Secretary for Health. *See id.* at 38,410. Now the HRSA administrator reports directly to the Secretary of Health and Human Services.[20] The administrator of HRSA is appointed by the Secretary of Health and Human Services without Senate confirmation.

III. THE PLAINTIFFS' LAWSUIT

On March 29, 2020, the plaintiffs sued and asked a federal district court to enjoin enforcement of the ACA's preventive-care coverage mandates. They argued that the members of the Task Force and ACIP, as well as the HRSA administrator, qualify as "officers of the United States" under Article II because they wield "significant authority pursuant to the laws of the United States"[21]—and that they must therefore be appointed by the president with the Senate's advice and consent. The plaintiffs further alleged that each of the four subsections in 42 U.S.C. § 300gg-13(a)(1)–(4) violates the non-delegation doctrine by failing to provide an "intelligible principle" to guide the discretion of the Task Force, ACIP, and HRSA.

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19. *See* https://www.hrsa.gov/about/organization/org-chart [https://perma.cc/7JHV-VDEB]

20. *See* https://www.hhs.gov/about/agencies/orgchart

21. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976); *see also* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443 (2018).

Cf. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657, 676 (2020) ("HRSA has virtually unbridled discretion to decide what counts as preventive care and screenings.").[22]

A. The District Court's Ruling

The district court held that the members of the U.S. Preventive Services Task Force are "principal" officers who must be appointed by the president with the Senate's advice and consent. Pet. App. 115a–116a. The district court then concluded that all preventive-care coverage mandates imposed by the Task Force since March 23, 2010, were unlawful for that reason, and it ordered that any "agency actions" taken to implement these unlawful mandates be "set aside" (*i.e.* formally vacated) under section 706 of the APA. App. 2a–3a; Pet. App. 72a–84a. *See Nat'l Ass'n of Private Fund Managers v. SEC*, 103 F.4th 1097, 1114 (5th Cir. 2024) ("Under section 706 of the APA, when a court holds that an agency rule violates the APA, it 'shall'—not may—'hold unlawful and set aside' [the] agency action." (citation omitted)). In accordance with its universal vacatur remedy under section 706, the district court also issued a concomitant nationwide injunction that restrained the defendants from "implementing or enforcing" the ACA's preventive-services "coverage requirements in response to an 'A' or 'B' rating from the Task Force in the future." Pet. App. 83a.

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22. The plaintiffs raised other claims in the district court, but none of them are at issue in the Solicitor General's petition or in the plaintiffs' cross-petition.

The district court, however, rejected the plaintiffs' Appointments Clause challenge to the preventive-care coverage mandates imposed by the Advisory Committee on Immunization Practices (ACIP) and the Health Resources and Services Administration (HRSA). Pet. App. 102a–106a. The district court also rejected the plaintiffs' non-delegation claim after concluding that it was foreclosed by binding Fifth Circuit precedent. Pet. App. 122a–128a; App. 3a.

B. The Appellate-Court Proceedings

The defendants appealed the district court's ruling that the Task Force members were unconstitutionally appointed, while the plaintiffs cross-appealed the district court's rejection of their non-delegation claim.[23] The plaintiffs acknowledged, however, that their non-delegation claim was foreclosed by the fifth circuit's precedent,[24] and they appealed solely to preserve the non-delegation issue for a certiorari petition to this Court. Pet. App. 10a n.23.

The court of appeals affirmed the district court's ruling that the Task Force members were unconstitutionally appointed,[25] although it rejected the district court's

23. The plaintiffs also cross-appealed the district court's rejection of their Appointments Clause challenges to the preventive-care coverage mandates imposed by the Advisory Committee on Immunization Practices (ACIP) and the Health Resources and Services Administration (HRSA). Pet. App. 43a–47a. The plaintiffs, however, are not seeking further review of those claims in this conditional cross-petition.

24. *See Big Time Vapes, Inc. v. FDA*, 963 F.3d 436 (5th Cir. 2020).

25. Pet. App. 12a–26a.

universal remedy and limited relief to the named plaintiffs.[26] The court of appeals also affirmed the district court's rejection of the plaintiffs' non-delegation claim. Pet. App. 10a n.23.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The majority opinion in *Little Sisters* went out of its way to criticize 42 U.S.C. § 300gg-13(a)(4) for conferring "unbridled discretion" on the Health Resources and Services Administration, and it strongly suggested that the Court would have interest in revisiting the non-delegation issues presented by this statute if a litigant were to invite the Court to do so. *See Little Sisters*, 591 U.S. at 676–79. And numerous members of this Court have expressed openness to once again enforcing constitutional limits on Congress's ability to transfer its law-making powers to bureaucrats and politically unaccountable expert panels. *See Gundy v. United States*, 588 U.S. 128, 148–49 (2019) (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); *id.* at 149–79 (Gorsuch, J., dissenting). This petition presents an ideal vehicle for resolving the non-delegation issues that this Court flagged in *Little Sisters*.

It is hard to imagine a more standardless delegation of authority than what appears in each of the four subsections to 42 U.S.C. § 300gg-13(a)(4). This Court has

26. Pet. App. 30a–43a.

repeatedly held that statutes that delegate lawmaking authority to agencies must supply an "intelligible principle" to guide the agency's discretion. *See Whitman v. American Trucking Associations*, 531 U.S. 457, 472 (2001); *Gundy*, 588 U.S. at 135 (plurality opinion of Kagan, J.) ("The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion."). Yet there is *nothing* in the text of section 300gg-13(a)(1)–(4) that purports to guide the discretion of the U.S. Preventive Services Task Force, the Advisory Committee on Immunization Practices, or the Health Resources and Services Administration when these entities dictate the preventive care that private insurance must cover. The statute does not even require these agencies to make these decisions based on the "public interest" or the "public health," and it does not provide *any* factors or considerations that might influence the agencies' decisionmaking. Even the statutes that have fallen along the outermost boundary of constitutionally permissible delegations have had at least something to guide the agency; this statute has nothing at all.

The Court's opinion in *Little Sisters* thoroughly explains the constitutional shortcomings with section 300gg-13(a)(4)'s delegation of lawmaking authority:

> On its face, then, [section 300gg-13(a)(4)] grants sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover. But the statute is completely silent as to *what* those "comprehensive guidelines" must contain, or

how HRSA must go about creating them. The statute does not, as Congress has done in other statutes, provide an exhaustive or illustrative list of the preventive care and screenings that must be included. See, *e.g.*, 18 U.S.C. § 1961(1); 28 U.S.C. § 1603(a). It does not, as Congress did elsewhere in the same section of the ACA, set forth any criteria or standards to guide HRSA's selections. See, *e.g.*, 42 U.S.C. § 300gg–13(a)(3) (requiring "*evidence-informed* preventive care and screenings" (emphasis added)); § 300gg–13(a)(1) ("evidence-based items or services"). It does not, as Congress has done in other contexts, require that HRSA consult with or refrain from consulting with any party in the formulation of the Guidelines. See, *e.g.*, 16 U.S.C. § 1536(a)(1); 23 U.S.C. § 138. This means that HRSA has virtually unbridled discretion to decide what counts as preventive care and screenings. But the same capacious grant of authority that empowers HRSA to make these determinations leaves its discretion equally unchecked in other areas, including the ability to identify and create exemptions from its own Guidelines.

Congress could have limited HRSA's discretion in any number of ways, but it chose not to do so. Instead, it enacted "'expansive language offer[ing] no indication whatever'" that the statute limits what HRSA can designate as preven-

> tive care and screenings or who must provide that coverage.

Little Sisters, 591 U.S. at 676–77 (some citations omitted). Of course, the Court did not go so far as to say that section 300gg-13(a)(4) actually violates the non-delegation doctrine, and it declined to rule on the constitutionality of the statute because none of the litigants had asked the Court to do so. *See id.* at 679 ("No party has pressed a constitutional challenge to the breadth of the delegation involved here."). But the Court *did* make clear that it remains interested in policing the boundary between permissible and impermissible delegations of lawmaking power, and it called out section 300gg-13(a)(4) as a unique (and uniquely troublesome) delegation of congressional authority.

The plaintiffs' non-delegation challenges to section 300gg-13(a)(4) (and to the remaining subsections in 42 U.S.C. § 300gg-13(a)(1)–(4)) are cleanly presented and there are no jurisdictional or other vehicle problems that might present an unwanted or unexpected obstacle to this Court's resolution of those claims. The plaintiffs asserted their non-delegation claim from the get-go and explicitly pleaded it in their complaint.[27] They preserved those claims throughout the district-court and appellate-court proceedings. Pet. App. 10a n.23. And their standing to assert those claims is unassailable. Braidwood Management Inc., the lead cross-petitioner, easily has Article

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27. *See* Complaint, *Braidwood Management, Inc. v. Becerra*, No. 20-cv-283, ECF No. 1 (N.D. Tex.) (Mar. 29, 2020) at ¶¶ 71–79, 148(c).

III standing because it operates a self-insured plan and employs more than 50 full-time workers.[28] Braidwood is compelled by 42 U.S.C. § 300gg-13(a)(1)–(4) to underwrite services that it would rather exclude, and it is restricted from imposing any cost-sharing arrangements for any of the preventive care decreed by the Task Force, ACIP, or HRSA.[29] That alone is enough to establish standing. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014); Pet. App. 95a ("Braidwood presents the easiest case for standing."); *id.* ("[T]he mandates deprive Braidwood of the ability to choose whether and to what extent its insurance plan covers preventive care."); Pet. App. 95a–97a (describing each of Braidwood's Article III injuries). And there is no need for any of the remaining cross-petitioners to make an independent showing of standing when Braidwood's standing is secure. *See Biden v. Nebraska*, 600 U.S. 477, 489 (2023) ("If at least one plaintiff has standing, the suit may proceed.").

The absence of a circuit split should not defeat this cross-petition because the Court granted certiorari on the non-delegation issues in *Gundy* despite the absence of lower-court disagreement. *See Gundy v. United States*, 588 U.S. 128, 134–35 (2019) (plurality opinion of Kagan, J.) ("The District Court and Court of Appeals for the Second Circuit rejected that [non-delegation] claim,

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28. Declaration of Steven F. Hotze ¶¶ 5–6, *Braidwood Management Inc. v. Becerra*, No. 4:20-cv-00283-O (N.D. Tex.), ECF No. 46.

29. Declaration of Steven F. Hotze ¶¶ 7–19, *Braidwood Management Inc. v. Becerra*, No. 4:20-cv-00283-O (N.D. Tex.), ECF No. 46.

as had every other court (including eleven Courts of Appeals) to consider the issue. We nonetheless granted certiorari." (citations omitted)). It is also unrealistic to expect a circuit split to develop on these non-delegation issues when so many lower-court judges regard the non-delegation doctrine as doctrine or dormant or defunct,[30] and when circuit-court precedents prevent even sympathetic appellate judges from reviving it. *See, e.g.*, *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436 (5th Cir. 2020); *United States v. Guzman*, 591 F.3d 83, 91–93 (2d Cir. 2010).

CONCLUSION

The conditional cross-petition should be granted if the Court grants the petition in No. 24-316.

Respectfully submitted.

GENE P. HAMILTON
America First Legal Foundation
611 Pennsylvania Ave SE #231
Washington, DC 20003
(202) 964-3721
gene.hamilton@aflegal.org

October 21, 2024

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

30. *See, e.g.*, *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 195 F.3d 4, 14 (D.C. Cir. 1999) (Silberman, J., dissenting from denial of rehearing en banc) ("The [non-delegation] doctrine . . . is at this stage of constitutional 'evolution' not in particularly robust health.").

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:20-cv-00283-O

BRAIDWOOD MANAGEMENT, INC., ET AL., PLAINTIFFS

v.

XAVIER BECERRA, ET AL., DEFENDANTS

Filed: Mar. 30, 2023

FINAL JUDGMENT

This Judgment is issued pursuant to Fed. R. Civ. P. 58(a).

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered in the Court's orders partially granting and partially denying the parties' motions for summary judgment.

It is therefore **ORDERED**, **ADJUDGED**, and **DECREED** that:

1) All claims of Joel Miller and Gregory Scheideman in the above-entitled and numbered cause are hereby DISMISSED without prejudice for lack of subject matter jurisdiction.

2) The Advisory Committee on Immunization Practices (ACIP) and the Health Resources and Services Administration (HRSA) do not, on the record in this case, violate Article II's Appointments clause. Therefore, Braidwood Management Inc., Kelley Orthodontics, John Kelley, Joel Starnes, Zach Maxwell, and Ashley Maxwell's (remaining Plaintiffs) **Claim No. 1** as it pertains to ACIP and HRSA is **DISMISSED with prejudice** to the refiling of same or any part thereof.

3) The U.S. Preventive Services Task Force's (PSTF) recommendations operating in conjunction with 42 U.S.C. § 300gg-13(a)(1) violate Article II's Appointments Clause and are therefore unlawful. Therefore, any and all agency actions taken to implement or enforce the preventive care coverage requirements in response to an "A" or "B" recommendation by the PSTF on or after March 23, 2010 are **VACATED** and Defendants and their officers, agents, servants, and employees are **ENJOINED** from implementing or enforcing 42 U.S.C. § 300gg-13(a)(1)'s compulsory coverage requirements in response to an "A" or "B" rating from PSTF in the future.

   Further, any and all agency action taken to implement or enforce the preventive care mandates

in response to an "A" or "B" recommendation by PSTF on or after March 23, 2010 and made compulsory under 42 U.S.C. § 300gg-13(a)(1) are **DECLARED** unlawful as violative of the Appointments Clause. Therefore, Braidwood Management Inc. and Kelley Orthodontics, and to the extent applicable, individual Plaintiffs need not comply with the preventive care coverage recommendations of PSTF issued on or after March 23, 2010, because the members of the Task Force have not been appointed in a manner consistent with Article II's Appointments Clause. Accordingly, the Court **ENJOINS** Defendants and their officers, agents, servants, and employees from implementing or enforcing the same against these Plaintiffs.

4) 42 U.S.C. § 300gg-13(a)(1)–(a)(4) do not violate the nondelegation doctrine. Therefore, remaining Plaintiffs' **Claim No. 2** is **DISMISSED with prejudice** to the re-filing of same or any part thereof.

5) The operation of 42 U.S.C. § 300gg-13(a)(1) does not violate Article II's Vesting Clause. Therefore, remaining Plaintiffs' **Claim No. 3** is **DISMISSED with prejudice** to the re-filing of same or any part thereof.

6) Remaining Plaintiffs' **Claim No. 4** is **DISMISSED with prejudice** to the re-filing of same or any part thereof for failure to state a claim upon which relief may be granted.

7) The PrEP mandate violates remaining Plaintiffs' rights under the Religious Freedom Restoration Act and is therefore **DECLARED** unlawful. As such, remaining Plaintiffs need not comply with the preventive care coverage recommendations of PSTF issued on or after March 23, 2010 and the Court **ENJOINS** Defendants and their officers, agents, servants, and employees from implementing or enforcing the PrEP mandate as against these Plaintiffs.

8) All costs shall be paid by the party incurring the same.

9) All relief not expressly granted herein is denied.

The Clerk of Court is **DIRECTED** to close the above-captioned case.

SO ORDERED on this **30th day** of **March, 2023**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX B

The Affordable Care Act's preventive services provision, Section 2713 of the Public Health Service Act, 42 U.S.C. § 300g-13(a)(1)–(4), requires that group health plans and health insurance issuers provide coverage without cost-sharing for preventive services recommended by or contained in guidelines supported by the United States Preventive Services Task Force (USPSTF), the Advisory Committee on Immunization Practices (ACIP), and the Health Resources and Services Administration (HRSA). Through this provision, Congress recognized the scientific expertise of these entities. Litigation has been brought questioning the authority under which these entities have issued recommendations and guidelines for preventive services that the Affordable Care Act requires health plans and issuers to cover without cost-sharing. To resolve questions raised in litigation and out of an abundance of caution, for purposes of coverage under the statute, I ratify the below listed guidelines and recommendations for the reasons relied on by the USPSTF, ACIP and the Director of the Centers for Disease Control and Prevention (CDC Director), and the HRSA Administrator in their previously published decisions or analyses regarding the relevant recommendations. This action is not intended to suggest any legal defect or infirmity in the authority of these entities to issue preventive service guidelines and recommendations.

- Evidence-based clinical preventive services that have in effect a rating of "A" or "B" in the recommendations of the USPSTF as of the date of this ratification, with the exception of the 2016

USPSTF recommendation on screening for breast cancer, set forth in Exhibit A, attached;

- Immunizations that have in effect a recommendation from ACIP and the CDC Director with respect to the individual involved as of the date of this ratification, set forth in Exhibit B, attached;
- With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by HRSA as of the date of this ratification, set forth in Exhibit C, attached; and
- With respect to women, such additional preventive care and screenings as provided for in comprehensive guidelines supported by HRSA for purposes of 42 U.S. Code § 300gg13(a) as of the date of this ratification, set forth in Exhibit D, attached.

Pursuant to my authority as Secretary of Health and Human Services, and based on my independent and considered review of the actions and decisions listed above, I hereby affirm and ratify the above recommendations and guidelines.

Xavier Becerra

January 21, 2022
Date