

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.)

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12
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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P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Mooppan.

ORAL ARGUMENT OF HASHIM M. MOOPPAN

ON BEHALF OF THE PETITIONERS

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

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

Moreover, the Secretary can review Task Force recommendations and prevent them from taking effect. During the minimum interval period, he can direct the Task Force to rescind 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 morning.
7 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 nine --
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
2 matter, and I took your question to be, where is
3 the statutory authority to do this? Before the
4 ACA, it had to be the case that the Secretary or
5 the 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" and
19 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 JUSTICE THOMAS: Yeah.

25 MR. MOOPPAN: -- how the statute

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

7 JUSTICE SOTOMAYOR: Don't you rely --

8 CHIEF JUSTICE ROBERTS: This is --

9 JUSTICE SOTOMAYOR: I'm sorry.

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

20 MR. MOOPAN: Well, Your Honor, the
21 Secretary clearly has the authority to do so.
22 Whether he chooses to exercise that authority or
23 whether he instead chooses to defer to the
24 expert judgment of the -- of the Task Force
25 isn't relevant to the constitutional question.

1 As a constitutional matter and as a statutory
2 matter, he has the authority to review their
3 recommendations, and that's the critical point
4 for here.

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

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

25 The Fifth Circuit didn't address the

1 antecedent question whether the Secretary,
2 indeed, has the power to appoint. What do we do
3 about that? Should we -- should we remand the
4 case to -- to assess that in the first instance?
5 Justice -- as Justice Thomas's questions point
6 out, there seems to be some -- some reason to
7 question that.

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

12 JUSTICE GORSUCH: Whoever it is --

13 MR. MOOPPAN: Right.

14 JUSTICE GORSUCH: -- is an important
15 question, though, right?

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

20 JUSTICE GORSUCH: I understand that.
21 But -- but you say the Secretary has that
22 at-will removal power. That's a pretty critical
23 premise of your argument, and it's an untested
24 premise, one that the Fifth Circuit hasn't
25 addressed and --

1 MR. MOOPPAN: So --

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

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

10 JUSTICE GORSUCH: Well, you also cite
11 Cutter and tell us, you know, we're not normally
12 a court -- reminding us --

13 MR. MOOPPAN: So --

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

16 MR. MOOPPAN: So I won't object if
17 this Court doesn't want to address that
18 question, but we do think the answer is quite
19 clear. For the reasons in my -- with my
20 colloquy with Justice Thomas, I don't think the
21 statute could plausibly be construed to vest the
22 appointment in the president and confer --
23 confirmation by Senate.

24 JUSTICE GORSUCH: I agree with that,
25 but whether it appoint -- whether it -- whether

1 it vests it in the director as opposed to the
2 Secretary is -- is an interesting question.

3 MR. MOOPPAN: Well, but that's a very
4 easy question because, if you agree with me it's
5 at least in the director, the Reorganization
6 Act, by its --

7 JUSTICE GORSUCH: I understand you
8 think it's easy. Counsel always thinks it's
9 easy.

10 (Laughter.)

11 MR. MOOPPAN: Also --

12 JUSTICE GORSUCH: But -- but I -- I'm
13 pretty sure Mr. Mitchell doesn't think it's
14 quite as -- he probably thinks it's easy too,
15 just the other way.

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

17 JUSTICE GORSUCH: And -- and -- and no
18 court's passed on the question. And so, again,
19 I ask you: Do you have any objection if we were
20 to remand it?

21 MR. MOOPPAN: I -- we don't. But, to
22 be fair, I don't even hear Mr. Mitchell to
23 disagree with what I'm about to say, which is
24 that the Reorganization Act of 1966 clearly
25 vests the Secretary with all the powers of the

1 director. So, if the director has the power,
2 the Secretary has the power.

3 JUSTICE SOTOMAYOR: And that includes,
4 doesn't it, subdivision (b)(2), which transfers
5 to the Secretary the power to make such
6 provisions as she shall deem appropriate,
7 authorizing the performance of any of the
8 functions of the director?

9 MR. MOOPPAN: That's correct, Your
10 Honor.

11 JUSTICE SOTOMAYOR: And so, if they
12 have to convene something and no one else is
13 appointing them, then the director appoints
14 them, right?

15 MR. MOOPPAN: That's right. And,
16 importantly --

17 JUSTICE SOTOMAYOR: And removes them?

18 MR. MOOPPAN: Correct. And
19 Mr. Mitchell's point about the Reorganization
20 Act, what he focused on is whether the Task
21 Force is an advisory board. But that's
22 irrelevant to the question we're talking about
23 right now because that's a question about
24 whether the Task Force powers have been vested
25 in the Secretary.

1 JUSTICE SOTOMAYOR: Now the Chief
2 asked you --

3 MR. MOOPPAN: The director --

4 JUSTICE SOTOMAYOR: -- the Chief asked
5 you a question about supervising technical
6 advice. That might be said -- be true of even
7 us. We're given law clerks to help us on some
8 of the things we don't know anything about.

9 That's the nature of an agency, isn't
10 it, that they hire experts to help the
11 decisionmakers come to a conclusion?

12 MR. MOOPPAN: Right. That was the
13 essential reasoning and holding of Free
14 Enterprise Fund, in fact --

15 JUSTICE SOTOMAYOR: All right.

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

18 So, yes, you have bureaucrats who
19 contribute their expertise, but, ultimately, the
20 final decision power is in a politically
21 accountable head of an agency.

22 JUSTICE SOTOMAYOR: And -- and that
23 word "independent" could mean that people on the
24 Task Force have an obligation to give their
25 independent opinion, but that doesn't mean that

1 the Secretary has to accept it, correct?

2 MR. MOOPPAN: That's exactly right.

3 And I would point this Court to how this Court
4 has described administrative law judges in -- in
5 Butz versus Economou.

6 JUSTICE ALITO: And that's an -- an
7 incredibly strained interpretation of the term
8 "independent."

9 Are you independent of the president?

10 MR. MOOPPAN: No, Your Honor.

11 JUSTICE ALITO: I mean, he's -- he is
12 counting on you to exercise a degree of
13 independent judgment. But, if somebody's
14 removable at will, that person is not in any
15 ordinary sense of the term "independent."

16 MR. MOOPPAN: Well, with all due
17 respect, Your Honor, in Your Honor's opinion for
18 the Court in Collins, this Court held that there
19 are many statutes that use the phrase
20 "independent" to describe an entity that is
21 nevertheless not subject to a removal.

22 JUSTICE ALITO: All right. Well,
23 maybe that's a little bit unfair. But, I
24 mean -- maybe I was wrong in Collins. But
25 explain to me --

1 (Laughter.)

2 JUSTICE ALITO: You know, explain to
3 me how somebody can be independent and yet
4 subject to removable on the whim of the
5 president.

6 MR. MOOPPAN: Sure. As -- as Justice
7 Sotomayor said, it's independent in the sense
8 that they have both the duty and the power to
9 exercise their own best judgment. That doesn't
10 mean that once they've done so, they're free
11 from accountability.

12 It just means that when they're making
13 the decision, they have an obligation to
14 exercise their best scientific judgment.

15 JUSTICE KAVANAUGH: Is -- go ahead.

16 JUSTICE ALITO: Well, let's say they
17 are removable at will, okay, and independent
18 means something. It's like a precatory
19 directive.

20 Still, if the Task Force rates
21 something A or B, then that's it. And you try
22 to get -- and -- and even if the members are
23 removable at will, the only way you can get
24 around that is through a really -- some really
25 jerry-built arguments.

1 MR. MOOPPAN: I don't think so, Your
2 Honor. Let me give you the most straightforward
3 of them. Under the statute itself, no
4 recommendation takes effect until the Secretary
5 sets the minimum interval period.

6 JUSTICE ALITO: Right, right.

7 MR. MOOPPAN: And the minimum interval
8 period is at least one year.

9 JUSTICE ALITO: Yeah.

10 MR. MOOPPAN: So one year is more than
11 adequate time for the Secretary, if he doesn't
12 agree with the recommendation, to direct the
13 board to rescind it, the force to rescind it
14 and, if the Task Force doesn't rescind it, to
15 replace them with people who will. That doesn't
16 seem very jerry-built to me.

17 In addition to that, the Secretary
18 also has the power to create a pre-approval
19 requirement. Under 300gg-92, he has rulemaking
20 power to implement the statute, and he can say:
21 Before you issue any recommendations, submit it
22 to me for my approval, and if and only if I
23 approve it can you issue it in the first place.

24 Again, that's not all that
25 jerry-built, and it perfectly preserves --

1 JUSTICE ALITO: And if -- if -- if
2 Congress really wanted these Task Force members
3 to do the bidding of the Secretary, isn't that
4 an incredibly odd way to go about conferring
5 that authority?

6 MR. MOOPPAN: No, because, critically,
7 we are not saying that Congress wanted the Task
8 Force to do the Secretary's bidding. We agree
9 that the Task -- the Secretary cannot tell the
10 Task Force to make a given recommendation.

11 If the Task Force doesn't want to make
12 a recommendation, it doesn't have to make a
13 recommendation. Our point is simply that if the
14 Task Force does make a recommendation, the
15 Secretary can block it.

16 It's -- to use an analogy, it's like
17 bicameralism. The Senate can't force the House
18 to pass a bill. But, if the Senate doesn't also
19 agree with the bill, it doesn't become a law.

20 JUSTICE ALITO: Well, under the
21 argument that you just made, why can't the
22 Secretary demand that a particular
23 recommendation be made using exactly the same
24 authority that you just outlined?

25 What am I missing? The president

1 says: I want you to make this recommendation,
2 and if you don't make this recommendation, I'm
3 going to remove you and replace you with
4 somebody who will make the recommendation.

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

13 And that makes perfect sense. If you
14 take a step back and think about the statutory
15 scheme, Congress was, as it often does,
16 balancing competing objectives. On the one
17 hand, it wanted the benefits of an expert body.
18 It wanted recommendations that reflected their
19 best scientific judgment. But, on the other
20 hand, it recognized that you need to have
21 political accountability.

22 And so the Secretary can block it,
23 but -- and that solves the problem. It means
24 that no final decision could be made that binds
25 the public unless the Secretary approves it.

1 JUSTICE BARRETT: But, Mr. Mooppan,
2 doesn't that make it difficult for you in your
3 inferiority argument? Because what if it's a
4 big priority of the president to have these
5 AIDS-prevention drugs available and the Task
6 Force says no, not -- not going to do it?

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

12 MR. MOOPPAN: So two points about
13 that, Your Honor. The first is I think this
14 Court has already resolved that question in Free
15 Enterprise Fund.

16 So, in Free Enterprise Fund, this
17 Court held that once the PCAOB was made
18 removable at will by the Commission, they were
19 inferior officers. Even though it was conceded
20 there was no statutory authority whatsoever for
21 the Commission to force the PCAOB --

22 JUSTICE BARRETT: So that's enough.
23 Your position -- because it was a little bit
24 difficult to tell in your brief. You're saying
25 that's enough. At-will removal is all that's

1 required?

2 MR. MOOPPAN: No, that's not what I'm
3 saying, Your Honor. We have said that it's both
4 the at-will removal power plus the powers of
5 supervision we've talked about. But,
6 critically, those are powers of supervision to
7 block recommendations.

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

10 As to forcing them to make a
11 recommendation, my -- our point is you don't
12 need supervision in that respect. Free
13 Enterprise Fund already holds that as long as
14 they're removable at will, the fact that you
15 can't force them to take action is -- does not
16 make them --

17 JUSTICE KAVANAUGH: Can you force --

18 JUSTICE KAGAN: Why is it --

19 JUSTICE KAVANAUGH: Go ahead.

20 MR. MOOPPAN: I -- the last thing I
21 was going to say, which I -- perhaps Justice
22 Kavanaugh was about to say, is you do still have
23 at-will removal power in that context, and so,
24 therefore, you do have some means of ensuring
25 the recommendation gets made. It's just the

1 means is replacing them if they won't do it, but
2 you don't have statutory authority to force them
3 to start. And Free Enterprise Fund already
4 blesses that arrangement.

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

8 MR. MOOPPAN: Well, we just don't
9 think your -- the Court needs to go that far.
10 This Court has always, in cases like Edmond and
11 Free Enterprise Fund, taken an incremental
12 approach to how it determines the line between
13 inferior and principal officers.

14 And we think, in this case, where
15 there's both at-will removal plus abundant means
16 of back-end supervision, that's all this Court
17 needs to do.

18 And to be candid, I think there would
19 be harder questions if, for example, you had an
20 officer who had the power to issue very
21 important, very broad-ranging decisions that
22 had -- took immediate effect, couldn't be
23 stopped on the back end, and the only means of
24 supervision was front-end removal.

25 We haven't taken a position one way or

1 the other on that, but I do think that that's a
2 harder question, and that's why we don't think
3 this Court needs to go there.

4 But that said, you don't have to go
5 very much further than that on the facts of this
6 case because, here, it's -- not only do you have
7 at-will removal, you have the critical
8 difference that the recommendations don't take
9 effect immediately. They don't take effect for
10 at least a year, and within that year period,
11 the Secretary has ample time to ensure they
12 never take effect.

13 And so those two alone, we're
14 perfectly comfortable saying that that's
15 sufficient for inferior officers.

16 JUSTICE JACKSON: Mr. Mooppan, can I
17 go back to Justice Gorsuch's questions about
18 at-will removal? Because he at least suggested
19 that we may not have at-will removal here, and I
20 guess I'm wondering about the presumptions in
21 our law related to the removability of officers.

22 So do we really need to send it back
23 for resolution of that if the law presumes that
24 where there is no statement regarding this,
25 at-will removal is at play?

1 MR. MOOPPAN: So, again, Your Honor, I
2 agree. I don't think there's any colorable
3 argument that there's a removal restriction
4 here. The only colorable dispute is whether
5 there's actually appointment authority --

6 JUSTICE JACKSON: Right. And what
7 does our law say about that situation? I mean,
8 part of the problem here, I think, is that we
9 are talking about a statute that doesn't speak
10 to particular things.

11 MR. MOOPPAN: I think what --

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

16 MR. MOOPPAN: Yes. The presumption is
17 that there is at-will removal by whoever has
18 appointment authority. And I think the question
19 with Justice Gorsuch is, who is the person who
20 has appointment authority? I don't think
21 there's any serious dispute that whoever it is
22 has at-will removal power because --

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

25 MR. MOOPPAN: Well, yeah.

1 JUSTICE JACKSON: -- in this case?

2 MR. MOOPPAN: Either here or on
3 remand, of course, if -- we need to be right
4 that the Secretary does have appointment
5 authority to defeat their claim. We think that
6 the Secretary does have appointment authority.
7 We think it's clear enough from the statute.

8 JUSTICE JACKSON: Who would it be if
9 it isn't the Secretary?

10 MR. MOOPPAN: Well, I -- in my view,
11 the only other colorable reading of the statute
12 is that it would be the director because the
13 statute says the director shall convene.

14 But, of course, that would render the
15 statute unconstitutional because the director is
16 not the head of the department. And so that's
17 yet another reason why you should read the
18 statute the way we suggest, that when it says
19 the director, under the backdrop of a statute
20 that vests all powers in the director and the
21 Secretary, the Secretary has the power.

22 My friend on the other side, his move
23 is to say: No, no, no, it's the president who
24 has the appointment authority confirmed by the
25 Senate, invoking the backdrop principle that

1 under the Appointments Clause, presidential
2 appointment and Senate confirmation is the
3 default rule for appointment.

4 But the reason that doesn't work, as I
5 was discussing earlier, is, before the ACA,
6 these were not officers. And if they were not
7 officers, it would be unconstitutional for the
8 Senate to have any role in their confirmation.
9 So you cannot read the statute to have
10 presidential appointment and Senate confirmation
11 before the ACA, and nothing in the text of the
12 statute changed after the ACA about who does the
13 appointing.

14 JUSTICE KAVANAUGH: I think you said
15 earlier that at-will removal gives the Secretary
16 the power to influence the content of
17 recommendations before they're made.

18 Is that accurate?

19 MR. MOOPPAN: I think that's correct,
20 Your Honor.

21 JUSTICE KAVANAUGH: And then --
22 because that comes from the at-will removal
23 power, correct?

24 MR. MOOPPAN: Correct.

25 JUSTICE KAVANAUGH: And how does that

1 then square with the word "independent?"

2 MR. MOOPPAN: Because it's still the
3 Task Force ultimate judgment that matters. Yes,
4 there will be -- they can consider what the
5 Secretary wants, they may be even influenced by
6 the fact that if they don't do what he wants,
7 they might get removed, but it's still
8 ultimately their call as a statutory matter. So
9 I would point, for example, the Benefits Review
10 Board --

11 JUSTICE KAVANAUGH: That's an odd
12 definition of "independent," I suppose. Does
13 "independent" in this context have any different
14 meaning because the folks in question are not
15 government employees, that they have outside
16 affiliations, their employers or wherever
17 they're affiliated with?

18 MR. MOOPPAN: Well, they -- well, we
19 do think that they are officers of the United
20 States, and we do think they're government
21 employees. But your point that they have other
22 affiliations as well, we do think that's part of
23 why --

24 JUSTICE KAVANAUGH: They're not paid,
25 right?

1 MR. MOOPPAN: Yes, they -- they are
2 volunteers. But we do think the fact -- that's
3 part of the reason why it uses the phrase
4 "independent" to underscore that it's not just
5 that they have the power to make the judgment
6 based on their best scientific judgment; they
7 have the duty. They have --

8 JUSTICE KAGAN: But I hear you as not
9 relying on the notion that "independence" in
10 that provision means independent from, you know,
11 your university or your think tank or something
12 like that, that you think that the word
13 "independent" here does mean independent from
14 political influences and particularly from
15 presidential ones?

16 MR. MOOPPAN: Well, in making the
17 recommendation, we think that they have to
18 exercise their best scientific judgment free
19 from all of it. They shouldn't do what, you
20 know, their university tells them to do. They
21 shouldn't necessarily do what the Secretary
22 tells them to do. They should exercise their
23 independent judgment based on the science.

24 JUSTICE KAVANAUGH: But the Secretary
25 might say -- and I think you acknowledged

1 this -- if you don't make the following
2 recommendation, I'm going to fire you.

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

5 JUSTICE KAVANAUGH: That's okay,
6 right?

7 MR. MOOPPAN: Yes. The analogy I
8 would give you is the Benefits Review Board in
9 the Department of Labor. So the Benefits Review
10 Board in the Department of Labor is an
11 adjudicatory body that is at-will removable.
12 Because they adjudicate cases, they should
13 adjudicate cases based on their view of the
14 facts and the law. But it's true that if the
15 Secretary tells them, look, you come out one
16 way, you're going to get fired, they might get
17 fired, but they should still exercise their
18 independent best judgment when they issue the
19 ruling.

20 JUSTICE KAVANAUGH: And an --

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

23 MR. MOOPPAN: So, look, I think that
24 that -- it's not entirely clear, Your Honor, but
25 I think that, if anything, it underscores our

1 point that you should not read this statute,
2 especially in light of constitutional avoidance,
3 to say that the Secretary can't engage --
4 exercise the types of review we've said just --

5 JUSTICE KAGAN: I mean, it does
6 suggest that Congress was thinking in some
7 circumstances it would not be practicable.

8 MR. MOOPPAN: Right. There's at
9 least --

10 JUSTICE KAGAN: And what circumstances
11 would Congress be thinking that about?

12 MR. MOOPPAN: Well, at a bare minimum,
13 the circumstances where the statute would be
14 unconstitutional if the Secretary couldn't
15 engage in that level of supervision. So I --
16 again, I think that that language just
17 underscores the constitutional avoidance point
18 that the limited forms of review on the back end
19 that we've emphasized have got to be permissible
20 under that statute both because it has that
21 language in it and because the canon of
22 constitutional avoidance says you should read it
23 that way.

24 And, again, going back to the
25 adjudicators, it's not just the Benefits Review

1 Board. More generally, under the APA, the
2 statutory scheme for adjudication has exactly
3 this feature to it. You have adjudicators who
4 are tasked with exercising independent judgment,
5 but their actions on the back end can be
6 reviewed.

7 JUSTICE KAVANAUGH: Yeah, I understand
8 the analogy to adjudicators, and I thought
9 that's what was in your brief, but, normally,
10 you wouldn't say with adjudicators that the
11 supervising officer can influence the content of
12 the adjudication.

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

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

16 MR. MOOPPAN: Well, but they also --
17 you know, as the Benefits Review Board says, you
18 can also influence -- you have at-will removal,
19 and every one of these adjudicators knows --

20 JUSTICE KAVANAUGH: Right.

21 MR. MOOPPAN: -- that they're acting
22 under the shadow of that. So, you know, does
23 that affect them? Perhaps. But their duty and
24 their power is still to make the decision based
25 on their best judgment.

1 Perhaps one way of making the point
2 is --

3 JUSTICE KAVANAUGH: And that's -- so
4 you're making the analogy, though, to
5 adjudicators here, right?

6 MR. MOOPPAN: Yeah.

7 JUSTICE KAVANAUGH: You think that's a
8 good analogy? And because their decision --
9 recommendations can be reviewed before they take
10 effect, it's similar to all the adjudication
11 cases where there's been supervising --
12 supervisor review of the ultimate decision?

13 MR. MOOPPAN: That's right. And one
14 way of making the point is, for these
15 individuals, if the Secretary tells them to do
16 something and they don't do it, they do the
17 opposite and make a different recommendation,
18 that's not insubordinate, right, because they
19 have statutory power to make their independent
20 best judgment.

21 For most inferior officers, if the
22 president -- or the head of your agency tells to
23 you do X and you do Y, that is insubordinate.
24 So that's what the language does.

25 Now that doesn't mean that you need to

1 be protected from removal on the back end. You
2 can be independent, make your own statutory
3 judgments, but then have to face the
4 consequences if the head of the agency disagrees
5 with those.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas, anything further?

9 JUSTICE THOMAS: Just briefly. What
10 role did you say the Reorganization Act played
11 with respect to the Task Force?

12 MR. MOOPPAN: So -- so several roles.
13 The first is, on the appointment question, we
14 think that the Reorganization Act is a way
15 that -- to confirm that the -- the Secretary has
16 the direct appointment authority with respect to
17 the Task Force members.

18 JUSTICE THOMAS: Now is the Task
19 Force -- I thought the reorganization dealt with
20 agencies within HHS.

21 MR. MOOPPAN: That's correct, Your
22 Honor.

23 JUSTICE THOMAS: Is the Task Force an
24 agency?

25 MR. MOOPPAN: We think the Task Force

1 is within the AHRQ and within PHS, so it's
2 within --

3 JUSTICE THOMAS: So what -- what
4 supports that?

5 MR. MOOPPAN: Well, it is an entity
6 that is convened by the Public Health Service,
7 selected by the Public Health Service,
8 supervised by the Public Health Service, and
9 supported --

10 JUSTICE THOMAS: Now is it
11 structurally -- is it -- is it structurally or
12 statutorily designated a part of an agency?

13 MR. MOOPPAN: Again, I -- there's not
14 anything that says they are or aren't, but I
15 think the clear best reading of the statute is,
16 when you have an entity that's convened by the
17 Public Health Service, selected by the Public
18 Health Service, supervised by the Public Health
19 Service, and supported by the Public Health
20 Service, it's part of the Public Health Service.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 JUSTICE ALITO: No.

23 CHIEF JUSTICE ROBERTS: No?

24 Justice Sotomayor?

25 JUSTICE SOTOMAYOR: There are any

1 number -- I think we mentioned them in our
2 opinion -- the opinion in Collins -- that are
3 deemed independent, but the President still has
4 the power to remove the leadership, correct?

5 MR. MOOPPAN: Correct.

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

11 MR. MOOPPAN: I'm not sure I would
12 psychoanalyze them that way. I -- I --

13 JUSTICE SOTOMAYOR: No, no, but my
14 colleagues are. They're saying that because
15 they could be removed, they're going to
16 automatically ignore their statutory duty.

17 MR. MOOPPAN: Look, I think that they
18 will exercise their statutory duty, and I
19 think --

20 JUSTICE SOTOMAYOR: -- which is to
21 give a recommendation --

22 MR. MOOPPAN: Right.

23 JUSTICE SOTOMAYOR: -- independently.

24 MR. MOOPPAN: But I -- I would say --
25 I -- I wouldn't say that means that the removal

1 power isn't a means of supervision and
2 influence.

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

10 (Laughter.)

11 MR. MOOPPAN: Correct, Your Honor.

12 JUSTICE SOTOMAYOR: All right. That's
13 the nature of asking people to advise you,
14 correct?

15 MR. MOOPPAN: Yes.

16 JUSTICE SOTOMAYOR: Which some advice
17 you'll accept, some you won't. And you can
18 choose to ignore your obligation, but that's not
19 something we presume you'll do?

20 MR. MOOPPAN: Correct.

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?
23 Justice Gorsuch?

24 JUSTICE GORSUCH: So I understand that
25 you -- you agree that they -- the government --

1 the Secretary cannot force a recommendation but
2 lean heavily on the fact it can -- the Secretary
3 can stop recommendations.

4 I think your best authority for that
5 may be Section 202 if I'm correct. You tell me
6 if I'm wrong. And what in 202, if it is your
7 best authority, gives the Secretary that power?

8 MR. MOOPPAN: So not quite, Your
9 Honor. I -- I -- the basis for the distinction
10 is coming from 299b-4(a)(6). We think the
11 statutory language says that they shall be
12 independent in the recommendations made. And so
13 we think that means that they get to make their
14 recommendations, but that doesn't necessarily
15 mean that those recommendations have to take
16 effect.

17 JUSTICE GORSUCH: Right. I understand
18 that.

19 MR. MOOPPAN: Now the statutory
20 power --

21 JUSTICE GORSUCH: Yeah.

22 MR. MOOPPAN: -- to block them, we
23 agree, is both 202 --

24 JUSTICE GORSUCH: Yeah.

25 MR. MOOPPAN: -- and the

1 Reorganization Act.

2 JUSTICE GORSUCH: Okay. And focusing
3 on 202 in particular and putting aside the
4 Reorganization Act for the moment, what in that
5 empowers the Secretary to stop a recommendation
6 from taking effect?

7 MR. MOOPPAN: Well, so the Assistant
8 Secretary for Health, who is supervised and
9 directed by the Secretary, shall administer the
10 entire Public Health Service. And the ability
11 to administer an agency is the language Congress
12 generally uses to describe an agency head's
13 power to control the whole agency.

14 As we cited in the reply brief, that's
15 the language that govern -- allows the Secretary
16 of State to administer the entire State
17 Department, is the Secretary of State shall
18 administer.

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

24 Because of b-4(a)(6), we acknowledge
25 that the specific governs the general, and they

1 have to be independent in making their
2 recommendations.

3 JUSTICE GORSUCH: Yeah.

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

6 JUSTICE GORSUCH: Appreciate that.
7 Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

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

14 MR. MOOPPAN: Well, that gives the
15 authority to delay the effective date. But then
16 you need some other source of authority to then
17 make the recommendation go away.

18 JUSTICE KAVANAUGH: So that's just the
19 when, that's not the whether?

20 MR. MOOPPAN: Correct.

21 JUSTICE KAVANAUGH: Okay. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: I just want to
25 clarify what you mean by the word "independent"

1 or how you understand it. I mean, Mr. Mitchell
2 is reading it in a very maximalist way. You are
3 taking a middle road.

4 I -- I wonder -- I mean, I was
5 thinking of a law clerk example myself. Does
6 "independent" even have to mean independent of
7 the Secretary? Because it seems to me that I
8 could give my law clerk some advance direction.
9 I could say: I want you to make an independent
10 judgment. I want it to be free of political
11 influence or free of outside influence. And by
12 that, I would mean outside the Court, I might
13 mean outside of our chambers, but I might not
14 mean for it to be apart from me, not independent
15 of me.

16 And I could even do that ex ante. I
17 could say: Give me your best understanding of
18 this statute, which -- your -- your best take on
19 its interpretation, seen through the lens of,
20 you know, the way I interpret statutes, the way
21 I see law.

22 So not entirely independent. If you
23 see statutes -- I mean, so, you know, I -- I
24 don't put a huge amount of stock in legislative
25 history. So, if I say: You know, give me your

1 best reading of the statute and that's what they
2 bring back, that's not going to be very useful
3 to me.

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

8 MR. MOOPPAN: So, Your Honor, we could
9 have taken an even narrower interpretation of
10 "independence" along the lines you're
11 suggesting. We thought the better reading of
12 the statute in light of its context is the one
13 we have articulated, where there is independence
14 in the recommendation made even vis-à-vis the
15 Secretary.

16 JUSTICE BARRETT: Even vis-à-vis the
17 Secretary.

18 MR. MOOPPAN: But it doesn't block the
19 Secretary on the back end.

20 Of course, if you want to interpret
21 the statute even more narrowly than that, then
22 that just makes it even harder for Mr. Mitchell.

23 JUSTICE BARRETT: Well, I mean, I
24 think the fact that you could interpret it and,
25 I think, give content to the word "independence"

1 in an even narrower sense, I mean, you have a
2 more middle of the road, and then, as I said, I
3 think Mr. Mitchell has a really maximalist view,
4 i mean, at --

5 MR. MOOPPAN: Right.

6 JUSTICE BARRETT: -- at a minimum, I
7 think it shows that the maximalist view isn't
8 necessary.

9 MR. MOOPPAN: I -- I think that's
10 right, Your Honor. And, again, ultimately, I
11 think one way of thinking about this is this is
12 an Appointments Clause challenge, so the
13 question is whether there is adequate
14 supervision.

15 The Court doesn't necessarily need to
16 get into the exact level of what "independent"
17 means and does it mean what you said or what I
18 said. All we -- the Court really needs to say
19 is there's enough supervision that these are
20 properly understood as inferior officers.

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

23 JUSTICE BARRETT: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

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

7 MR. MOOPPAN: Sure. And, you know, we
8 do think we have the better reading. But, if
9 you thought there was ambiguity here about what
10 the scope of "independence" was or whether the
11 appointment power was vested in the Secretary
12 rather than just the director, this Court
13 obviously reads statutes to avoid constitutional
14 problems rather than create them.

15 So you shouldn't read the phrase
16 "independent" to impose a removal restriction
17 that's not there, to impose a bar on review
18 that's not there, to impose restrictions on who
19 can appoint that aren't there.

20 You should read the statute to
21 reinforce that the Secretary has adequate
22 supervision so that the statute, as written by
23 Congress, can continue to operate.

24 And Mr. Mitchell's only real response
25 to all of that is, again, to say, well, the

1 statute's actually perfectly constitutional on
2 even his theory because he thinks the president
3 can appoint and the Senate can confirm.

4 But that doesn't work as a statutory
5 matter for the reasons we discussed. And once
6 you take that off the table, his reading does
7 create serious constitutional problems with the
8 statute that you can void if you adopt our
9 reading.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Mitchell.

14 ORAL ARGUMENT OF JONATHAN F. MITCHELL
15 ON BEHALF OF THE RESPONDENTS

16 MR. MITCHELL: Mr. Chief Justice, and
17 may it please the Court:

18 The court of appeals correctly held
19 that Task Force members are principal officers
20 who must be appointed by the president and the
21 Senate, as required by Article II. They cannot
22 be inferior officers because their task --
23 because their preventive care coverage mandates
24 are neither directed nor supervised by the
25 Secretary of Health and Human Services or by

1 anyone else who has been appointed as a
2 principal officer.

3 The governing statutes make this
4 clear. Section 300gg-13(a)(1) gives the Task
5 Force alone the prerogative to impose preventive
6 care coverage mandates on insurers regardless of
7 whether the Secretary approves or disapproves a
8 Task Force recommendation.

9 And Section 299b-4(a)(1) and (a)(6)
10 require the Task Force members and their
11 recommendations be kept independent and, to the
12 extent practicable, protected from any type of
13 political pressure.

14 These statutes cannot co-exist with a
15 regime in which the Secretary can overrule the
16 Task Force coverage recommendations or deny them
17 binding effect.

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

23 And a federal district court has no
24 authority and no ability to formally revoke or
25 cancel a statutory provision when entering

1 judgment for a party. More importantly, a
2 remedy from this Court must, to the maximum
3 possible extent, respect the will of Congress as
4 reflected in its enacted laws.

5 Congress has chosen to create an
6 independent Task Force and shield it from
7 political pressure, and the plaintiffs' proposed
8 remedy honors that congressional decision.

9 The government's proposed remedy would
10 rewrite the statute into something
11 unrecognizable by the Congress that enacted the
12 ACA. And it is not even clear that Congress
13 would have approved a regime in which
14 politicians, rather than an independent Task
15 Force, decide the preventive care that insurers
16 must cover.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: Mr. Mitchell, your
19 argument depends on a much broader reading of
20 "independent" than the government's. Would you
21 address the government's limit -- more limited
22 view of "independence?"

23 MR. MITCHELL: Well, there are two
24 different words in play here. It's not just the
25 word "independent," which appears in both

1 Section 299b-4(a)(1) and (a)(6). It's also the
2 phrase in subsection (a)(6) that says the Task
3 Force is to be protected from political pressure
4 to the extent practicable.

5 And we don't see any way that
6 statutory language can be squared with the
7 regime envisioned by the government, where the
8 Secretary can come in and influence the Task
9 Force decisions on the front end, which
10 Mr. Mooppan once again acknowledged at oral
11 argument he believes the Secretary can do that.
12 And we don't see how that can be squared with
13 the actual statutory language.

14 Mr. Mooppan suggests invoking the
15 canon of constitutional avoidance in a way to
16 bend subsection (a)(6) to make it more
17 accommodating of his view of secretarial power.
18 But the constitutional avoidance canon is
19 inapplicable here for many reasons.

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

23 Under the government's interpretation
24 of subsection (a)(6), the Task Force members are
25 still principal officers because they have

1 unreviewable discretion when deciding not to
2 recommend A or B ratings on a particular
3 preventive care service or when they decide to
4 withdraw a previous A or B rating that they have
5 conferred prior to their decision to withdraw.
6 That means they have final decision-making
7 authority that's not subject to direction and
8 supervision.

9 The second point --

10 JUSTICE JACKSON: I don't -- I'm
11 sorry, I don't understand that. Can you help?

12 MR. MITCHELL: Yes.

13 JUSTICE JACKSON: What -- what do you
14 mean, they have unreviewable authority? First
15 of all, I thought there was an interval period
16 that the statute imposed.

17 MR. MITCHELL: That's right.

18 JUSTICE JACKSON: What -- what
19 function is that if not to have some
20 consideration of what these recommendations are?
21 That's one question.

22 MR. MITCHELL: Sure.

23 JUSTICE JACKSON: And then another is
24 what -- what do you mean about them having
25 unreviewable discretion not to make a

1 recommendation?

2 MR. MITCHELL: So the test for
3 principal officer status is whether the officer
4 in question is directed and supervised in his
5 decisionmaking. On the government's reading of
6 Section 299b-4(a)(6), if the Court were to adopt
7 that view, the Secretary would have the ability
8 to overrule Task Force decisions to confer A or
9 B ratings on preventive care. But the Secretary
10 would not have any authority to overrule the
11 Task Force --

12 JUSTICE JACKSON: But why is that?

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

14 JUSTICE JACKSON: Why is that? I
15 mean, the year --

16 MR. MITCHELL: This --

17 JUSTICE JACKSON: They make a
18 recommendation --

19 MR. MITCHELL: Mm-hmm.

20 JUSTICE JACKSON: -- and they have
21 rejected other recommendation -- or --

22 MR. MITCHELL: Right.

23 JUSTICE JACKSON: -- other options.

24 The Secretary puts into place the interval
25 period, reviews what they did and didn't do --

1 MR. MITCHELL: Mm-hmm.

2 JUSTICE JACKSON: -- and says I'm
3 going to remove you as a result. You know, I
4 don't like what you did or didn't do and you're
5 out.

6 MR. MITCHELL: That doesn't make them
7 into inferior officers. And Arthrex holds as
8 much because Arthrex acknowledges situations in
9 which a principal officer can, through informal
10 means, influence the decisionmaking of a
11 subordinate official. And Arthrex says that's
12 still not good enough. There has to be a formal
13 authority to review the decisions that are being
14 made. And what --

15 JUSTICE JACKSON: But what about all
16 the -- what about all the adjudicatory cases?
17 Mr. Mooppan says --

18 MR. MITCHELL: Right.

19 JUSTICE JACKSON: -- this is more like
20 Edmond.

21 MR. MITCHELL: Right.

22 JUSTICE JACKSON: This is -- this is
23 independent in the sense that people are making
24 recommendations using their own best judgment,
25 but they're still at-will removable, and we've

1 found that is okay.

2 MR. MITCHELL: But they also have all
3 their decisions subject to review by a principal
4 officer. What this Court said in Edmond was
5 that the reason those judges were deemed
6 inferior was because they could not issue any
7 final decision on behalf of the United States
8 without being allowed to do so by a principal
9 officer. That is --

10 JUSTICE GORSUCH: Mr. Mitchell, I take
11 that point, and the government concedes that a
12 decision not to list something is unreviewable
13 --

14 MR. MITCHELL: Yes.

15 JUSTICE GORSUCH: -- but says that
16 Free Enterprise Fund blessed that arrangement
17 already.

18 MR. MITCHELL: No.

19 JUSTICE GORSUCH: What are your
20 thoughts?

21 MR. MITCHELL: The difference in Free
22 Enterprise Fund was the SEC had all sorts of
23 supervisory authority over the PCAOB, the Public
24 Accounting -- the Public Company Accounting
25 Oversight Board that is not present here. The

1 SEC could review and alter any rulemaking done
2 by the board. The SEC could review and overrule
3 any sanction that was being imposed by the
4 board. And if you look at page --

5 JUSTICE GORSUCH: But what about a
6 non-action by the board?

7 MR. MITCHELL: Well, if you look at
8 page 504 of the Court's opinion in Free
9 Enterprise Fund, it lists all the ways in which
10 the SEC had these oversight authorities. And
11 this is not -- with all respect, Your Honor,
12 this is not a situation of non-action. When the
13 Task Force decides to issue a C, D, or I rating
14 rather than an A or B rating, that is action.
15 It's not inaction. If the Task Force decides to
16 withdraw an A or B rating that it previously
17 conferred, that is also action rather than
18 inaction.

19 So the government's brief tries to
20 rely on the act/omission distinction. It just
21 doesn't hold up here. There will be situations
22 in which the Task Force can take affirmative
23 actions that cause a certain type of preventive
24 care not to receive the A or B rating. And the
25 government concedes that's unreviewable, so that

1 means they're still principal officers.

2 But there's a second problem as well.
3 Even if this Court were to think that Task Force
4 members become inferior officers under the
5 government's interpretation of the statute, they
6 are still unconstitutionally appointed because
7 Congress has not vested the Secretary of Health
8 and Human Service with the authority to appoint
9 the Task Force.

10 And the court of appeals did not reach
11 this question, as Justice Gorsuch noted during
12 the questioning of Mr. Mooppan. But the Court
13 would have to conclude that there was vesting of
14 this authority in the Secretary before it can
15 say that they're constitutionally appointed now.

16 JUSTICE BARRETT: So are you saying we
17 should remand to the Fifth Circuit to let them
18 address that for the first time?

19 MR. MITCHELL: The Court should not
20 remand unless it disagrees with our principal
21 officer argument or if the Court wants to impose
22 the severance remedy suggested by the
23 government. If the Court --

24 JUSTICE BARRETT: So, if we disagreed
25 with your principal officer argument, you would

1 say, say that you disagree with our principal
2 officer argument but then remand to the Fifth
3 Circuit to give them a crack at the appointment?

4 MR. MITCHELL: I think there would
5 have to be a remand in that situation, Justice
6 Barrett, unless the Court thought the issue was
7 so open and shut.

8 JUSTICE SOTOMAYOR: You think -- why
9 do you think that the Fifth Circuit didn't reach
10 it? I saw that this --

11 MR. MITCHELL: Right.

12 JUSTICE SOTOMAYOR: -- was a huge part
13 of the briefing before the Fifth Circuit.

14 MR. MITCHELL: It was.

15 JUSTICE SOTOMAYOR: It seems to me
16 that it -- it wasn't merely an assumption; it
17 was a conclusion.

18 MR. MITCHELL: But --

19 JUSTICE SOTOMAYOR: In their whole
20 reasoning, the conclusion was --

21 MR. MITCHELL: Well, if I can defend
22 the court of appeals for a moment, Justice
23 Sotomayor.

24 JUSTICE SOTOMAYOR: Yes.

25 MR. MITCHELL: They did not need to

1 reach that question because they concluded,
2 number one, the Task Force members are principal
3 officers. So there's no need to decide whether
4 Congress vested the appointment authority in the
5 Secretary. You only need to reach that question
6 if you think they're inferior officers because
7 even inferior officers still need to be
8 appointed by the president and the Senate unless
9 Congress has affirmatively opted out of the
10 default rule. But, if you think they're
11 principal officers, you don't need to reach that
12 question at all.

13 The second reason I think the court of
14 appeals refused to rule on it was because they
15 rejected the government's proposed severance
16 remedy.

17 And the Court will also need to
18 address this point if it wants to sever Section
19 299b-4(a)(6) because the severance remedy
20 proposed by the government is premised on the
21 idea that the Secretary has constitutional
22 authority vested by Congress to appoint the Task
23 Force. If the Secretary doesn't have that power
24 because Congress hasn't vested the power in the
25 Secretary, then the government's severance

1 remedy does not work because the inferior
2 officers would still have to be appointed by the
3 president and the Senate even if they're
4 considered inferior officers.

5 JUSTICE SOTOMAYOR: Thank you.

6 JUSTICE JACKSON: I guess I don't
7 understand why you're separating the principal
8 officers and the removability. I thought
9 whether or not they are principal officers in
10 part turns on whether or not they are removable
11 at will. You seem to have --

12 MR. MITCHELL: It's --

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

15 MR. MITCHELL: Well, we don't need to
16 separate the inquiry. Removability is a factor
17 to consider. It's not the be all and end all of
18 principal officer status, and this Court has
19 never held that that --

20 JUSTICE JACKSON: I understand, but
21 you said the -- the --

22 MR. MITCHELL: -- is the only factor,
23 but it's one --

24 JUSTICE JACKSON: -- you said the
25 Fifth Circuit didn't have to really go into

1 appointments or removability because they
2 determined that they're principal officers. And
3 I thought the -- you can only reach the issue of
4 whether or not they are principal officers by
5 examining such things as how they are appointed
6 and how they are removed.

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

10 JUSTICE JACKSON: Hmm.

11 MR. MITCHELL: -- the Secretary of
12 Health and Human Services with appointment
13 authority over the Task Force. That was the
14 question I was answering.

15 And the Fifth Circuit had no need to
16 reach that issue. And this Court also has no
17 need to reach this issue unless it disagrees
18 with our argument on principal officers or
19 unless the Court wants to impose the
20 government's proposed severance --

21 JUSTICE KAVANAUGH: In the reply
22 brief --

23 JUSTICE KAGAN: Why -- no, please.

24 JUSTICE KAVANAUGH: In the reply
25 brief, the government came back with Hartwell.

1 Do you want to address that case?

2 MR. MITCHELL: Yeah. Hartwell is not
3 on point because, in Hartwell, the statute
4 required the Secretary of the Treasury to
5 specifically approve the appointment of that
6 inferior officer. So Hartwell concluded that
7 was enough to vest the appointment power in the
8 Secretary of the Treasury.

9 We don't have anything like that in
10 these statutes. Nothing in any of the statutes
11 here requires the Secretary of Health and Human
12 Services to affirmatively approve the
13 appointment of Task Force members.

14 Now --

15 JUSTICE KAVANAUGH: And I guess the
16 government comes back there and says but they
17 have broader authority to -- the Secretary has
18 broader authority to carry out the provisions --
19 299(a) and the Reorg Act, they say those
20 together give the Secretary the authority to
21 essentially stand in the shoes, I suppose, would
22 be one way to characterize their argument, of
23 the director. You want to respond to that?

24 MR. MITCHELL: Sure. The Secretary is
25 allowed to appoint the Task Force. We

1 acknowledge that. Anyone is allowed to appoint
2 the Task Force under the statute. The question
3 is, under the Constitution, who can appoint.
4 The statute doesn't say anything about who
5 appoints. So anybody can appoint them. The
6 AHRQ director appointed them for a time, and
7 that was --

8 JUSTICE KAVANAUGH: Well, if you lose
9 your principal -- I think that's important. If
10 you lose your principal officer argument --

11 MR. MITCHELL: Mm-hmm.

12 JUSTICE KAVANAUGH: -- so that's the
13 premise, not saying you will --

14 MR. MITCHELL: Right.

15 JUSTICE KAVANAUGH: -- but, if you do,
16 and you just said then you could read the
17 statute to allow the Secretary to appoint,
18 that's kind of the end of it.

19 MR. MITCHELL: No, I don't think so.
20 That's not vesting, all right? Anyone can
21 appoint under the statute. The Secretary of
22 Energy could appoint. The President could
23 appoint. The AHRQ director could appoint.
24 Someone from the private sector could appoint.
25 The statute doesn't say anything at all about

1 who appoints. No one is vested with the
2 authority because the statute takes no position
3 on who appoints. So --

4 JUSTICE KAVANAUGH: Yeah. Okay. And
5 I think I understand your argument. Your
6 argument's something's got to speak specifically
7 to appointment. The general authorities in the
8 Reorganization Act and 299 are not enough to --

9 MR. MITCHELL: That's right.

10 JUSTICE KAVANAUGH: And that's why
11 Hartwell's different, because Hartwell --

12 MR. MITCHELL: That's right.

13 JUSTICE KAVANAUGH: Yeah. I've got
14 it.

15 MR. MITCHELL: We have a specific
16 reference in the statute in Hartwell to the
17 Secretary of the Treasury, who must approve the
18 appointment before it can take effect.

19 JUSTICE KAGAN: But is -- is -- is --

20 MR. MITCHELL: We don't have anything
21 remotely like that here.

22 JUSTICE KAGAN: -- is your view that
23 Congress actually wrote a statute without saying
24 who should appoint?

25 MR. MITCHELL: Yes, because they

1 didn't need to work --

2 JUSTICE KAGAN: Without even thinking
3 that it was saying who should appoint?

4 MR. MITCHELL: Yes.

5 JUSTICE KAGAN: That Congress was
6 leaving this, like, just to the -- whatever they
7 come up with?

8 MR. MITCHELL: Yes, because this was
9 initially established as a purely advisory body.
10 So it didn't matter under -- under the
11 Constitution who appointed them. The
12 Appointments Clause didn't apply to the Task
13 Force when it was first created because it only
14 had advisory powers.

15 JUSTICE KAVANAUGH: But, even if
16 purely advisory, to pick up on Justice Kagan's
17 point, it's unlikely that Congress just was
18 throwing it out there in terms of who would --

19 JUSTICE KAGAN: I mean, usually
20 Congress thinks that it does things like that,
21 right? I mean, it would be an odd statute. I
22 doubt you could find another where Congress has
23 set up a board and said, you know -- just not
24 said who should -- who should --

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

1 JUSTICE KAGAN: -- who should make up
2 the board?

3 MR. MITCHELL: All they said is that
4 the AHRQ director shall convene the Task Force.
5 And "convene" does not mean appoint, as Justice
6 Thomas mentioned earlier.

7 JUSTICE KAGAN: I know.

8 JUSTICE BARRETT: But it could.

9 JUSTICE KAGAN: But, in the absence of
10 anything else, it would be a natural reading to
11 say: When you're looking at one person and
12 saying he can convene the board, that means --
13 and there's nobody else out there to actually
14 pick the board members, that means he should
15 also pick the board members.

16 MR. MITCHELL: He's certainly allowed
17 to pick the board members, Justice Kagan. What
18 we're saying is the statute doesn't forbid other
19 people from appointing.

20 The president could appoint the A --
21 the members of the Task Force. He could have
22 done that prior to the ACA, and he can do it
23 after the ACA. In fact, we think he's
24 constitutionally compelled now, after the ACA,
25 to appoint them, with the advice and consent of

1 the Senate. There is no statute that forbids
2 the president to appoint.

3 JUSTICE GORSUCH: Well, if "convene"
4 does mean appoint, then -- then we do have a
5 problem on -- on an inferior officer theory,
6 don't we?

7 MR. MITCHELL: There is a problem,
8 yes, because now we have a statute that's
9 requiring the appointment of a principal
10 officer --

11 JUSTICE GORSUCH: Well, even on the
12 inferior --

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

15 JUSTICE GORSUCH: Yeah, but even if --
16 even if you should lose that argument, again,
17 and we're talking about inferior officers,
18 Mr. Mitchell, if we read "convene" to mean
19 vesting the appointment power in the director,
20 that -- that's -- that's a problem.

21 MR. MITCHELL: That's a big problem.
22 It means the statute is unconstitutional, and
23 the Court should, therefore, reject any
24 interpretation of the word "convene" that makes
25 it synonymous with appoint because that would

1 create not simply a constitutional question but
2 a constitutional violation even --

3 JUSTICE KAVANAUGH: Well, that's where
4 you -- that's where you --

5 JUSTICE JACKSON: But wait. Why?

6 JUSTICE KAVANAUGH: -- pull in 299(a),
7 which says the Secretary can carry out -- shall
8 carry out the statutory provisions, acting
9 through the director. I mean, that's their
10 response to that, right?

11 MR. MITCHELL: Maybe -- maybe that
12 works, but, again, the question Justice Gorsuch
13 was asking me is, if (a)(1) is construed to vest
14 the appointment power in the AHRQ director, even
15 the government would agree with us that's
16 unconstitutional.

17 JUSTICE KAVANAUGH: That -- yeah, that
18 alone would be a problem, I totally agree. But
19 then maybe you have to figure out how to fix
20 that problem. And one way that the government
21 points out is, well, the statute itself
22 essentially fixes that problem because it says
23 that the Secretary can carry out the duties of
24 the director.

25 MR. MITCHELL: Maybe that works. But

1 the question, again, under the Article II is
2 where has Congress vested the appointment power.

3 And if Congress has vested it in the
4 AHRQ director, who is not even a head of
5 department, the AHRQ director can't even appoint
6 inferior officers. And the government agrees
7 with us on this much, right?

8 One thing we all agree on is that the
9 Task Force was unconstitutionally appointed for
10 the 13-year period that began in March of 2010,
11 when the Affordable Care Act was first enacted
12 into law, through June of 2023, when Secretary
13 Becerra reappointed the Task Force.

14 Everyone agrees that those were
15 unconstitutional appointments, and everyone
16 agrees, I would think, that the recommendations
17 that issued during that 13-year period cannot be
18 enforced until the Task Force reissues those
19 recommendations after receiving a constitutional
20 appointment.

21 So it's hard for me to understand why
22 the government's suggesting a remedy of
23 severance when, at the very least, we should be
24 entitled to an injunction that restrains the
25 enforcement of --

1 JUSTICE KAVANAUGH: Well, I --

2 MR. MITCHELL: -- the previously
3 issued Task Force recommendations.

4 JUSTICE KAVANAUGH: -- I don't want to
5 belabor it, but I think --

6 MR. MITCHELL: Yeah.

7 JUSTICE KAVANAUGH: -- to Justice
8 Gorsuch's point, which is a good one, they're
9 saying constitutional avoidance would say:
10 Well, don't read it to be the director in
11 isolation. Read the other provisions which give
12 the Secretary authority over the director so
13 that the Secretary can do the
14 convening/appointing, and that solves the
15 constitutional problem.

16 MR. MITCHELL: Yeah, Justice
17 Kavanaugh, I agree that the Secretary is allowed
18 to appoint the Task Force.

19 JUSTICE KAVANAUGH: Right.

20 MR. MITCHELL: And we've never
21 disputed that. The question is --

22 JUSTICE KAVANAUGH: And so it's vested
23 by law under Article II. That's your key point
24 there.

25 MR. MITCHELL: Right. Vested by

1 Congress. Where has Congress by law vested that
2 authority? And if the statute is vesting the
3 authority in the AHRQ director, that is
4 unconstitutional even if they're inferior
5 officers. And that's why the Court, I think,
6 has to reject an interpretation of the word
7 "convene" that equates to it appoint, because --

8 JUSTICE GORSUCH: And you're saying as
9 well, as I understand it, that if Congress
10 didn't vest it in the director but vested it in
11 the director and the Secretary and 15 other
12 people in between, that's a problem too?

13 MR. MITCHELL: It's a problem too
14 because these are principal officers. So
15 Congress can't --

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

22 MR. MITCHELL: I'm not sure. It
23 would -- at the very least, if they had vested
24 it in the Secretary and they also go on to say
25 in the statute but other people can also

1 exercise the power, it still has to be, I think,
2 ultimately, a head of department that exercises
3 that power, so --

4 JUSTICE KAGAN: But what if it's --
5 what if it's investing it in the director
6 subject to the supervision and control of the
7 Secretary? So there aren't 14 other people
8 wandering around. It's in the director because
9 he's the person who convenes, subject to the
10 Secretary, because the statute, otherwise, gives
11 the -- the Secretary supervisory control over
12 the director.

13 MR. MITCHELL: I -- I don't think
14 that's good enough, Justice Kagan. I think the
15 statute would have to say the Secretary must
16 affirmatively approve the Assistant Secretary or
17 the director's recommendation. That was
18 Hartwell.

19 JUSTICE BARRETT: But doesn't --

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

22 JUSTICE KAVANAUGH: What if it says --

23 JUSTICE BARRETT: But doesn't that --

24 MR. MITCHELL: I don't think it -- I'm
25 sorry.

1 JUSTICE BARRETT: Go ahead, Justice
2 Kavanaugh.

3 But doesn't that prove the point there
4 are all of these questions, and shouldn't we
5 leave this to the Fifth Circuit --

6 MR. MITCHELL: Yeah.

7 JUSTICE BARRETT: -- on remand if you
8 lose the principal officer point?

9 MR. MITCHELL: Yes, I do believe that
10 it should be remanded if the Court thinks it
11 necessary to reach this question.

12 We don't think the Court should reach
13 this question or any court should reach this
14 question because --

15 JUSTICE KAVANAUGH: What -- what if --
16 just to stay on this point --

17 MR. MITCHELL: Yes.

18 JUSTICE KAVANAUGH: -- what if --
19 Justice Kagan's point, what if it said Secretary
20 or director may appoint?

21 MR. MITCHELL: If it says the
22 Secretary or director may appoint, then Congress
23 has vested the appointment authority in a head
24 of department. But we would still say that's
25 unconstitutional because they're principal

1 officers. So, if the Court --

2 JUSTICE KAVANAUGH: Putting that
3 aside.

4 MR. MITCHELL: If the Court disagrees
5 with us, if they reject our principal officer
6 argument, that's the question that would have to
7 be resolved by the Fifth Circuit on remand,
8 Justice Kavanaugh.

9 JUSTICE GORSUCH: I mean, that's --
10 it's a curious thing just to -- just to continue
11 to say you're -- it's vested in two places. One
12 is constitutional, and the other's
13 unconstitutional.

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

16 JUSTICE GORSUCH: Well, but --

17 MR. MITCHELL: And I think the head of
18 department would have to exercise that
19 authority, first of all.

20 JUSTICE GORSUCH: Well, what if --
21 what if he didn't, though? What if the
22 Secretary didn't exercise that authority, but
23 the other person did? I mean, I --

24 MR. MITCHELL: And --

25 JUSTICE GORSUCH: We've never had a

1 case like that.

2 MR. MITCHELL: I don't think there
3 has. I think the Secretary would have to
4 approve the appointment for it to be valid under
5 Hartwell.

6 JUSTICE GORSUCH: Yeah, I -- yeah.
7 So -- so you're saying that under -- under any
8 circumstance -- vested in 15 different places,
9 but, ultimately, for it to be constitutional, it
10 has to be the Secretary who acts?

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

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

18 MR. MITCHELL: Mm-hmm.

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

25 MR. MITCHELL: No. We don't think the

1 Secretary has the authority to do any of that.

2 JUSTICE SOTOMAYOR: You think that the
3 Constitution requires him -- giving Justice
4 Kagan's example -- that the director is subject
5 to the supervision of the Secretary?

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

12 JUSTICE SOTOMAYOR: Both. Both.

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

22 JUSTICE SOTOMAYOR: All right.

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

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

1 JUSTICE KAVANAUGH: Do you -- you
2 accept Hartwell. You just say this doesn't fall
3 within Hartwell?

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

6 And, again, all these issues probably
7 should be remanded to the Fifth Circuit if the
8 Court thinks it necessary to reach this point
9 because, number one, the Fifth Circuit didn't
10 resolve the question below.

11 There's very little briefing on this
12 issue. We barely discussed this in our brief.
13 There's a little bit of a more robust discussion
14 in 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. I
13 mean, "to the extent practicable" actually seems
14 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 It's not saying that we should go to
4 these types of extreme measures. But the -- the
5 reason I don't think constitutional avoidance is
6 even relevant here, Justice Barrett, is because
7 the statute is constitutional no matter how it's
8 construed. Even if the Court were to adopt our
9 view of the meaning of "independent," there's no
10 constitutional problem with the statute. It
11 does not violate the Constitution for Congress
12 to give the Task Force authority to make these
13 preventive care coverage decisions as long as
14 the president and the Senate appoint them --

15 JUSTICE KAVANAUGH: Well, I guess --

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

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

20 MR. MITCHELL: Yes. Please.

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

1 protected from presidential or someone else's,
2 Secretary, head of department, removal power.

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

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

14 MR. MITCHELL: Sure.

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

22 MR. MITCHELL: Right. And there's no
23 specified --

24 JUSTICE KAVANAUGH: And that's usually
25 in the statute.

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

4 JUSTICE KAVANAUGH: And then it
5 says --

6 MR. MITCHELL: -- there's an
7 Appointments Clause problem.

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

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

13 JUSTICE KAVANAUGH: Right. So all
14 that's missing here.

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

25 JUSTICE JACKSON: Can you speak to

1 the --

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

7 (Laughter.)

8 MR. MITCHELL: That seems to be --

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

14 MR. MITCHELL: In terms of construing
15 statutes --

16 JUSTICE KAGAN: In terms of --

17 MR. MITCHELL: -- to maximize
18 presidential influence over the -- over the
19 independent official.

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

25 MR. MITCHELL: Right. But the problem

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

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

10 MR. MITCHELL: Right.

11 JUSTICE KAGAN: -- clear at-will
12 removal power here.

13 MR. MITCHELL: Mm-hmm.

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

18 MR. MITCHELL: Right.

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

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

5 MR. MITCHELL: Right.

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

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

18 But, if you look at the Arthrex
19 opinion, pages 15 and 16, where Arthrex catalogs
20 all the ways in which the PTO Director can
21 influence the decisionmaking of these
22 administrative patent judges in an informal way,
23 without the formal ability to review their
24 decisions, and then the Court says not only is
25 that not good enough, it actually says that

1 aggravates the problem. This is not the
2 solution; it is the problem because it blurs the
3 lines of accountability and it undermines the
4 transparency that the Appointments Clause is
5 supposed to provide.

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

16 JUSTICE JACKSON: Mr. Mitchell, can I
17 ask you about the interval?

18 MR. MITCHELL: Yes.

19 JUSTICE JACKSON: Because we don't
20 just have potential at-will removal power here.
21 We have something in this statute that seems to
22 me to be fairly unusual, which is the
23 requirement that the Secretary establish this
24 minimal interval after the recommendation is
25 made before they come -- it comes into effect.

1 MR. MITCHELL: Right.

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

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

15 JUSTICE JACKSON: No, I understand --

16 MR. MITCHELL: So --

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

25 MR. MITCHELL: The point of that is

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

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

11 MR. MITCHELL: Right.

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

21 So I guess I'm just trying -- I mean,
22 it doesn't necessarily suggest that really this
23 is only a time-related thing. The Secretary's
24 getting involved. He's making decisions. Why
25 doesn't that give us some basis for interpreting

1 this to be a statute in which there is
2 secretarial control?

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

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

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

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

25 May I answer, Mr. Chief Justice?

1 CHIEF JUSTICE ROBERTS: Sure.

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

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

14 And, number three, Your Honor's
15 proposed reading of the statute still does not
16 fix the problem that occurred from March of 2010
17 to June of 2023 when even the government
18 acknowledges the Task Force was
19 unconstitutionally appointed during that 13-year
20 window of time. And all the preventive care
21 coverage mandates that were issued during that
22 time should not be enforceable until the Task
23 Force members receive a new appointment that is
24 constitutional and they reissue the A or B
25 ratings in response to that constitutional

1 appointment.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas?

5 Justice Alito?

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

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

24 I think what Mr. Mooppan is trying to
25 do is salvage some role for 299b-4(a)(6) because

1 it's not plausible, I think, even on the
2 government's view to allow the earlier enacted
3 statutes, such as Section 202 and Reorganization
4 Plan, to completely swallow up these
5 later-enacted guarantees of independence.

6 So they're trying to draw some line.
7 But there's nothing in the text of the statute
8 that can provide an anchor for the distinction
9 he -- that he's trying to draw.

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

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

18 JUSTICE ALITO: Like the setup
19 constitutional?

20 MR. MITCHELL: Yeah. None of the
21 statute needs to be jettisoned in order to make
22 it constitutional even under our reading of the
23 statute. If the Court decides that Congress has
24 vested the Secretary with appointment power over
25 the Task Force, the appointments are still

1 unconstitutional in our view because they're
2 principal officers. They have to be appointed
3 by the president and the Senate no matter what.

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

10 ALITO: So that would be -- that would
11 be for the -- what was done before Secretary
12 Becerra. What about going forward? What would
13 need to be done?

14 MR. MITCHELL: Going forward, it will
15 depend on whether the Court thinks these are
16 principal officers. If the Court thinks they're
17 principal officers, then they have to be
18 appointed by the president and the Senate as
19 well.

20 JUSTICE ALITO: Suppose we thought
21 that they were inferior officers.

22 MR. MITCHELL: If the Court thinks
23 they're inferior officers, there should be a
24 remand, in our view, to the Fifth Circuit to
25 rule on the question whether Congress has vested

1 the Secretary of Health and Human Services with
2 appointment power.

3 I don't think it's appropriate for the
4 Court to decide that issue based on how cursory
5 the briefing is.

6 JUSTICE ALITO: Well, suppose that --
7 suppose we do that, the Fifth Circuit goes back
8 and says that, or we tackle the question and we
9 say that the statute vests -- vests the
10 appointment power in the Secretary. Then what?

11 MR. MITCHELL: Then there has to be
12 some remedy or --

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

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

20 Even the government concedes the Task
21 Force was unconstitutionally appointed during
22 that time. So I don't see how the government
23 can deny that we're entitled to at least that
24 much.

25 JUSTICE ALITO: And what would be the

1 remedy going forward if we went along that --

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

9 JUSTICE ALITO: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor?

12 JUSTICE SOTOMAYOR: I can look this up
13 later, but I thought that at a certain point the
14 Secretary had issued or -- something saying that
15 he was accepting --

16 MR. MITCHELL: He did, yes.

17 JUSTICE SOTOMAYOR: He did?

18 MR. MITCHELL: Yes.

19 JUSTICE SOTOMAYOR: So --

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

21 JUSTICE SOTOMAYOR: -- why do we need
22 a remedy if you're not questioning that he was
23 entitled to do that?

24 MR. MITCHELL: Oh, we are --
25 absolutely are questioning that he's entitled to

1 do that. The Fifth Circuit --

2 JUSTICE SOTOMAYOR: Well, for the same
3 grounds. But, if we say that they're inferior
4 officers, that --

5 MR. MITCHELL: Right. So here's why
6 that doesn't work. This is the ratification
7 memo. It appears on pages 34 to 35A of the
8 Joint Appendix.

9 The Fifth Circuit specifically held
10 that Secretary Becerra had no authority to issue
11 that ratification memo. That's on pages 27A to
12 28A of the petition.

13 JUSTICE SOTOMAYOR: Is that because
14 he -- why?

15 MR. MITCHELL: Because he has no
16 authority to impose preventive care coverage
17 mandates. Only the Task Force can do that.

18 The government -- the government did
19 not seek certiorari on that question. They have
20 not asked and they are not asking this Court to
21 reverse that part of the Fifth Circuit's ruling.
22 So that is a closed issue.

23 Even if it were properly --

24 JUSTICE SOTOMAYOR: Then I'm going to
25 let the SG answer that --

1 MR. MITCHELL: All right.

2 JUSTICE SOTOMAYOR: -- okay? Thank
3 you.

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

15 So it has to go through notice and
16 comment under Section 553, and it didn't.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

23 And, you know, just an alternative
24 view of that language is something along the
25 lines of: Look, the members of this Task Force

1 are going to be subject to some kinds of
2 influence because somebody can remove them and
3 also because they're subject to supervision.
4 But we want them to approach their jobs with a
5 spirit of independent-ness.

6 MR. MITCHELL: Right.

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

18 So why shouldn't I read the statute
19 that way?

20 MR. MITCHELL: Well, even if Your
21 Honor reads the statute that way, they're still
22 principal officers under Arthrex because, under
23 that view that Your Honor is describing of
24 "independence," there's no authority in the
25 Secretary to formally review and formally

1 reverse the decisions the Task Force is making
2 in either direction.

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

11 JUSTICE KAGAN: Oh, okay. So then I'm
12 going to say then it -- then your argument
13 depends on a pretty aggressive read of
14 Arthrex --

15 MR. MITCHELL: I --

16 JUSTICE KAGAN: -- because I thought
17 Arthrex said: We're dealing here with
18 adjudicators. We're not dealing with every
19 circumstance, every scenario. You know, we're
20 dealing here with a particular kind of officer.

21 MR. MITCHELL: I just -- I don't think
22 that's an aggressive reading at all because
23 Arthrex says the touchstone for principal
24 officer status is whether there is formal review
25 available of the relevant official's

1 decisionmaking.

2 And even under the government's
3 construction of the statutes, the only formal
4 review that they're providing is formal review
5 of an affirmative decision by the Task Force to
6 issue an A or B rating.

7 They admit that the Secretary can't
8 reverse the Task Force if it makes a decision in
9 the opposite direction, a decision not to impose
10 an A or B rating. I mean, that alone is enough
11 to make them principal officers even under the
12 SG's view and even under Your Honor's proposed
13 interpretation of the word "independent."

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

19 So, even if the Secretary were to say:
20 I hereby disapprove this Task Force
21 recommendation, that's useless when it comes to
22 Section 300gg-13(a)(1) because what matters is
23 what the Task Force says. It's not what the
24 Secretary says.

25 JUSTICE KAGAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?

3 JUSTICE GORSUCH: If I understood your
4 exchange with Justice Sotomayor -- and I just
5 want to make sure I do, Mr. Mitchell -- your
6 view is, if -- if you should win either on the
7 view that they're principal officers or if we
8 should remand on the basis that they're inferior
9 officers who may not have been appointed by the
10 Secretary --

11 MR. MITCHELL: Mm-hmm.

12 JUSTICE GORSUCH: -- that the
13 ratification of the Secretary of the Task
14 Force's past actions must fall for a couple of
15 reasons.

16 One, he has no authority. I want you
17 to spell that out a little further.

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

19 JUSTICE GORSUCH: And second, there
20 was no notice and comment.

21 And -- and I understand that one. I
22 want you to spell out the first one a little bit
23 further, make sure I --

24 MR. MITCHELL: Sure.

25 JUSTICE GORSUCH: -- I've summarized

1 it correctly first of all.

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

5 JUSTICE GORSUCH: That was my -- that
6 was my next question --

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

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

11 MR. MITCHELL: Right.

12 JUSTICE GORSUCH: So what do we do
13 about it?

14 MR. MITCHELL: Well, I'm happy to
15 answer Your Honor's question, but, again, it's
16 not properly before this Court because it's not
17 in the scope of the QP. The government did not
18 seek certiorari on the question. And at no
19 point anywhere in the briefing or in
20 Mr. Mooppan's oral presentation today has the
21 government asked this Court to reverse that part
22 of the Fifth Circuit's ruling.

23 But the ruling is nonetheless correct
24 because the only entity that has the power to
25 impose preventive care coverage mandates is the

1 Task Force.

2 The Secretary's role is only to
3 determine when those coverage mandates take
4 effect. So for the Secretary to go out and say:
5 I hereby ratify the Task Force recommendations,
6 that has no more legal force than if I were to
7 produce a memo that says I ratify the Task Force
8 recommendations.

9 I don't have any authority to impose
10 preventive care coverage mandates either.
11 Neither does the Secretary. So the document has
12 no force -- that's what the Fifth Circuit said
13 in its opinion, and that's completely right.

14 The other reason is notice and
15 comment. The Fifth Circuit did not reach that
16 issue. But this is undoubtedly a substantive
17 rule. It's clearly a rule. And it's a
18 substantive rule as well because it's imposing
19 binding legal obligations on private insurers.
20 It's prescribing law and policy. So it has to
21 go through notice and comment unless some
22 exception applies. Maybe the good cause
23 exception if the government wants to argue for
24 that.

25 But, again, they've waived this entire

1 issue, so I don't think they can possibly make
2 that type of argument now about how an exception
3 to notice and comment might kick in.

4 JUSTICE GORSUCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh?

7 JUSTICE KAVANAUGH: Your theory, I
8 think, depends on us treating the Task Force as
9 this massively important agency that operates
10 with unreviewable authority --

11 MR. MITCHELL: Mm-hmm.

12 JUSTICE KAVANAUGH: -- to make really
13 critical decisions that are going to affect the
14 economy.

15 MR. MITCHELL: Yeah, it is.

16 JUSTICE KAVANAUGH: And without any
17 supervision or direction by the Secretary. And,
18 normally, before that kind of thing would
19 happen, Congress would have provided stronger
20 indications that this Task Force is enormously
21 important in the American economy and would have
22 treated it such.

23 And I just don't see indications of
24 that. And it's a big-picture question
25 related --

1 MR. MITCHELL: Yeah.

2 JUSTICE KAVANAUGH: -- related to my
3 earlier question. But I just don't see the
4 indicators that: Oh, this Task Force, called a
5 Task Force, is more powerful than the Secretary
6 of HHS or the president in terms of how these
7 recommendations are going to affect the
8 healthcare industry.

9 MR. MITCHELL: It is -- it is more
10 powerful than both of those individuals you
11 mentioned because that's --

12 JUSTICE KAVANAUGH: Under your
13 theory -- under your theory, yeah.

14 MR. MITCHELL: -- that is how -- it's
15 not my theory, Justice Kavanaugh. It's how the
16 statute is written.

17 JUSTICE KAVANAUGH: Well, I --

18 MR. MITCHELL: It says -- it says the
19 Task Force shall be independent and shielded
20 from political pressure to the extent
21 practicable. It's hard for me to see stronger
22 language than that if Congress is trying to
23 create --

24 JUSTICE KAVANAUGH: This goes back to
25 the history. You're -- I mean, when that was

1 originally drafted, that -- they weren't
2 binding.

3 MR. MITCHELL: Right. And I don't
4 think Your Honor should be surprised that
5 Congress would write the statute this way
6 because it's perfectly consistent with this
7 Court's current doctrine.

8 They are not exercising executive
9 power. So Myers and those line -- and all those
10 lines of cases about how the president has to
11 remove executive officers --

12 JUSTICE KAVANAUGH: What are -- what
13 are they exercising?

14 MR. MITCHELL: They're exercising
15 quasi-legislative power. It's not
16 quasi-judicial. They're not adjudicating
17 anything. But they cannot enforce the law
18 against anyone. They are making recommendations
19 that have binding effect under another statute.
20 That's quasi-legislative power.

21 And it's a multi-member agency. It's
22 not headed by a single director. So the
23 holdings of Seila Law, Collins against Yellen,
24 none of that applies here. This is perfectly
25 constitutional under the Court's current

1 doctrine --

2 JUSTICE KAVANAUGH: Okay. Thank you.

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

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 Justice Jackson?

8 JUSTICE JACKSON: So I think your
9 argument might be circular, and I'm sitting here
10 trying to figure out how that is happening, and
11 it's a little frustrating, but maybe you can
12 help me to untangle it.

13 It goes -- it starts with Justice
14 Kagan's point, which is we're looking at the
15 independence provision, and she says, okay, I'm
16 not reading that as independent of supervision.
17 I'm reading that as independent duty to make
18 your own judgment.

19 MR. MITCHELL: Right.

20 JUSTICE JACKSON: Your response in
21 your discussion with her was: Well, even if
22 that's the case, it doesn't matter because these
23 folks are principal officers.

24 MR. MITCHELL: Right.

25 JUSTICE JACKSON: And you point to

1 Arthrex.

2 MR. MITCHELL: Right.

3 JUSTICE JACKSON: And you say that the
4 test in Arthrex is that there is -- there has to
5 be formal review available, and we don't have
6 that in the statute. Now Mr. --

7 MR. MITCHELL: Right.

8 JUSTICE JACKSON: -- Mooppan says,
9 well, we do have the provisions that make the
10 Secretary over this entire thing, and he says
11 that counts. You say it doesn't.

12 MR. MITCHELL: Right.

13 JUSTICE JACKSON: To resolve that
14 issue, who's right about whether there actually
15 is formal review available? I took you to say
16 the reason why you're right is because of the
17 independence provision.

18 MR. MITCHELL: Well, it's more than
19 just that.

20 JUSTICE JACKSON: No, but wait.

21 MR. MITCHELL: Okay.

22 JUSTICE JACKSON: This is important.

23 MR. MITCHELL: Please.

24 JUSTICE JACKSON: Because this is the
25 circularity, right?

1 MR. MITCHELL: Right.

2 JUSTICE JACKSON: That if you come
3 back and you say the reason why I'm right that
4 there's not formal review under Arthrex is
5 because we have an independence provision that
6 has these people operating independent of the
7 Secretary or political pressure, then I'm back
8 to Justice Kagan, but that's not what the
9 independence provision means.

10 So you both can't, I think, disclaim
11 it on the front end, independence, it doesn't
12 matter, Justice Kagan might be right, and then
13 pick it up on the back end to say, ah, but it's
14 the independence provision that resolves the
15 debate between and you Mr. Mooppan over whether
16 there's sufficient control by the Secretary in
17 this statute.

18 MR. MITCHELL: That's not our
19 argument, Justice Jackson.

20 JUSTICE JACKSON: Okay.

21 MR. MITCHELL: We are not relying on
22 the word "independence" to preclude secretarial
23 review. We're relying on Section
24 300gg-13(a)(1), which says that it's the
25 recommendations of the Task Force that must be

1 given legal force and effect, not the
2 recommendations of the Secretary.

3 So, if we were to adopt Justice
4 Kagan's proposed interpretation of the word
5 "independent," the Task Force will make its
6 independent recommendations, but the Secretary
7 has no ability to veto them. He can try to veto
8 them. He can issue a document saying: I,
9 Secretary Kennedy, disapprove. But --

10 JUSTICE JACKSON: But why do you say
11 he has no ability? Because --

12 MR. MITCHELL: Because --

13 JUSTICE JACKSON: -- of that one
14 provision -- because you read "independent" in
15 one as saying -- there's nothing in the statute
16 that says the Secretary can't veto. So where do
17 you get that construct?

18 MR. MITCHELL: We get it from
19 300gg-13(a)(1) because it -- the statute says
20 that it's the A or B ratings of the Task Force
21 that must be followed when determining what
22 preventive care insurers must cover.

23 JUSTICE JACKSON: Okay.

24 MR. MITCHELL: It is not the
25 recommendations of the Secretary.

1 JUSTICE JACKSON: Thank you.

2 MR. MITCHELL: So -- thank you, Your
3 Honors.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Rebuttal, Mr. Mooppan?

7 REBUTTAL ARGUMENT OF HASHIM M. MOOPPAN

8 ON BEHALF OF THE PETITIONERS

9 MR. MOOPPAN: So I'll pick up right
10 there. So, on the question of whether the
11 Secretary has the power to review, gg-13 just
12 says that recommendations that are in effect are
13 binding. It doesn't say one word about whether
14 the Secretary could prevent the recommendation
15 from taking effect by directing the Task Force
16 to withdraw it.

17 His only argument on that is to rely
18 on the language "independent," interpreting
19 "independent" way more broadly than necessary,
20 and creating constitutional problems rather than
21 solving it. He recognizes that, and so he falls
22 back on the point that even we agree that the
23 Secretary can't force the Task Force to make
24 recommendations.

25 But, as Justice Gorsuch pointed out,

1 that was already decided in Free Enterprise
2 Fund. And my friend pointed out that in Free
3 Enterprise Fund, the Secretary -- the Commission
4 had lots of power over the PCAOB, which is true,
5 but, if you look at page 504 of Free Enterprise
6 Fund, this is what the Court said: The Act
7 nowhere gives the Commission effective power to
8 start, stop, or alter individual board
9 investigations.

10 That is exactly the argument he's
11 making here, that because they didn't have that
12 power in this case, they are principal officers.
13 And Free Enterprise Fund says, even though they
14 didn't have that power, they were inferior
15 officers.

16 Turning to the removal question, I
17 didn't really hear any argument for why, as a
18 statutory matter, you should read "independent"
19 to create a removal restriction even though that
20 creates lots of constitutional problems. The
21 best he did was to suggest, well, maybe it's
22 just a question of timing.

23 But, actually, the timing cuts against
24 him too. b-4(a)(6), the provision that has the
25 "independence" language, it was added to the

1 statute with the ACA at the time that Congress
2 gave the Task Force these powers. That's when
3 they added the language about "independent" and
4 "free from political pressure to the maximum
5 extent possible."

6 So, if they wanted to impose a removal
7 restriction, they would have done it using all
8 the language that Justice Kagan and Justice
9 Kavanaugh suggested. That's how they normally
10 say impose removal restrictions. They wouldn't
11 have just used the word "independent."

12 And Arthrex doesn't solve this problem
13 either because, as the case makes clear, there
14 was not at-will removal restriction -- power in
15 Arthrex. In Arthrex, the APJs were only subject
16 to removal for the efficiency of the service.
17 They had cause protection. So Arthrex doesn't
18 solve it for him either.

19 Turning to the appointments question,
20 I agree that it wasn't decided below and it
21 could be remanded, but I think the colloquy here
22 today makes clear why the answer is quite clear
23 and why it would be better to just resolve it
24 now. My friend says that the statute is
25 agnostic about who can appoint. I believe he

1 even said that the Secretary of Energy or a
2 private party could appoint these people.

3 That is obviously wrong on its face.
4 Among other things, it doesn't answer what
5 happens if three different people all purport to
6 appoint the same -- appoint different people to
7 the Task Force. You cannot possibly read this
8 statute to say it's agnostic about who picks the
9 members of the Task Force. And given that
10 someone has to pick them, the word "convened"
11 must suggest that the person doing the convening
12 is the one who's doing the picking.

13 So then now all we have left is, is it
14 the director or is it the Secretary? And on
15 that, we have two points. The first is that
16 under the Reorg Act, all of the director's
17 powers are the Secretary's powers.

18 The second point we have is, as
19 Justice Kavanaugh pointed out, under 299, the
20 Secretary exercises all the powers of that
21 agency through the director. So we think that
22 that is pretty clear evidence that it is vested
23 by law in the Secretary.

24 To use a hypothetical that came up
25 earlier, if the statute just said it shall be

1 appointed by either the director or the
2 Secretary, it would plainly be constitutional if
3 the Secretary was the one that did the
4 appointing. We agree that if the director did
5 it instead and the Secretary had nothing to do
6 with it and didn't approve it on the back end or
7 on the front end, that would be unconstitutional
8 as applied.

9 But there's no question that the
10 statute would be permissible if it purported to
11 vest the appointment authority in both the head
12 of the department permissibly and someone else.
13 And that's exactly what this statute does two
14 different ways.

15 And if there was any doubt about this,
16 Hartwell -- this is an easier case for us than
17 Hartwell. In Hartwell, as you pointed out,
18 there was an inferior officer who had the
19 ability to make the appointment with the
20 Secretary's approval on the back end. But the
21 decision in the first instance was vested in
22 someone who wasn't the head of the department.
23 And yet the Court still said that that was
24 enough to satisfy the Appointments Clause.
25 Here, the Secretary can and, in fact, has

1 exercised the appointment authority in the first
2 instance. So, if Hartwell is okay, this is a
3 fortiori from that.

4 So, for all those reasons, there's
5 just no real good reason to remand this to the
6 Fifth Circuit on this appointments question.
7 There is no way you can read this statute to
8 vest the appointment in anyone other than the
9 director/Secretary, and the Secretary has
10 complete control in that situation.

11 A final point on remedy, we agree with
12 Mr. Mitchell on this: If we are right that
13 these are inferior officers, prospectively he's
14 not entitled to any remedy, and retrospectively
15 there will need to be a remand to figure out
16 whether the old recommendations either have to
17 be enjoined or can be ratified by the Task
18 Force. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 The case is submitted.

22 (Whereupon, at 11:30 a.m., the case
23 was submitted.)

24

25

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