SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - -

ROBERT F. KENNEDY, JR.,   )

SECRETARY OF HEALTH AND HUMAN   )

SERVICES, ET AL.,   )

           Petitioners,   )

        v.   ) No. 24-316

BRAIDWOOD MANAGEMENT, INC.,   )

ET AL.,   )

           Respondents.   )

- - - - - - - - - - - - - - - - - - -

Pages: 1 through 112

Place: Washington, D.C.

Date: April 21, 2025

```
1          IN THE SUPREME COURT OF THE UNITED STATES

2     - - - - - - - - - - - - - - - - - -

3     ROBERT F. KENNEDY, JR.,            )

4     SECRETARY OF HEALTH AND HUMAN      )

5     SERVICES, ET AL.,                  )

6                    Petitioners,        )

7               v.                       ) No. 24-316

8     BRAIDWOOD MANAGEMENT, INC.,        )

9     ET AL.,                            )

10                   Respondents.        )

11    - - - - - - - - - - - - - - - - - -

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.
```

2

C O N T E N T S

```
1              P R O C E E D I N G S
2                            (10:03 a.m.)
3              CHIEF JUSTICE ROBERTS:  We will hear
4    argument first this morning in Case 24-316,
5    Kennedy versus Braidwood Management.
6              Mr. Mooppan.
7         ORAL ARGUMENT OF HASHIM M. MOOPPAN
8              ON BEHALF OF THE PETITIONERS
9              MR. MOOPPAN:  Mr. Chief Justice, and
10   may it please the Court:
11             Task Force members are inferior
12   officers because they are subject to ample
13   supervision by the Secretary in issuing
14   recommendations that bind the public.  Most
15   importantly, the Secretary can remove Task Force
16   members at will.  His power to remove them flows
17   from his power to appoint them acting through
18   the director's authorities.  And this Court has
19   repeatedly recognized that at-will removal power
20   is a powerful tool for control.
21             Moreover, the Secretary can review
22   Task Force recommendations and prevent them from
23   taking effect.  During the minimum interval
24   period, he can direct the Task Force to rescind
25   a recommendation, and he can replace Task Force
```

1   members as needed to ensure that happens. In

2   addition, he can require the Task Force to

3   obtain his pre-approval before they issue any

4   recommendation at all.

5   Given these collective powers of

6   supervision, the Task Force cannot issue final

7   recommendations that bind the public unless the

8   Secretary permits them to do so.

9   Respondents' contrary argument rests

10   entirely on the statutory language providing

11   that the Task Force shall be independent and, to

12   the extent practicable, not subject to political

13   pressure. But, as this Court's cases make

14   clear, that language does not create a

15   restriction on removing the Task Force members,

16   and it does not impose a bar on reviewing their

17   recommendations.

18   It certainly does not do so clearly

19   enough to overcome the canon of constitutional

20   avoidance, especially since the language itself

21   contemplates some amount of political

22   involvement.

23   In all events, if that statutory

24   language is the constitutional problem, then the

25   solution is straightforward. This Court should

1   hold that the language is unenforceable and

2   severable. It is neither necessary nor

3   appropriate to hold instead that Task Force

4   members must be appointed by the president and

5   confirmed by the Senate.

6   I welcome this Court's questions.

7   JUSTICE THOMAS: Before we get to the

8   constitutional problems, what's the statutory

9   authority to appoint the Task Force?

10   MR. MOOPPAN: So there are two sources

11   of authority, Your Honor. The first is that

12   under the Reorganization Act, the Secretary has

13   the power to exercise all functions and duties

14   of the director, and the director, under 299,

15   has the authority to convene the Task Force.

16   JUSTICE THOMAS: Isn't that an odd

17   delegation? Normally, it would be the superior

18   or the principal officer who would have the

19   authority who would delegate it to subordinates.

20   MR. MOOPPAN: Well, it's not just a

21   delegation, Your Honor. The Reorganization Act

22   was in place when 299 was enacted. And so, when

23   Congress passed 299 and said that the director

24   could convene the Task Force, that meant that

25   the Secretary could convene the Task Force.

1   JUSTICE THOMAS: So what -- so the

2   word -- you're using the word "convene?"

3   MR. MOOPPAN: Yes, Your Honor.

4   JUSTICE THOMAS: Well, I think that

5   normally connotes just calling a meeting or

6   something. The court was convened this 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. MOOPPAN: 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

51

 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

54

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-clause 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

90:4

decided [3] **88**:11 **108**:1 **109**:20

decides [4] **49**:13 **52**:13,15 **88**:23

deciding [4] **8**:19 **11**:9 **43**:5 **48**:1

decision [16] **14**:20 **16**:13 **19**:24 **31**:24 **32**:8,12 **42**:22 **46**:8 **48**:5 **51**:7,12 **96**:5,8,9, 18 **111**:21

decision-making [1] **48**:6

decisionmakers [1] **14**:11

decisionmaking [4] **49**:5 **50**:10 **81**:21 **96**:1

decisions [13] **22**:21 **47**:9 **49**:8 **50**:13 **51**:3 **76**:13 **80**:4,20 **81**:24 **84**:24 **86**:6 **95**:1 **100**:13

declare [1] **79**:11

deem [1] **13**:6

deemed [2] **35**:3 **51**:5

default [2] **26**:3 **55**:10

defeat [1] **25**:5

defend [1] **54**:21

defer [2] **8**:23 **83**:22

deferring [1] **83**:21

definition [1] **27**:12

degree [1] **15**:12

delay [2] **39**:15 **84**:14

delegate [1] **5**:19

delegated [1] **93**:12

delegation [2] **5**:17,21

demand [1] **18**:22

deny [2] **45**:16 **90**:23

Department [14] **1**:22 **25**:16 **29**:9,10 **38**:17 **63**:14 **65**:5 **68**:2 **69**:24 **70**:15,18 **77**:2 **111**:12,22

depend [1] **89**:15

depends [3] **46**:19 **95**:13 **100**:8

Deputy [1] **1**:21

describe [2] **15**:20 **38**:12

described [1] **15**:4

describing [2] **85**:7 **94**:23

designated [1] **34**:12

destroy [1] **79**:5

determine [2] **83**:13 **99**:3

determined [1] **57**:2

determines [1] **22**:12

determining [1] **106**:21

difference [2] **23**:8 **51**:21

differences [1] **77**:17

different [10] **8**:17 **27**:13 **32**:17 **46**:24 **60**:11 **71**:8 **76**:22 **110**:5,6 **111**:14

difficult [3] **20**:2,24 **72**:25

direct [5] **3**:24 **17**:12 **33**:16 **38**:22 **80**:4

directed [3] **38**:9 **44**:24 **49**:4

directing [1] **107**:15

direction [6] **40**:8 **48**:7 **76**:

22 **95**:2 **96**:9 **100**:17

directive [1] **16**:19

director [48] **5**:14,14,23 **6**:18 **7**:5,14 **12**:1,5 **13**:1,1,8, 13 **14**:3 **25**:12,13,15,19,20 **43**:12 **58**:23 **59**:6,23 **62**:4 **63**:19 **64**:9,14,24 **65**:4,5 **66**:10,12 **67**:3,10,11 **68**:5,8, 12 **69**:20,22 **71**:21 **72**:4 **81**:20 **89**:6 **102**:22 **110**:14,21 **111**:1,4

director's [3] **3**:18 **68**:17 **110**:16

director/Secretary [1] **112**:9

disagree [3] **9**:12 **12**:23 **54**:1

disagreed [1] **53**:24

disagrees [5] **33**:4 **53**:20 **57**:17 **70**:4 **84**:20

disapprove [2] **96**:20 **106**:9

disapproves [1] **45**:7

discharge [1] **94**:10

disclaim [1] **105**:10

discretion [3] **48**:1,25 **86**:6

discussed [2] **44**:5 **73**:12

discusses [1] **95**:7

discussing [1] **26**:5

discussion [3] **73**:13 **82**:8 **103**:21

dispute [4] **24**:4,21 **85**:3,16

disputed [1] **66**:21

distinction [6] **37**:9 **52**:20 **87**:8,15,22 **88**:8

district [2] **45**:22,23

doctrine [2] **102**:7 **103**:1

document [3] **93**:5 **99**:11 **106**:8

doing [4] **29**:22 **84**:10 **110**:11,12

done [9] **16**:10 **52**:1 **62**:22 **79**:13 **84**:7,17 **89**:11,13 **109**:7

doubt [2] **61**:22 **111**:15

down [2] **8**:14 **85**:9

drafted [1] **102**:1

draw [2] **88**:6,9

drugs [1] **20**:5

due [1] **15**:16

During [10] **3**:23 **53**:11 **65**:17 **74**:19 **76**:1 **84**:13 **85**:5 **86**:19,21 **90**:21

duties [2] **5**:13 **64**:23

duty [6] **16**:8 **28**:7 **31**:23 **35**:16,18 **103**:17

E

earlier [7] **26**:5,15 **62**:6 **83**:12 **88**:2 **101**:3 **110**:25

easier [1] **111**:16

easy [5] **12**:4,8,9,14 **78**:16

Economou [1] **15**:5

economy [2] **100**:14,21

Edmond [4] **9**:16 **22**:10 **50**:20 **51**:4

effect [19] **3**:23 **17**:4 **22**:22 **23**:9,9,12 **32**:10 **37**:16 **38**:6 **45**:17 **60**:18 **76**:2 **82**:25 **83**:14 **99**:4 **102**:19 **106**:1 **107**:12,15

effective [2] **39**:15 **108**:7

efficiency [1] **109**:16

Either [8] **25**:2 **95**:2 **97**:6 **99**:10 **109**:13,18 **111**:1 **112**:16

else's [1] **77**:1

emphasized [1] **30**:19

employee [1] **71**:15

employees [2] **27**:15,21

employers [1] **27**:16

empowers [1] **38**:5

enacted [6] **5**:22 **6**:17 **46**:4, 11 **65**:11 **88**:2

end [18] **22**:23 **30**:18 **31**:5 **33**:1 **38**:23 **39**:5 **41**:19 **47**:9 **56**:17 **59**:18 **80**:16,21 **96**:14 **105**:11,13 **111**:6,7,20

Energy [2] **59**:22 **110**:1

enforce [1] **102**:17

enforceable [1] **86**:22

enforced [1] **65**:18

enforcement [1] **65**:25

enforcing [1] **90**:17

engage [2] **30**:3,15

enjoined [1] **112**:17

enormously [1] **100**:20

enough [15] **4**:19 **20**:22,25 **25**:7 **42**:19 **50**:12 **58**:7 **60**:8 **68**:14 **77**:8 **80**:8 **81**:25 **95**:10 **96**:10 **111**:24

ensure [2] **4**:1 **23**:11

ensuring [1] **21**:24

entered [1] **45**:22

entering [1] **45**:25

Enterprise [14] **9**:17 **14**:14 **20**:15,16 **21**:13 **22**:3,11 **51**:16,22 **52**:9 **108**:1,3,5,13

entire [4] **38**:10,16 **99**:25 **104**:10

entirely [3] **4**:10 **29**:24 **40**:22

entitled [5] **65**:24 **90**:23 **91**:23,25 **112**:14

entity [4] **15**:20 **34**:5,16 **98**:24

envisioned [1] **47**:7

equates [1] **67**:7

especially [3] **4**:20 **20**:8 **30**:2

ESQ [3] **2**:3,6,9

ESQUIRE [1] **1**:24

essence [1] **80**:23

essential [1] **14**:13

essentially [2] **58**:21 **64**:22

establish [2] **82**:23 **84**:9

established [2] **61**:9 **78**:17

ET [2] **1**:5,9

even [54] **9**:10 **12**:22 **14**:6 **16**:22 **20**:19 **27**:5 **40**:6,16 **41**:5,9,14,16,21,22 **42**:1 **44**:2 **46**:12 **53**:3 **55**:7 **56**:3 **61**:2,15 **63**:11,14,15,16 **64**:2, 14 **65**:4,5 **67**:4,16 **76**:6,8 **84**:16 **86**:8,17 **88**:1,22 **89**:4 **90**:20 **92**:23 **93**:4,8 **94**:20 **96**:2,11,12,19 **103**:21 **107**:22 **108**:13,19 **110**:1

events [1] **4**:23

everyone [3] **7**:8 **65**:14,15

everything [1] **79**:13

evidence [1] **110**:22

ex [1] **40**:16

exact [1] **42**:16

exactly [5] **15**:2 **18**:23 **31**:2 **108**:10 **111**:13

examining [1] **57**:5

example [6] **7**:17 **22**:19 **27**:9 **40**:5 **72**:4 **75**:23

examples [1] **36**:4

exception [3] **99**:22,23 **100**:2

exchange [1] **97**:4

executive [2] **102**:8,11

exercise [13] **5**:13 **8**:22 **15**:12 **16**:9,14 **28**:18,22 **29**:17 **30**:4 **35**:18 **68**:1 **70**:18,22

exercised [1] **112**:1

exercises [2] **68**:2 **110**:20

exercising [5] **31**:4 **85**:19 **102**:8,13,14

exert [1] **82**:12

expert [2] **8**:24 **19**:17

expertise [1] **14**:19

experts [1] **14**:10

explain [4] **15**:25 **16**:2 **43**:4 **78**:16

extent [12] **4**:12 **24**:13 **29**:22 **45**:12 **46**:3 **47**:4 **75**:6, 13 **77**:16 **87**:21 **101**:20 **109**:5

extreme [1] **76**:4

F

face [2] **33**:3 **110**:3

fact [9] **14**:14 **21**:14 **27**:6 **28**:2 **37**:2 **41**:24 **62**:23 **94**:11 **111**:25

factor [2] **56**:16,22

facts [2] **23**:5 **29**:14

fair [2] **12**:16,22

fairly [2] **8**:11 **82**:22

fall [3] **73**:2 **93**:21 **97**:14

falls [1] **107**:21

far [2] **22**:9 **68**:21

feature [1] **31**:3

federal [2] **45**:23 **93**:13

feel [1] **74**:18

Fifth [23] **9**:25 **10**:24 **53**:17 **54**:2,9,13 **56**:25 **57**:8,15 **69**:5 **70**:7 **73**:7,9 **89**:24 **90**:7 **92**:1,9,21 **93**:6 **98**:22 **99**:

12,15 **112**:6

figure [3] **64**:19 **103**:10 **112**:15

final [7] **4**:6 **14**:20 **19**:24 **45**:21 **48**:6 **51**:7 **112**:11

find [1] **61**:22

fire [4] **20**:9 **29**:2 **36**:9 **94**:14

fired [2] **29**:16,17

first [22] **3**:4 **5**:11 **10**:4 **11**:3, 15 **17**:23 **20**:13 **33**:13 **48**:14 **53**:18 **61**:13 **65**:11 **70**:19 **73**:23 **74**:2 **78**:23 **87**:11 **97**:22 **98**:1 **110**:15 **111**:21 **112**:1

fix [2] **64**:19 **86**:16

fixes [1] **64**:22

flows [1] **3**:16

focused [1] **13**:20

focusing [1] **38**:2

folks [2] **27**:14 **103**:23

followed [1] **106**:21

following [2] **10**:9 **29**:1

for-cause [1] **78**:9

for-clause [1] **77**:11

forbid [1] **62**:18

forbids [1] **63**:1

Force [129] **3**:11,15,22,24, 25 **4**:2,6,11,15 **5**:3,9,15,24, 25 **8**:5,6,11,24 **13**:21,24 **14**:24 **16**:20 **17**:13,14 **18**:2,8, 10,11,14,17 **19**:6 **20**:6,10, 21 **21**:15,17 **22**:2 **27**:3 **33**:11,17,19,23,25 **35**:7 **37**:1 **38**:22 **44**:19 **45**:5,8,10,16 **46**:6,15 **47**:3,9,24 **49**:8,11 **52**:13,15,22 **53**:3,9 **55**:2,23 **57**:13 **58**:13,25 **59**:2 **61**:13 **62**:4,21 **65**:9,13,18 **66**:3,18 **71**:22 **72**:11 **75**:5 **76**:12 **78**:23 **80**:5 **81**:12 **82**:13 **83**:11 **84**:16 **85**:9 **86**:10,12,18,23 **87**:17,19 **88**:25 **89**:6 **90**:17, 21 **92**:17 **93**:25 **94**:12 **95**:1, 5 **96**:5,8,16,20,23 **99**:1,5,6, 7,12 **100**:8,20 **101**:4,5,19 **105**:25 **106**:1,5,20 **107**:15, 23,23 **109**:2 **110**:7,9 **112**:18

Force's [3] **72**:8 **85**:6 **97**:14

forcing [2] **21**:9,10

form [1] **45**:21

formal [8] **50**:12 **81**:23 **95**:24 **96**:3,4 **104**:5,15 **105**:4

formalistic [1] **82**:9

formally [3] **45**:24 **94**:25,25

forms [1] **30**:18

forth [1] **82**:10

fortiori [1] **112**:3

forward [6] **89**:12,14 **91**:1, 3,6 **94**:17

found [1] **51**:1

Free [19] **9**:16 **14**:13 **16**:10 **20**:14,16 **21**:12 **22**:3,11 **28**:

18 **40**:10,11 **51**:16,21 **52**:8 **108**:1,2,5,13 **109**:4
friend [4] **25**:22 **74**:20 **108**: 2 **109**:24
front [4] **38**:23 **47**:9 **105**:11 **111**:7
front-end [1] **22**:24
frustrating [1] **103**:11
fully [1] **11**:8
function [1] **48**:19
functions [2] **5**:13 **13**:8
Fund [14] **9**:17 **14**:14 **20**:15, 16 **21**:13 **22**:3,11 **51**:16,22 **52**:9 **108**:2,3,6,13
further [4] **23**:5 **33**:8 **97**:17, 23

G

gave [3] **78**:23 **84**:8 **109**:2
General [3] **1**:21 **38**:25 **60**: 7
General's [1] **73**:14
generally [2] **31**:1 **38**:12
gets [1] **21**:25
getting [1] **84**:24
gg-13 [1] **107**:11
give [16] **7**:16 **14**:24 **17**:2 **29**:4,8 **35**:21 **36**:5 **40**:8,17, 25 **41**:25 **53**:4 **58**:20 **66**:11 **76**:12 **84**:25
Given [6] **4**:5 **14**:7 **18**:10 **93**: 13 **106**:1 **110**:9
gives [6] **26**:15 **37**:7 **39**:14 **45**:4 **68**:10 **108**:7
giving [1] **72**:3
GORSUCH [47] **9**:18 **10**:12, 14,20 **11**:2,10,14,24 **12**:7, 12,17 **24**:19 **36**:23,24 **37**: 17,21,24 **38**:2 **39**:3,6 **51**:10, 15,19 **52**:5 **53**:11 **63**:3,11, 15 **64**:12 **67**:8,16 **70**:9,16, 20,25 **71**:6 **72**:15 **97**:2,3,12, 19,25 **98**:5,9,12 **100**:4 **107**: 25
Gorsuch's [2] **23**:17 **66**:8
got [4] **8**:17 **30**:19 **60**:6,13
govern [1] **38**:15
governing [1] **45**:3
government [25] **9**:20 **27**: 15,20 **35**:10 **36**:25 **45**:20 **47**:7 **51**:11 **52**:25 **53**:23 **55**: 20 **57**:25 **58**:16 **64**:15,20 **65**:6 **86**:17 **90**:20,22 **92**:18, 18 **93**:14 **98**:17,21 **99**:23
government's [13] **46**:9,20, 21 **47**:23 **49**:5 **52**:19 **53**:5 **55**:15,25 **57**:20 **65**:22 **88**:2 **96**:2
governs [1] **38**:25
ground [1] **82**:15
grounds [1] **92**:3
guarantee [2] **85**:6,11
guarantees [3] **87**:14,17 **88**:5

guess [9] **10**:8 **23**:20 **56**:6 **58**:15 **74**:10 **76**:15 **83**:20 **84**:21 **85**:14

H

hand [2] **19**:17,20
happen [1] **100**:19
happening [1] **103**:10
happens [2] **4**:1 **110**:5
happy [1] **98**:14
hard [4] **65**:21 **82**:14 **84**:1 **101**:21
hard-nosed [1] **82**:11
harder [3] **22**:19 **23**:2 **41**: 22
Hartwell [14] **57**:25 **58**:2,3, 6 **60**:11,16 **68**:18 **71**:5 **73**: 2,3 **111**:16,17,17 **112**:2
Hartwell's [1] **60**:11
HASHIM [5] **1**:21 **2**:3,9 **3**:7 **107**:7
head [14] **7**:22 **14**:21 **25**:16 **32**:22 **33**:4 **63**:14 **65**:4 **68**: 2 **69**:23 **70**:15,17 **77**:2 **111**: 11,22
head's [1] **38**:12
headed [1] **102**:22
HEALTH [16] **1**:4 **34**:6,7,8, 17,18,18,19,20 **38**:8,10 **44**: 25 **53**:7 **57**:12 **58**:11 **90**:1
healthcare [1] **101**:8
hear [4] **3**:3 **12**:22 **28**:8 **108**: 17
heavily [1] **37**:2
held [5] **15**:18 **20**:17 **44**:18 **56**:19 **92**:9
help [5] **14**:7,10 **48**:11 **56**: 14 **103**:12
hereby [2] **96**:20 **99**:5
HHS [2] **33**:20 **101**:6
hinges [1] **9**:20
hire [1] **14**:10
history [3] **40**:25 **79**:3 **101**: 25
Hmm [1] **57**:10
hold [3] **5**:1,3 **52**:21
holding [1] **14**:13
holdings [1] **102**:23
holds [2] **21**:13 **50**:7
Honor [27] **5**:11,21 **6**:3,8 **7**: 22 **8**:20 **10**:17 **13**:10 **15**:10, 17 **17**:2 **20**:13 **21**:3 **24**:1 **26**:20 **29**:4,24 **33**:22 **36**:11 **37**:9 **41**:8 **42**:10 **52**:11 **72**: 9 **94**:21,23 **102**:4
Honor's [6] **15**:17 **72**:6 **86**: 8,14 **96**:12 **98**:15
honors [2] **46**:8 **107**:3
hortatory [2] **94**:13,17
House [1] **18**:17
huge [2] **40**:24 **54**:12
HUMAN [6] **1**:4 **44**:25 **53**:8 **57**:12 **58**:11 **90**:1
hundred [1] **81**:9

hypothetical [2] **72**:14 **110**: 24

I

idea [2] **55**:21 **79**:9
identified [1] **77**:15
ignore [2] **35**:16 **36**:18
II [5] **44**:21 **65**:1 **66**:23 **76**: 22 **103**:4
immediate [1] **22**:22
immediately [1] **23**:9
immune [1] **75**:24
immunized [1] **87**:20
implement [1] **17**:20
implementing [1] **93**:12
implication [1] **83**:9
implicitly [1] **88**:12
important [6] **10**:14 **22**:21 **59**:9 **100**:9,21 **104**:22
importantly [4] **3**:15 **13**:16 **19**:9 **46**:1
impose [14] **4**:16 **43**:16,17, 18 **45**:5 **53**:21 **57**:19 **86**:7 **92**:16 **96**:9 **98**:25 **99**:9 **109**: 6,10
imposed [2] **48**:16 **52**:3
imposes [1] **93**:11
imposing [1] **99**:18
inaction [2] **52**:15,18
inapplicable [1] **47**:19
INC [1] **1**:8
includes [1] **13**:3
incompatible [1] **87**:13
inconsistent [1] **79**:12
incredibly [2] **15**:7 **18**:4
incremental [1] **22**:11
indeed [1] **10**:2
independence [25] **19**:8 **28**:9 **41**:10,13,25 **43**:6,10 **46**:22 **74**:8,22 **75**:4 **85**:7 **87**:14,17 **88**:5 **93**:22 **94**:24 **103**:15 **104**:17 **105**:5,9,11, 14,22 **108**:25
independent [68] **4**:11 **14**: 23,25 **15**:8,9,13,15,20 **16**:3, 7,17 **19**:10 **27**:1,12,13 **28**:4, 10,13,13,23 **29**:18 **31**:4 **32**: 19 **33**:2 **35**:3 **36**:5 **37**:12 **39**:1,25 **40**:6,9,9,14,22 **41**: 4,6 **42**:16 **43**:16 **45**:11 **46**: 6,14,20,25 **50**:23 **76**:9,23 **77**:6,8,18,19 **79**:4,6,11,19 **94**:13 **96**:13 **101**:19 **103**: 16,17 **105**:6 **106**:5,6,14 **107**:18,19 **108**:18 **109**:3,11
independent-ness [1] **94**: 5
independently [1] **35**:23
indication [1] **76**:24
indications [2] **100**:20,23
indicators [1] **101**:4
indicia [1] **83**:3
individual [1] **108**:8
individuals [4] **6**:20 **7**:7 **32**:

15 **101**:10
industry [1] **101**:8
inferior [34] **3**:11 **20**:19 **22**: 13 **23**:15 **32**:21 **42**:20 **44**: 22 **50**:7 **51**:6 **53**:4 **55**:6,7 **56**:1,4 **58**:6 **63**:5,12,17 **65**: 6 **67**:4,17,18,19 **72**:19 **81**: 17 **86**:10 **89**:21,23 **91**:4 **92**: 3 **97**:8 **108**:14 **111**:18 **112**: 13
inferiority [1] **20**:3
influence [14] **26**:16 **31**:11, 18 **36**:2 **40**:11,11 **47**:8 **50**: 10 **79**:18 **81**:21 **82**:13 **94**:2 **95**:5,8
influenced [1] **27**:5
influences [1] **28**:14
informal [4] **50**:9 **81**:22 **95**: 4,8
initially [3] **61**:9 **78**:17,19
injunction [2] **65**:24 **90**:16
inquiry [1] **56**:16
instance [4] **10**:4 **74**:2 **111**: 21 **112**:2
instead [3] **5**:3 **8**:23 **111**:5
instruction [1] **41**:5
insubordinate [2] **32**:18, 23
insulates [1] **20**:8
insurance [1] **84**:4
insurers [8] **45**:6 **46**:15 **84**: 1 **93**:11 **96**:17,18 **99**:19 **106**:22
interesting [2] **12**:2 **82**:7
interpret [4] **40**:20 **41**:20, 24 **76**:23
interpretation [11] **15**:7 **40**: 19 **41**:9 **47**:23 **53**:5 **63**:24 **67**:6 **74**:13 **75**:8 **96**:13 **106**: 4
interpreting [2] **84**:25 **107**: 18
interrupt [1] **76**:19
interval [11] **3**:23 **17**:5,7 **48**: 15 **49**:24 **82**:17,24 **84**:3,9, 13 **85**:5
intervene [1] **83**:22
invalid [1] **93**:6
investigations [1] **108**:9
investing [1] **68**:5
invite [1] **43**:4
invoking [2] **25**:25 **47**:14
involved [2] **84**:8,24
involvement [1] **4**:22
irrelevant [1] **13**:22
Isn't [8] **5**:16 **8**:25 **14**:9 **18**:3 **25**:9 **36**:1 **42**:7 **80**:7
isolation [1] **66**:11
issue [25] **4**:3,6 **6**:22 **9**:11 **17**:21,23 **22**:20 **29**:18 **51**:6 **52**:13 **54**:6 **57**:3,16,17 **73**: 12 **90**:4 **92**:10,22 **93**:20 **96**: 6 **98**:3 **99**:16 **100**:1 **104**:14 **106**:8

issued [7] **65**:17 **66**:3 **85**:9 **86**:21 **89**:8 **90**:18 **91**:14
issues [1] **73**:6
issuing [1] **3**:13
itself [4] **4**:20 **17**:3 **64**:21 **75**:8

J

JACKSON [56] **23**:16 **24**:6, 12,23 **25**:1,8 **42**:25 **43**:1 **44**:10 **48**:10,13,18,23 **49**: 12,14,17,20,23 **50**:2,15,19, 22 **56**:6,13,20,24 **57**:10 **64**: 5 **78**:25 **82**:16,19 **83**:2,9,15, 17 **84**:6,12 **85**:12 **86**:3 **103**: 7,8,20,25 **104**:3,8,13,20,22, 24 **105**:2,19,20 **106**:10,13, 23 **107**:1
jerry-built [3] **16**:25 **17**:16, 25
jettisoned [2] **88**:15,21
job [1] **35**:10
jobs [1] **94**:4
Joint [1] **92**:8
JONATHAN [3] **1**:24 **2**:6 **44**:14
JR [1] **1**:3
judges [3] **15**:4 **51**:5 **81**:22
judgment [20] **8**:24 **15**:13 **16**:9,14 **19**:19 **27**:3 **28**:5,6, 18,23 **29**:18 **31**:4,25 **32**:20 **36**:6 **40**:10 **45**:21 **46**:1 **50**: 24 **103**:18
judgments [1] **33**:3
June [4] **65**:12 **86**:17 **89**:7 **90**:19
jurors [1] **75**:25
Justice [356] **1**:22 **3**:3,9 **5**:7, 16 **6**:1,4,21 **7**:16,24 **8**:7,8, 9,10 **9**:18 **10**:5,5,12,14,20 **11**:2,10,14,20,24 **12**:7,12, 17 **13**:3,11,17 **14**:1,4,15,22 **15**:6,11,22 **16**:2,6,15,16 **17**: 6,9 **18**:1,20 **20**:1,9,22 **21**: 17,18,19,21 **22**:5 **23**:16,17 **24**:6,12,19,23 **25**:1,8 **26**:14, 21,25 **27**:11,24 **28**:8,24 **29**: 5,20,21 **30**:5,10 **31**:7,14,20 **32**:3,7 **33**:6,8,9,18,23 **34**:3, 10,21,21,22,23,24,25 **35**:6, 13,20,23 **36**:3,12,16,21,22, 22,23,24 **37**:17,21,24 **38**:2 **39**:3,6,8,8,10,18,21,22,22, 24 **41**:16,23 **42**:6,23,24,24 **43**:1 **44**:10,11,16 **46**:18 **48**: 10,13,18,23 **49**:12,14,17, 20,23 **50**:2,15,19,22 **51**:10, 15,19 **52**:5 **53**:11,16,24 **54**: 5,8,12,15,19,22,24 **56**:5,6, 13,20,24 **57**:7,10,21,23,24 **58**:15 **59**:8,12,15 **60**:4,10, 13,19,22 **61**:2,5,15,16,19 **62**:1,5,7,8,9,17 **63**:3,11,15 **64**:3,5,6,12,17 **66**:1,4,7,7,

16,19,22 **67**:8,16 **68**:4,14, 19,22,23 **69**:1,1,7,15,18,19 **70**:2,8,9,16,20,25 **71**:6,13, 19 **72**:2,3,12,15,22,24 **73**:1, 16,19,24 **74**:6,10,18 **75**:12, 16,19 **76**:6,15,18,21 **77**:4, 10,13,15,24 **78**:4,8,13,25 **79**:2,9,16,20 **80**:2,7,11,14, 19 **81**:6 **82**:16,19 **83**:2,9,11, 15,17 **84**:6,12 **85**:12,25 **86**: 1,3 **87**:2,4,5,6,13 **88**:10,18 **89**:20 **90**:6,13,25 **91**:9,10, 10,12,17,19,21 **92**:2,13,24 **93**:2,17,17,18 **94**:7 **95**:11, 16 **96**:25 **97**:1,1,3,4,12,19, 25 **98**:5,9,12 **100**:4,5,5,7, 12,16 **101**:2,12,15,17,24 **102**:12 **103**:2,5,5,7,8,13,20, 25 **104**:3,8,13,20,22,24 **105**:2,8,12,19,20 **106**:3,10, 13,23 **107**:1,4,25 **109**:8,8 **110**:19 **112**:19

K

KAGAN [42] **21**:18 **22**:5 **28**: 8 **29**:21 **30**:5,10 **36**:22 **57**: 23 **60**:19,22 **61**:2,5,19 **62**:1, 7,9,17 **68**:4,14 **75**:12,16,19 **77**:13 **79**:2,9,16,20 **80**:2,7, 11,14,19 **81**:6 **93**:17,18 **94**: 7 **95**:11,16 **96**:25 **105**:8,12 **109**:8
Kagan's [5] **61**:16 **69**:19 **72**:4 **103**:14 **106**:4
KAVANAUGH [74] **16**:15 **21**:17,19,22 **26**:14,21,25 **27**:11,24 **28**:24 **29**:5,20 **31**: 7,14,20 **32**:3,7 **39**:9,10,18, 21 **57**:21,24 **58**:15 **59**:8,12, 15 **60**:4,10,13 **61**:15 **64**:3,6, 17 **66**:1,4,7,17,19,22 **68**:22 **69**:2,15,18 **70**:2,8 **73**:1,16, 19,24 **76**:15,18,21 **77**:5,10, 15,24 **78**:4,8,13 **83**:12 **100**: 6,7,12,16 **101**:2,12,15,17, 24 **102**:12 **103**:2 **109**:9 **110**:19
KENNEDY [3] **1**:3 **3**:5 **106**: 9
kept [1] **45**:11
key [2] **66**:23 **95**:3
kick [1] **100**:3
kind [5] **8**:16 **59**:18 **87**:12 **95**:20 **100**:18
kinds [1] **94**:1
knows [1] **31**:19

L

Labor [2] **29**:9,10
language [25] **4**:10,14,20, 24 **5**:1 **6**:10 **19**:11 **29**:22 **30**:16,21 **32**:24 **37**:11 **38**: 11,15 **47**:6,13 **75**:9 **77**:4 **93**:22,24 **101**:22 **107**:18

108:25 **109**:3,8
last [1] **21**:20
later [1] **91**:13
later-enacted [1] **88**:5
Laughter [4] **12**:10 **16**:1 **36**: 10 **79**:7
law [19] **14**:7 **15**:4 **18**:19 **23**: 21,23 **24**:7,13 **29**:14 **36**:5 **40**:5,8,21 **65**:12 **66**:23 **67**: 1 **99**:20 **102**:17,23 **110**:23
laws [1] **46**:4
leadership [1] **35**:4
lean [1] **37**:2
least [11] **12**:5 **17**:8 **23**:10, 18 **30**:9 **65**:23 **67**:23 **70**:14 **81**:6 **83**:23 **90**:23
leave [2] **69**:5 **71**:16
leaving [2] **61**:6 **71**:23
left [1] **110**:13
legal [4] **82**:11 **99**:6,19 **106**: 1
legislative [2] **40**:24 **93**:10
lengths [1] **80**:15
lens [1] **40**:19
level [2] **30**:15 **42**:16
light [3] **6**:12 **30**:2 **41**:12
limit [1] **46**:21
limited [2] **30**:18 **46**:21
limits [1] **75**:17
line [4] **8**:14 **22**:12 **88**:6 **102**: 9
lines [4] **41**:10 **82**:3 **93**:25 **102**:10
list [1] **51**:12
lists [1] **52**:9
litigating [1] **81**:13
little [7] **15**:23 **20**:23 **73**:11, 13 **97**:17,22 **103**:11
long [2] **21**:13 **76**:13
look [11] **29**:15,23 **35**:17 **52**: 4,7 **81**:18 **82**:11 **83**:4 **91**: 12 **93**:25 **108**:5
looking [2] **62**:11 **103**:14
lose [4] **59**:8,10 **63**:16 **69**:8
losing [1] **35**:10
lot [4] **9**:20 **36**:7 **74**:20 **81**: 15
lots [2] **108**:4,20

M

made [17] **18**:21,23 **19**:10, 24 **20**:17 **21**:25 **26**:17 **31**: 15 **36**:4 **37**:12 **41**:14 **50**:14 **70**:15 **82**:25 **84**:18 **85**:4 **87**: 8
MANAGEMENT [2] **1**:8 **3**: 5
mandates [7] **44**:23 **45**:6 **86**:21 **92**:17 **98**:25 **99**:3,10
many [5] **15**:19 **47**:19 **73**:22 **78**:8 **80**:22
March [4] **65**:10 **86**:16 **89**:7 **90**:18
massively [1] **100**:9

matter [14] **1**:16 **7**:1,2,23 **9**: 1,2 **27**:8 **44**:5 **61**:10 **76**:7 **89**:3 **103**:22 **105**:12 **108**: 18
matters [3] **27**:3 **96**:16,22
maximalist [5] **40**:2 **42**:3,7 **74**:13 **75**:7
maximize [1] **79**:17
maximum [2] **46**:2 **109**:4
mean [53] **6**:13 **8**:12,14 **14**: 23,25 **15**:11,24 **16**:10 **20**:7 **24**:7 **28**:13 **30**:5 **32**:25 **37**: 15 **39**:4,25 **40**:1,4,6,12,13, 14,23 **41**:23 **42**:1,4,17 **43**:2 **48**:14,24 **49**:15 **61**:19,21 **62**:5 **63**:4,18 **64**:9 **70**:9,23 **71**:23 **74**:10,24 **75**:3,13 **76**: 18 **79**:3,20 **80**:14 **83**:18 **84**: 21 **96**:10 **98**:7 **101**:25
meaning [2] **27**:14 **76**:9
means [23] **9**:9,14 **16**:12,18 **19**:23 **21**:24 **22**:1,15,23 **28**: 10 **35**:8,25 **36**:1 **37**:13 **42**: 17 **48**:6 **50**:10 **53**:1 **62**:12, 14 **63**:22 **95**:8 **105**:9
meant [1] **5**:24
measures [1] **76**:4
medically [1] **8**:11
meeting [1] **6**:5
members [29] **3**:11,16 **4**:1, 15 **5**:4 **6**:12 **16**:22 **18**:2 **33**: 17 **35**:7 **44**:19 **45**:10 **47**:24 **53**:4 **55**:2 **58**:13 **62**:14,15, 17,21 **75**:5 **80**:5 **83**:6 **86**: 10,23 **87**:18 **93**:25 **94**:12 **110**:9
memo [3] **92**:7,11 **99**:7
mentioned [4] **35**:1 **43**:3 **62**:6 **101**:11
mere [1] **9**:13
merely [1] **54**:16
middle [3] **40**:3 **42**:2 **84**:2
might [11] **14**:6 **27**:7 **28**:25 **29**:16 **39**:10 **40**:12,13 **75**: 25 **100**:3 **103**:9 **105**:12
minimal [1] **82**:24
minimum [8] **3**:23 **17**:5,7 **30**:12 **42**:6 **84**:3,4 **85**:5
missing [3] **18**:25 **78**:14,17
misunderstood [1] **39**:11
MITCHELL [180] **1**:24 **2**:6 **12**:13,22 **40**:1 **41**:22 **42**:3 **44**:13,14,16 **46**:18,23 **48**: 12,17,22 **49**:2,13,16,19,22 **50**:1,6,18,21 **51**:2,10,14,18, 21 **52**:7 **53**:19 **54**:4,11,14, 18,21,25 **56**:12,15,22 **57**:7, 11 **58**:2,24 **59**:11,14,19 **60**: 9,12,15,20,25 **61**:4,8,25 **62**: 3,16 **63**:7,13,18,21 **64**:11, 25 **66**:2,6,16,20,25 **67**:13, 22 **68**:13,20,24 **69**:6,9,17, 21 **70**:4,14,17,24 **71**:2,11, 18,25 **72**:6,13,23 **73**:4,17,

21,25 **74**:9,17 **75**:2,15,18, 21 **76**:16,20 **77**:3,14,22 **78**: 1,6,11,15 **79**:8,14,17,25 **80**: 10,13,18 **81**:5,11 **82**:16,18 **83**:1,8,16,25 **84**:11 **85**:3,22 **86**:2 **87**:12 **88**:17,20 **89**:14, 22 **90**:11,15 **91**:2,16,18,20, 24 **92**:5,15 **93**:1,4,19 **94**:6, 20 **95**:15,21 **97**:5,11,18,24 **98**:2,7,11,14 **100**:11,15 **101**:1,9,14,18 **102**:3,14 **103**:3,19,24 **104**:2,7,12,18, 21,23 **105**:1,18,21 **106**:12, 18,24 **107**:2 **112**:12
Mitchell's [2] **13**:19 **43**:24
Mm-hmm [9] **49**:19 **50**:1 **59**:11 **71**:18 **74**:9 **75**:15 **80**: 13 **97**:11 **100**:11
moment [2] **38**:4 **54**:22
Monday [1] **1**:14
MOOPPAN [111] **1**:21 **2**:3, 9 **3**:6,7,9 **5**:10,20 **6**:3,8,25 **7**:21,25 **8**:20 **9**:18 **10**:8,13, 16 **11**:1,7,13,16 **12**:3,11,16, 21 **13**:9,15,18 **14**:3,12,16 **15**:2,10,16 **16**:6 **17**:1,7,10 **18**:6 **19**:5 **20**:1,12 **21**:2,20 **22**:8 **23**:16 **24**:1,11,16,25 **25**:2,10 **26**:19,24 **27**:2,18 **28**:1,16 **29**:3,7,23 **30**:8,12 **31**:13,16,21 **32**:6,13 **33**:12, 21,25 **34**:5,13 **35**:5,11,17, 22,24 **36**:11,15,20 **37**:8,19, 22,25 **38**:7 **39**:4,14,20 **41**:8, 18 **42**:5,9 **43**:7 **47**:10,14 **50**:17 **53**:12 **74**:12,14 **80**: 17 **84**:12 **85**:4,7 **87**:24 **104**: 8 **105**:15 **107**:6,7,9
Mooppan's [3] **47**:20 **87**:7 **98**:20
Moreover [1] **3**:21
morning [2] **3**:4 **6**:6
Most [5] **3**:14 **6**:13 **8**:3 **17**:2 **32**:21
move [1] **25**:22
much [7] **23**:5 **46**:19 **50**:8 **65**:7 **80**:15 **88**:14 **90**:24
multi-member [1] **102**:21
must [12] **5**:4 **44**:20 **45**:21 **46**:2,16 **60**:17 **68**:15 **97**:14 **105**:25 **106**:21,22 **110**:11
Myers [1] **102**:9
myself [1] **40**:5

N

narrower [2] **41**:9 **42**:1
narrowly [2] **41**:21 **74**:22
natural [2] **8**:3 **62**:10
naturally [1] **6**:13
nature [2] **14**:9 **36**:13
near [1] **81**:10
necessarily [5] **6**:9 **28**:21 **37**:14 **42**:15 **84**:22
necessary [8] **5**:2 **42**:8 **69**:

21,25 **74**:9,17 **75**:2,15,18, 21 **76**:16,20 **77**:3,14,22 **78**: 1,6,11,15 **79**:8,14,17,25 **80**: 10,13,18 **81**:5,11 **82**:16,18 **83**:1,8,16,25 **84**:11 **85**:3,22 **86**:2 **87**:12 **88**:17,20 **89**:14, 22 **90**:11,15 **91**:2,16,18,20, 24 **92**:5,15 **93**:1,4,19 **94**:6, 20 **95**:15,21 **97**:5,11,18,24 **98**:2,7,11,14 **100**:11,15 **101**:1,9,14,18 **102**:3,14 **103**:3,19,24 **104**:2,7,12,18, 21,23 **105**:1,18,21 **106**:12, 18,24 **107**:2 **112**:12

need [23] **11**:14 **19**:20 **21**: 12 **23**:22 **24**:24 **25**:3 **32**:25 **39**:16 **42**:15,21 **54**:25 **55**:3, 5,7,11,17 **56**:15 **57**:15,17 **61**:1 **89**:13 **91**:21 **112**:15
needed [1] **4**:1
needs [7] **22**:9,17 **23**:3 **42**: 18 **72**:17 **88**:21 **93**:8
neither [3] **5**:2 **44**:24 **99**:11
never [4] **23**:12 **56**:19 **66**: 20 **70**:25
nevertheless [1] **15**:21
new [1] **86**:23
newspaper [1] **76**:2
next [2] **84**:5 **98**:6
nine [1] **6**:16
nobody [4] **62**:13 **94**:14,15, 15
non-action [2] **52**:6,12
non-maximalist [1] **75**:14
non-officer [1] **7**:11
None [2] **88**:20 **102**:24
nonetheless [1] **98**:23
nor [2] **5**:2 **44**:24
Normally [9] **5**:17 **6**:5 **11**: 11 **31**:9 **74**:14 **77**:17,18 **100**:18 **109**:9
noted [1] **53**:11
nothing [6] **7**:14 **26**:11 **58**: 10 **88**:7 **106**:15 **111**:5
notice [6] **93**:9,15 **97**:20 **99**: 14,21 **100**:3
notion [2] **28**:9 **85**:15
nowhere [1] **108**:7
number [8] **35**:1 **47**:20 **55**: 2 **73**:9 **81**:2 **86**:4,8,14

O

oath [1] **35**:9
object [2] **11**:5,16
objection [1] **12**:19
objectives [1] **19**:16
obligation [3] **14**:24 **16**:13 **36**:18
obligations [2] **93**:11 **99**: 19
obtain [1] **4**:3
Obviously [3] **36**:3 **43**:13 **110**:3
occasions [2] **80**:22 **81**:2
occurred [2] **47**:22 **86**:16
odd [4] **5**:16 **18**:4 **27**:11 **61**: 21
officer [25] **5**:18 **22**:20 **31**: 11 **45**:2 **49**:3,3 **50**:9 **51**:4,9 **53**:21,25 **54**:2 **56**:18 **58**:6 **59**:10 **63**:5,10 **67**:20 **69**:8 **70**:5 **80**:3 **82**:9 **95**:20,24 **111**:18
officers [57] **3**:12 **7**:9 **20**:19 **22**:13 **23**:15,21 **26**:6,7 **27**: 19 **32**:21 **42**:20 **44**:19,22

47:25 50:7 53:1,4 55:3,6,7, 11 56:2,4,8,9 57:2,4,18 63: 17 65:6 67:5,14,17 70:1 72:19 76:17 78:24 81:17 83:19 86:5,10 89:2,16,17, 21,23 91:4 92:4 94:22 96: 11 97:7,9 102:11 103:23 108:12,15 112:13
official [2] **50:**11 **79:**19
official's [1] **95:**25
often [3] **19:**15 **79:**5 **80:**20
okay [15] **16:**17 **29:**5 **38:**2 **39:**21 **51:**1 **60:**4 **91:**9 **93:**2 **95:**11 **103:**2,15 **104:**21 **105:**20 **106:**23 **112:**2
old [1] **112:**16
once [4] **16:**10 **20:**17 **44:**5 **47:**10
one [37] **10:**24 **13:**12 **17:**8, 10 **19:**16 **22:**25 **29:**15 **31:** 19 **32:**1,13 **41:**12 **42:**11 **47:** 20 **48:**21 **55:**2 **56:**23 **58:**22 **60:**1 **62:**11 **64:**20 **65:**8 **66:** 8 **70:**11 **73:**9 **74:**10 **79:**11 **84:**3 **86:**4 **93:**13 **97:**16,21, 22 **106:**13,15 **107:**13 **110:** 12 **111:**3
ones [1] **28:**15
only [26] **7:**12 **16:**23 **17:**22 **22:**23 **23:**6 **24:**4 **25:**11 **31:** 14 **43:**24 **55:**5 **56:**22 **57:**3 **61:**13 **78:**22 **81:**24 **83:**12 **84:**13,23 **87:**16 **91:**6 **92:**17 **96:**3 **98:**24 **99:**2 **107:**17 **109:**15
open [1] **54:**7
operate [1] **43:**23
operates [1] **100:**9
operating [1] **105:**6
operative [1] **7:**18
opinion [10] **14:**25 **15:**17 **35:**2,2 **52:**8 **81:**13,15,19 **95:**9 **99:**13
opposed [1] **12:**1
opposite [3] **32:**17 **83:**9 **96:** 9
opted [1] **55:**9
options [1] **49:**23
oral [7] **1:**16 **2:**5 **3:**7 **44:** 14 **47:**10 **98:**20
order [3] **72:**20 **88:**15,21
ordinary [1] **15:**15
originally [1] **102:**1
other [23] **6:**10 **8:**1 **12:**15 **19:**19 **23:**1 **25:**11,22 **27:**21 **39:**16 **49:**21,23 **62:**18 **66:** 11 **67:**11,25 **68:**7 **70:**23 **72:** 23 **74:**20 **95:**6 **99:**14 **110:**4 **112:**8
other's [1] **70:**12
others [1] **6:**23
otherwise [2] **68:**10 **78:**3
out [22] **10:**6 **11:**4 **29:**15 **50:** 5 **55:**9 **58:**18 **61:**18 **62:**13

64:7,8,19,21,23 97:17,22 99:4 103:10 107:25 108:2 110:19 111:17 112:15
outlined [1] **18:**24
outside [4] **27:**15 **40:**11,12, 13
over [12] **51:**23 **57:**13 **66:**12 **68:**11 **79:**18,18 **86:**12 **88:** 24 **94:**10 **104:**10 **105:**15 **108:**4
overcome [1] **4:**19
overrule [4] **45:**15 **49:**8,10 **52:**2
Oversight [2] **51:**25 **52:**10
own [4] **16:**9 **33:**2 **50:**24 **103:**18

P

PAGE [5] **2:**2 **52:**4,8 **91:**20 **108:**5
pages [5] **73:**16 **81:**19 **92:**7, 11 **95:**8
paid [2] **27:**24 **35:**8
paper [1] **71:**20
part [10] **24:**8 **27:**22 **28:**3 **34:** 12,20 **54:**12 **56:**10 **75:**2 **92:** 21 **98:**21
particular [6] **8:**15 **18:**22 **24:**10 **38:**3 **48:**2 **95:**20
particularly [1] **28:**14
party [2] **46:**1 **110:**2
pass [1] **18:**18
passed [2] **5:**23 **12:**18
past [2] **91:**7 **97:**14
patent [1] **81:**22
PCAOB [4] **20:**17,21 **51:**23 **108:**4
people [20] **6:**14 **8:**3,5 **14:** 23 **17:**15 **24:**14 **36:**13 **50:** 23 **62:**19 **67:**12,20,25 **68:**7 **75:**22 **78:**21 **94:**8 **105:**6 **110:**2,5,6
percent [1] **81:**9
perfect [1] **19:**13
perfectly [5] **17:**25 **23:**14 **44:**1 **102:**6,24
performance [1] **13:**7
perhaps [4] **21:**21 **31:**23 **32:**1 **84:**16
period [8] **3:**24 **17:**5,8 **23:** 10 **48:**15 **49:**25 **65:**10,17
permissible [3] **30:**19 **67:** 21 **111:**10
permissibly [1] **111:**12
permits [1] **4:**8
person [7] **15:**14 **24:**19 **62:** 11 **68:**9 **70:**23 **72:**17 **110:** 11
pertinent [1] **8:**18
petition [1] **92:**12
Petitioners [6] **1:**6,23 **2:**4, 10 **3:**8 **107:**8
phrase [7] **15:**19 **19:**8,9 **28:** 3 **43:**15 **47:**2 **77:**12

PHS [1] **34:**1
pick [8] **8:**2 **61:**16 **62:**14,15, 17 **105:**13 **107:**9 **110:**10
picking [1] **110:**12
picks [1] **110:**8
piece [1] **71:**20
place [5] **5:**22 **17:**23 **49:**24 **71:**23 **87:**11
places [2] **70:**11 **71:**8
plainly [1] **111:**2
plaintiffs' [1] **46:**7
plan [3] **84:**2,5 **88:**4
plausible [2] **74:**25 **88:**1
plausibly [1] **11:**21
play [2] **23:**25 **46:**24
played [1] **33:**10
please [5] **3:**10 **44:**17 **57:** 23 **76:**20 **104:**23
plus [3] **21:**4 **22:**15 **67:**20
point [38] **9:**3 **10:**5,16 **11:**4 **13:**19 **15:**3 **18:**13 **21:**11 **27:** 9,21 **30:**1,17 **32:**1,14 **48:**9 **51:**11 **55:**18 **58:**3 **61:**17 **66:** 8,23 **69:**3,8,16,19 **73:**8 **74:** 8 **79:**2 **83:**21,24,25 **91:**13 **98:**19 **103:**14,25 **107:**22 **110:**18 **112:**11
pointed [4] **107:**25 **108:**2 **110:**19 **111:**17
points [3] **20:**12 **64:**21 **110:** 15
policy [1] **99:**20
political [14] **4:**12,21 **19:**21 **28:**14 **40:**10 **45:**13 **46:**7 **47:** 3 **75:**6,24 **87:**20 **101:**20 **105:**7 **109:**4
politically [1] **14:**20
politicians [1] **46:**14
position [4] **8:**13 **20:**23 **22:** 25 **60:**2
possible [4] **46:**3 **75:**20,21 **109:**5
possibly [2] **100:**1 **110:**7
potential [1] **82:**20
power [76] **3:**16,17,19 **5:**13 **6:**19 **7:**10 **9:**6,8,14,21,22, 23,24 **10:**2,22 **13:**1,2,5 **14:** 20 **16:**8 **17:**18,20 **21:**4,23 **22:**7,20 **24:**22 **25:**21 **26:**16, 23 **28:**5 **31:**24 **32:**19 **35:**4 **36:**1,9 **37:**7,20 **38:**13 **43:** 11 **47:**17 **55:**23,24 **58:**7 **63:** 19 **64:**14 **65:**2 **67:**19 **68:**1, 3 **72:**16 **77:**2 **79:**23,24 **80:** 2,8,12,23 **81:**3 **82:**20 **86:**12 **88:**13,24 **90:**2,10 **91:**5 **98:** 24 **102:**9,15,20 **107:**11 **108:** 4,7,12,14 **109:**14
powerful [5] **3:**20 **9:**14 **81:** 16 **101:**5,10
powers [15] **4:**5 **12:**25 **13:** 24 **21:**4,6 **25:**20 **61:**14 **78:** 18,23 **82:**12 **94:**10 **109:**2 **110:**17,17,20

practicable [10] **4:**12 **29:** 22 **30:**7 **45:**12 **47:**4 **75:**7, 13 **77:**16 **87:**21 **101:**21
pre-approval [2] **4:**3 **17:**18
precatory [1] **16:**18
preclude [1] **105:**22
premise [4] **10:**23,24 **59:**13 **72:**20
premised [1] **55:**20
prerogative [1] **45:**5
prescribed [1] **45:**20
prescribing [1] **99:**20
present [1] **51:**25
presentation [1] **98:**20
presented [1] **98:**8
preserves [1] **17:**25
president [24] **5:**4 **7:**6 **11:** 22 **15:**9 **16:**5 **18:**25 **20:**4 **25:**23 **32:**22 **35:**3 **44:**2,20 **55:**8 **56:**3 **59:**22 **62:**20 **63:** 2 **76:**14 **77:**20 **78:**20 **89:**3, 18 **101:**6 **102:**10
presidential [6] **26:**1,10 **28:**15 **77:**1,9 **79:**18
pressure [14] **4:**13 **45:**13 **46:**7 **47:**3 **75:**6,24 **85:**8 **87:** 9,10,12,20 **101:**20 **105:**7 **109:**4
presume [1] **36:**19
presumes [1] **23:**23
presumption [2] **24:**15,16
presumptions [1] **23:**20
pretty [7] **10:**22 **12:**13 **79:** 12 **80:**15 **81:**10 **95:**13 **110:** 22
prevent [5] **3:**22 **19:**12 **85:** 19 **94:**16 **107:**14
preventative [1] **20:**11
preventive [13] **44:**23 **45:**5 **46:**15 **48:**3 **49:**9 **52:**23 **76:** 13 **83:**13 **86:**20 **92:**16 **98:** 25 **99:**10 **106:**22
previous [1] **48:**4
previously [3] **52:**16 **66:**2 **85:**9
Principal [46] **1:**21 **5:**18 **7:** 20 **22:**13 **44:**19 **45:**2 **47:**25 **49:**3 **50:**9 **51:**3,8 **53:**1,20, 25 **54:**1 **55:**2,11 **56:**7,9,18 **57:**2,4,18 **59:**9,10 **63:**9 **67:** 14 **69:**8,25 **70:**5 **74:**7 **76:** 16 **80:**2,6 **82:**8 **83:**19 **86:**4 **89:**2,16,17 **94:**22 **95:**23 **96:** 11 **97:**7 **103:**23 **108:**12
principle [1] **25:**25
prior [2] **48:**5 **62:**22
priority [1] **20:**4
private [4] **59:**24 **93:**11 **99:** 19 **110:**2
probably [2] **12:**14 **73:**6
problem [23] **4:**24 **19:**23 **24:**8 **53:**2 **63:**5,7,20,21 **64:** 18,20,22 **66:**15 **67:**12,13, 18 **76:**10 **78:**7 **79:**25 **82:**1,

2 **86:**16 **89:**5 **109:**12
problems [6] **5:**8 **43:**14 **44:** 7 **47:**22 **107:**20 **108:**20
produce [1] **99:**7
properly [5] **42:**20 **92:**23 **93:**5 **98:**4,16
proposed [11] **45:**19 **46:**7, 9 **47:**20 **55:**15,20 **57:**20 **86:** 9,15 **96:**12 **106:**4
prospectively [1] **112:**13
protected [5] **33:**1 **45:**12 **47:**3 **75:**6 **77:**1
protection [3] **77:**11 **78:**10 **109:**17
prove [1] **69:**3
provide [2] **82:**5 **88:**8
provided [1] **100:**19
providing [2] **4:**10 **96:**4
provision [12] **8:**1,4 **28:**10 **45:**25 **75:**4 **103:**15 **104:**17 **105:**5,9,14 **106:**14 **108:**24
provisions [6] **13:**6 **58:**18 **64:**8 **66:**11 **83:**14 **104:**9
prudent [1] **74:**1
psychoanalyze [1] **35:**12
PTO [1] **81:**20
public [14] **3:**14 **4:**7 **19:**25 **34:**6,7,8,17,17,18,19,20 **38:** 10 **51:**23,24
pull [2] **64:**6 **85:**9
purely [3] **61:**9,16 **78:**18
purport [1] **110:**5
purported [1] **111:**10
put [2] **40:**24 **85:**8
puts [2] **49:**24 **79:**23
putting [4] **38:**3 **70:**2 **79:**22 **93:**19

Q

QP [1] **98:**17
quasi-judicial [1] **102:**16
quasi-legislative [2] **102:** 15,20
question [59] **7:**2 **8:**25 **9:**10 **10:**1,7,15,17 **11:**6,18 **12:**2, 4,18 **13:**22,23 **14:**5 **20:**14 **23:**2 **24:**18 **27:**14 **33:**13 **38:** 20 **42:**13 **48:**21 **49:**4 **53:**11 **55:**1,5,12 **57:**7,14 **59:**2 **64:** 1,12 **65:**1 **66:**21 **69:**11,13, 14 **70:**6 **72:**7 **73:**10 **74:**2 **80:**1,5 **89:**25 **90:**8 **92:**19 **98:**6,8,15,18 **100:**24 **101:**3 **107:**10 **108:**16,22 **109:**19 **111:**9 **112:**6
questioning [3] **53:**12 **91:** 22,25
questions [7] **5:**6 **10:**5 **22:** 19 **23:**17 **46:**17 **69:**4 **74:**16
quite [4] **11:**18 **12:**14 **37:**8 **109:**22

R

rates [1] **16:**20

rather [6] **43**:12,14 **46**:14 **52**:14,17 **107**:20
ratification [3] **92**:6,11 **97**:13
ratified [1] **112**:17
ratify [2] **99**:5,7
rating [9] **48**:4 **52**:13,14,16,24 **85**:10 **86**:7 **96**:6,10
ratings [4] **48**:2 **49**:9 **86**:25 **106**:20
reach [15] **53**:10 **54**:9 **55**:1,5,11 **57**:3,16,17 **69**:11,12,13 **73**:8 **74**:3,5 **99**:15
read [22] **6**:13 **25**:17 **26**:9 **30**:1,22 **43**:15,20 **59**:16 **63**:18 **66**:10,11 **76**:2 **79**:22 **80**:20 **85**:18 **93**:21 **94**:18 **95**:13 **106**:14 **108**:18 **110**:7 **112**:7
reading [21] **8**:4 **25**:11 **34**:15 **40**:2 **41**:1,11 **43**:6,8 **44**:6,9 **46**:19 **47**:21 **49**:5 **62**:10 **85**:15 **86**:9,15 **88**:22 **95**:22 **103**:16,17
reads [2] **43**:13 **94**:21
real [5] **41**:6 **43**:24 **78**:18,23 **112**:5
realist [1] **82**:11
realistic [1] **81**:4
really [18] **8**:12 **11**:2 **16**:24,24 **18**:2 **23**:22 **42**:3,18 **56**:25 **75**:23 **76**:25 **80**:1,23 **82**:14 **84**:22 **93**:20 **100**:12 **108**:17
reappointed [1] **65**:13
reason [15] **10**:6 **25**:17 **26**:4 **28**:3 **51**:5 **55**:13 **76**:5 **78**:12 **81**:16 **83**:18 **98**:3 **99**:14 **104**:16 **105**:3 **112**:5
reasoning [2] **14**:13 **54**:20
reasons [6] **11**:19 **44**:5 **47**:19 **85**:24 **97**:15 **112**:4
REBUTTAL [3] **2**:8 **107**:6,7
receive [2] **52**:24 **86**:23
receiving [1] **65**:19
recognized [3] **3**:19 **9**:16 **19**:20
recognizes [1] **107**:21
recommend [1] **48**:2
recommendation [37] **3**:25 **4**:4 **9**:11 **17**:4,12 **18**:10,12,13,14,23 **19**:1,2,4,7 **21**:9,11,25 **28**:17 **29**:2 **32**:17 **35**:21 **37**:1 **38**:5 **39**:13,17 **41**:14 **45**:8 **49**:1,18,21 **68**:17 **82**:24 **87**:10,11 **96**:16,21 **107**:14
recommendations [46] **3**:14,22 **4**:7,17 **9**:3,7 **17**:21 **19**:10,18 **21**:7 **23**:8 **26**:17 **32**:9 **37**:3,12,14,15 **39**:2 **45**:11,16 **48**:20 **50**:24 **65**:16,19 **66**:3 **71**:22 **72**:8 **83**:

7,20 **84**:14,18 **87**:18,19 **90**:18 **94**:16 **99**:5,8 **101**:7 **102**:18 **105**:25 **106**:2,6,25 **107**:12,24 **112**:16
reconciled [1] **87**:15
reference [1] **60**:16
reflected [2] **19**:18 **46**:4
refused [1] **55**:14
regarding [2] **23**:24 **84**:17
regardless [1] **45**:6
regime [3] **45**:15 **46**:13 **47**:7
reinforce [1] **43**:21
reissue [1] **86**:24
reissues [1] **65**:18
reject [6] **39**:13 **42**:21 **63**:23 **67**:6 **70**:5 **72**:19
rejected [2] **49**:21 **55**:15
rejects [1] **89**:4
related [3] **23**:21 **100**:25 **101**:2
relationship [1] **83**:5
relevant [3] **8**:25 **76**:6 **95**:25
reluctant [1] **22**:6
rely [4] **8**:7 **43**:1 **52**:20 **107**:17
relying [4] **28**:9 **39**:12 **105**:21,23
remand [15] **10**:3 **11**:5 **12**:20 **25**:3 **45**:22 **53**:17,20 **54**:2,5 **69**:7 **70**:7 **89**:24 **97**:8 **112**:5,15
remanded [3] **69**:10 **73**:7 **109**:21
remedy [20] **45**:20 **46**:2,8,9 **53**:22 **55**:16,19 **56**:1 **65**:22 **89**:8 **90**:12,14,15 **91**:1,3,6,7,22 **112**:11,14
reminding [1] **11**:12
remotely [1] **60**:21
removability [5] **23**:21 **24**:14 **56**:8,16 **57**:1
removable [9] **15**:14 **16**:4,17,23 **20**:18 **21**:14 **29**:11 **50**:25 **56**:10
removal [49] **3**:19 **9**:8,14,21 **10**:10,18,18,19,22 **15**:21 **20**:25 **21**:4,23 **22**:7,15,24 **23**:7,18,19,25 **24**:3,15,17,22 **26**:15,22 **31**:18 **33**:1 **35**:25 **43**:16 **77**:2,9 **78**:10 **79**:23,24 **80**:1,8,12,22 **81**:3 **82**:20 **95**:5,6 **108**:16,19 **109**:6,10,14,16
removal-at-will [1] **9**:19
remove [9] **3**:15,16 **9**:24 **19**:3,5 **35**:4 **50**:3 **94**:2 **102**:11
removed [3] **27**:7 **35**:15 **57**:6
removes [1] **13**:17
removing [1] **4**:15
render [1] **25**:14
Reorg [2] **58**:19 **110**:16

Reorganization [12] **5**:12,21 **12**:5,24 **13**:19 **33**:10,14,19 **38**:1,4 **60**:8 **88**:3
repeatedly [2] **3**:19 **9**:9
replace [3] **3**:25 **17**:15 **19**:3
replacing [1] **22**:1
reply [4] **38**:14 **57**:21,24 **73**:14
require [3] **4**:2 **6**:23 **45**:10
required [3] **21**:1 **44**:21 **58**:4
requirement [2] **17**:19 **82**:23
requirements [1] **84**:2
requires [2] **58**:11 **72**:3
requiring [2] **63**:9 **71**:14
rescind [4] **3**:24 **17**:13,13,14
resolution [1] **23**:23
resolve [3] **73**:10 **104**:13 **109**:23
resolved [2] **20**:14 **70**:7
resolves [1] **105**:14
respect [8] **15**:17 **21**:12 **33**:11,16 **46**:3 **52**:11 **84**:19 **103**:3
respond [1] **58**:23
Respondents [4] **1**:10,25 **2**:7 **44**:15
Respondents' [1] **4**:9
response [4] **43**:24 **64**:10 **86**:25 **103**:20
restrains [2] **65**:24 **90**:16
restriction [7] **4**:15 **10**:10 **24**:3 **43**:16 **108**:19 **109**:7,14
restrictions [4] **43**:18 **79**:23,24 **109**:10
rests [1] **4**:9
result [1] **50**:3
retrospectively [1] **112**:14
reverse [5] **42**:22 **92**:21 **95**:1 **96**:8 **98**:21
review [29] **3**:21 **9**:2,7 **11**:15 **27**:9 **29**:8,9 **30**:4,18,25 **31**:15,17 **32**:12 **43**:17 **50**:13 **51**:3 **52**:1,2 **73**:22 **81**:23 **94**:25 **95**:24 **96**:4,4 **104**:5,15 **105**:4,23 **107**:11
reviewed [2] **31**:6 **32**:9
reviewing [1] **4**:16
reviews [1] **49**:25
revoke [1] **45**:24
rewrite [1] **46**:10
rid [1] **87**:10
rise [1] **93**:21
road [2] **40**:3 **42**:2
ROBERT [1] **1**:3
ROBERTS [20] **3**:3 **8**:8,10 **33**:6 **34**:21,23 **36**:22 **39**:8,22 **42**:24 **44**:11 **86**:1 **87**:2 **91**:10 **93**:17 **97**:1 **100**:5 **103**:5 **107**:4 **112**:19
robust [1] **73**:13

role [6] **7**:10 **26**:8 **33**:10 **83**:11 **87**:25 **99**:2
roles [1] **33**:12
root [1] **38**:23
rule [11] **26**:3 **55**:10,14 **57**:9 **74**:1 **89**:25 **93**:10,10 **99**:17,17,18
ruled [1] **14**:17
rulemaking [3] **17**:19 **52**:1 **93**:9
ruling [4] **29**:19 **92**:21 **98**:22,23

S

sake [1] **74**:23
salvage [1] **87**:25
same [3] **18**:23 **92**:2 **110**:6
sanction [1] **52**:3
satisfy [1] **111**:24
saw [5] **54**:10 **71**:21,21,22,22
saying [22] **8**:14 **18**:7 **20**:24 **21**:3 **23**:14 **35**:14 **53**:16 **59**:13 **60**:23 **61**:3 **62**:12,18 **66**:9 **67**:8 **71**:7 **76**:3 **91**:14 **94**:8,14,15 **106**:8,15
says [45] **8**:2,4 **19**:1 **20**:6 **25**:13,18 **30**:22 **31**:17 **34**:14 **37**:11 **47**:2 **50**:2,11,17 **51**:15 **58**:16 **64**:7,22 **68**:22 **69**:21 **71**:20 **75**:5 **78**:5 **81**:24,25 **84**:12 **87**:18 **90**:8 **95**:3,9,23 **96**:23,24 **99**:7 **101**:18,18 **103**:15 **104**:8,10 **105**:24 **106**:16,19 **107**:12 **108**:13 **109**:24
scenario [1] **95**:19
scheme [2] **19**:15 **31**:2
science [2] **9**:13 **28**:23
scientific [4] **16**:14 **19**:19 **28**:6,18
scientifically [1] **8**:12
scope [3] **43**:10 **98**:8,17
score [1] **9**:19
SEC [4] **51**:22 **52**:1,2,10
second [5] **48**:9 **53**:2 **55**:13 **97**:19 **110**:18
secondly [1] **75**:10
secretarial [4] **47**:17 **83**:4 **85**:2 **105**:22
SECRETARY [172] **1**:4 **3**:13,15,21 **4**:8 **5**:12,25 **6**:18 **7**:4,13 **8**:12,21 **9**:22 **10**:1,21 **12**:2,25 **13**:2,5,25 **15**:1 **17**:4,11,17 **18**:3,9,15,22 **19**:22,25 **23**:11 **25**:4,6,9,21,21 **26**:15 **27**:5 **28**:21,24 **29**:15 **30**:3,14 **32**:15 **33**:15 **37**:1,2,7 **38**:5,8,9,15,17,21,22 **40**:7 **41**:15,17,19 **43**:11,21 **44**:25 **45**:7,15 **47**:8,11 **49**:7,9,24 **53**:7,14 **55**:5,21,23,25 **57**:11 **58**:4,8,11,17,20,24 **59**:17,21 **60**:17 **64**:7,23

65:12 **66**:12,13,17 **67**:11,20,24 **68**:7,10,11,15,16 **69**:19,22 **70**:22 **71**:3,10,11,20,24 **72**:1,5,7,10,16,17 **77**:2 **80**:3 **82**:12,23 **83**:6,13,22 **84**:7,8,13,19 **85**:4,8,16,19 **86**:11 **87**:9 **88**:13,24 **89**:11 **90**:1,10,16 **91**:4,14 **92**:10 **93**:7 **94**:25 **95**:4 **96**:7,19,24 **97**:10,13 **99**:4,11 **100**:17 **101**:5 **104**:10 **105**:7,16 **106**:2,6,9,16,25 **107**:11,14,23 **108**:3 **110**:1,14,20,23 **111**:2,3,5,25 **112**:9
Secretary's [8] **18**:8 **83**:10 **84**:10,23 **96**:18 **99**:2 **110**:17 **111**:20
Section [12] **37**:5 **45**:4,9,19 **47**:1 **49**:6 **55**:18 **88**:3 **93**:16 **96**:15,22 **105**:23
sector [1] **59**:24
see [12] **40**:21,23 **47**:5,12 **77**:17 **87**:15,21 **90**:22 **98**:10 **100**:23 **101**:3,21
seek [2] **92**:19 **98**:18
seem [4] **17**:16 **20**:7 **56**:11 **93**:18
seems [8] **10**:6 **35**:7 **40**:7 **54**:15 **75**:13 **79**:8 **80**:20 **82**:21
seen [1] **40**:19
Seila [1] **102**:23
select [3] **6**:14 **7**:6 **8**:5
selected [3] **7**:17 **34**:7,17
selection [1] **7**:11
Senate [19] **5**:5 **7**:7,9 **11**:23 **18**:17,18 **25**:25 **26**:2,8,10 **44**:3,21 **55**:8 **56**:3 **63**:1 **76**:14 **77**:21 **89**:3,18
Senate's [1] **78**:21
send [1] **23**:22
sense [6] **15**:15 **16**:7 **19**:13 **41**:6 **42**:1 **50**:23
separate [1] **56**:16
separated [1] **56**:13
separating [1] **56**:7
sequester [1] **75**:25
sequestered [1] **76**:1
serious [2] **24**:21 **44**:7
seriously [1] **35**:9
serve [2] **6**:14 **8**:6
Service [12] **34**:6,7,8,17,18,19,20,20 **38**:10 **48**:3 **53**:8 **109**:16
SERVICES [5] **1**:5 **44**:25 **57**:12 **58**:12 **90**:1
set [3] **61**:23 **79**:10 **84**:3
sets [2] **17**:5 **82**:10
setup [1] **88**:18
sever [2] **45**:19 **55**:18
severable [1] **5**:2
several [1] **33**:12
severance [6] **53**:22 **55**:15,19,25 **57**:20 **65**:23

SG [1] 92:25
SG's [1] 96:12
shadow [1] 31:22
shall [13] 4:11 8:4 13:6 19:
10 25:13 37:11 38:9,17 62:
4 64:7 77:21 101:19 110:
25
shield [1] 46:6
shielded [1] 101:19
shoes [1] 58:21
shouldn't [5] 28:19,21 43:
15 69:4 94:18
shows [1] 42:7
shut [1] 54:7
side [2] 25:22 74:20
sign [2] 71:20 72:17
similar [1] 32:10
simply [2] 18:13 64:1
since [1] 4:20
single [1] 102:22
sitting [1] 103:9
situation [5] 24:7 52:12 54:
5 85:21 112:10
situations [2] 50:8 52:21
Solicitor [2] 1:21 73:14
solution [2] 4:25 82:2
solve [2] 109:12,18
solves [2] 19:23 66:14
solving [1] 107:21
somebody [4] 16:3 19:4
80:16 94:2
somebody's [1] 15:13
Someone [6] 59:24 63:13
77:1 110:10 111:12,22
something's [1] 60:6
sometimes [1] 75:20
sorry [4] 8:9 48:11 68:25
71:13
sorts [2] 51:22 85:23
SOTOMAYOR [44] 8:7,9
13:3,11,17 14:1,4,15,22 16:
7 34:24,25 35:6,13,20,23
36:3,12,16,21 54:8,12,15,
19,23,24 56:5 57:8 71:13,
19 72:2,12,22,24 91:11,12,
17,19,21 92:2,13,24 93:2
97:4
source [1] 39:16
sources [1] 5:10
specific [3] 38:25 60:15 85:
13
specifically [4] 58:5 60:6
83:10 92:9
specified [1] 77:23
specifies [1] 6:11
spell [2] 97:17,22
spirit [1] 94:5
square [1] 27:1
squared [3] 47:6,12 87:22
stand [1] 58:21
start [2] 22:3 108:8
starts [1] 103:13
State [3] 38:16,16,17
statement [1] 23:24

STATES [5] 1:1,18 27:20
51:7 78:24
status [5] 49:3 56:18 80:3
82:9 95:24
statute [94] 6:11 7:13,25
10:10 11:21 17:3,20 24:9
25:7,11,13,15,18,19 26:9,
12 30:1,13,20 34:15 40:18
41:1,12,21 43:20,22 44:8
46:10 48:16 53:5 58:3 59:
2,4,17,21,25 60:2,16,23 61:
21 62:18 63:1,8,22 64:21
67:2,25 68:10,15,20 72:15
75:8,10 76:7,10 77:25 78:
2,20 79:10 82:21 84:7 85:
1,12,15,17,18,23 86:3,9,15
87:16,23 88:7,12,14,21,23
90:9 94:18,21 101:16 102:
5,19 104:6 105:17 106:15,
19 109:1,24 110:8,25 111:
10,13 112:7
statute's [1] 44:1
statutes [15] 15:19 40:20,
23 43:13 45:3,14 58:10,10
74:15 76:23 77:20 79:15
85:6 88:3 96:3
statutorily [1] 34:12
statutory [26] 4:10,23 5:8
7:1,3,23 9:1 19:14 20:20
22:2 27:8 31:2 32:19 33:2
35:16,18 37:11,19 44:4 45:
25 47:6,13 64:8 85:10 87:
14 108:18
stay [1] 69:16
step [2] 9:5 19:14
steps [2] 84:15,17
Still [25] 16:20 21:22 27:2,7
29:17 31:24 35:3 36:9 47:
25 50:12,25 53:1,6 55:7
56:2 68:1 69:24 79:3 86:4,
12,15 88:25 89:5 94:21
111:23
stock [1] 40:24
stop [3] 37:3 38:5 108:8
stopped [1] 22:23
straightforward [2] 4:25
17:2
strained [1] 15:7
strikes [1] 79:12
stronger [6] 76:24 77:4,11,
12 100:19 101:21
structurally [2] 34:11,11
structure [1] 8:16
struggling [2] 74:11 83:20
stuff [1] 8:17
subdivision [1] 13:4
subject [12] 3:12 4:12 15:
21 16:4 48:7 51:3 68:6,9
72:4 94:1,3 109:15
submit [1] 17:21
submitted [2] 112:21,23
subordinate [2] 7:20 50:
11
subordinates [1] 5:19

subsection [4] 47:2,16,21,
24
substantive [3] 93:10 99:
16,18
sufficient [3] 22:7 23:15
105:16
suggest [5] 25:18 30:6 84:
22 108:21 110:11
suggested [5] 23:18 53:22
80:22 83:12 109:9
suggesting [3] 41:11 65:
22 74:12
suggests [2] 47:14 75:16
summarized [1] 97:25
superior [1] 5:17
supervise [3] 80:4 94:9,15
supervised [6] 8:19 34:8,
18 38:8 44:24 49:4
supervising [3] 14:5 31:
11 32:11
supervision [18] 3:13 4:6
21:5,6,12 22:16,24 30:15
36:1 42:14,19 43:22 48:8
68:6 72:5 94:3 100:17 103:
16
supervisor [1] 32:12
supervisory [2] 51:23 68:
11
supported [2] 34:9,19
supports [1] 34:4
suppose [8] 27:12 58:21
80:8 88:10,11 89:20 90:6,
7
supposed [2] 8:13 82:5
SUPREME [2] 1:1,17
surprised [1] 102:4
swallow [1] 88:4
synonymous [1] 63:25
system [1] 94:11

T

table [1] 44:6
tackle [1] 90:8
tactics [1] 95:6
talked [1] 21:5
tank [1] 28:11
Task [121] 3:11,15,22,24,25
4:2,6,11,15 5:3,9,15,24,25
8:5,6,10,24 13:20,24 14:24
16:20 17:14 18:2,7,9,10,11,
14 20:5,10 27:3 33:11,17,
18,23,25 35:7 38:22 44:19,
22 45:4,8,10,16 46:6,14 47:
2,8,24 49:8,11 52:13,15,22
53:3,9 55:2,22 57:13 58:
13,25 59:2 61:12 62:4,21
65:9,13,18 66:3,18 71:22
72:8,11 75:5 76:12 78:23
80:5 82:13 83:11 84:16 85:
6,8 86:9,12,18,22 87:17,19
88:25 89:5 90:17,20 92:17
93:25 94:12 95:1,5 96:5,8,
15,20,23 97:13 99:1,5,7
100:8,20 101:4,5,19 105:

25 106:5,20 107:15,23 109:
2 110:7,9 112:17
tasked [1] 31:4
technical [3] 8:11 9:13 14:
5
tells [5] 28:20,22 29:15 32:
15,22
term [3] 7:18 15:7,15
terms [6] 10:17 43:5 61:18
79:14,16 101:6
test [5] 49:2 80:2 82:8,9
104:4
Texas [1] 1:24
text [4] 26:11 87:16,23 88:7
theory [6] 44:2 63:5 100:7
101:13,13,15
there's [28] 6:10 22:15 24:
2,3,5,21 30:8 32:11 34:13
42:19 53:2 55:3 62:13 72:
15 73:11,13 76:9 77:22 78:
6 88:7 89:5 94:24 98:3
105:4,16 106:15 111:9
112:4
therefore [5] 9:23 11:4 21:
24 38:21 63:23
they'll [1] 36:7
they've [2] 16:10 99:25
thinking [5] 30:6,11 40:5
42:11 61:2
thinks [10] 12:8,14 44:2 61:
20 69:10 73:8 74:2 89:15,
16,22
third [1] 98:3
THOMAS [17] 5:7,16 6:1,4,
21 7:16,24 11:20 33:8,9,18,
23 34:3,10 46:18 62:6 87:
4
Thomas's [1] 10:5
though [10] 9:5 10:15 20:
19 32:4 41:5 70:21 77:4
93:19 108:13,19
thoughts [1] 51:20
threatened [1] 95:6
three [2] 86:14 110:5
throwing [1] 61:18
time-related [1] 84:23
timing [2] 108:22,23
today [2] 98:20 109:22
together [1] 58:20
took [4] 7:2 22:22 71:21
104:15
tool [1] 3:20
top [1] 7:21
totally [1] 64:18
touchstone [1] 95:23
transfers [1] 13:4
transparency [1] 82:4
Treasury [3] 58:4,8 60:17
treated [2] 94:12 100:22
treating [1] 100:8
trial [1] 76:1
tries [1] 52:19
true [5] 6:16 14:6 29:14 78:
15 108:4

try [4] 16:21 74:14 83:5 106:
7
trying [6] 84:21 87:24 88:6,
9 101:22 103:10
Turning [2] 108:16 109:19
turns [2] 56:10 80:3
two [10] 5:10 20:12 23:13
46:23 70:11 73:16 77:16
86:8 110:15 111:13
type [3] 45:12 52:23 100:2
types [4] 30:4 76:4 95:6,7

U

ultimate [3] 27:3 32:12 72:
18
ultimately [7] 14:19 27:8
42:10 68:2 71:9 88:11,11
unconstitutional [11] 25:
15 26:7 30:14 63:22 64:16
65:15 67:4 69:25 70:13 89:
1 111:7
unconstitutionally [5] 53:
6 65:9 86:13,19 90:21
under [37] 5:12,14 17:3,19
18:20 25:19 26:1 30:20 31:
1,22 47:23 53:4 59:2,3,21
61:10,10 65:1 66:23 71:4,
7,7 87:8 88:22 93:16 94:
22,22 96:2,11,12 101:12,
13 102:19,25 105:4 110:16,
19
undermines [1] 82:3
underscore [1] 28:4
underscores [2] 29:25 30:
17
understand [17] 10:20 12:
7 31:7 36:24 37:17 40:1
48:11 56:7,20 60:5 65:21
67:9 75:19 83:5,15,21 97:
21
understanding [4] 40:17
72:25 81:3 87:8
understood [2] 42:20 97:3
undoubtedly [1] 99:16
unenforceable [1] 5:1
unfair [1] 15:23
UNITED [5] 1:1,17 27:19
51:7 78:24
university [2] 28:11,20
unless [9] 4:7 19:25 53:20
54:6 55:8 57:17,19 79:23
99:21
unlikely [1] 61:17
unrecognizable [1] 46:11
unreviewable [7] 48:1,14,
25 51:12 52:25 86:5 100:
10
untangle [1] 103:12
untested [1] 10:23
until [3] 17:4 65:18 86:22
unusual [1] 82:22
up [11] 52:21 61:7,16,23 62:
1 79:11 88:4 91:12 105:13
107:9 110:24

useful [1] **41**:2
useless [1] **96**:21
uses [2] **28**:3 **38**:12
using [5] **6**:2 **7**:18 **18**:23 **50**:
  24 **109**:7

V

valid [1] **71**:4
versus [2] **3**:5 **15**:5
vest [6] **11**:21 **58**:7 **64**:13
  67:10 **111**:11 **112**:8
vested [25] **13**:24 **43**:11 **53**:
  7 **55**:4,22,24 **57**:9 **60**:1 **65**:
  2,3 **66**:22,25 **67**:1,10,19,23
  69:23 **70**:11 **71**:8 **86**:11 **88**:
  24 **89**:25 **91**:5 **110**:22 **111**:
  21
vesting [8] **53**:13 **59**:20 **63**:
  19 **67**:2 **68**:21 **70**:15 **93**:20
  103:4
vests [6] **12**:1,25 **25**:20 **72**:
  16 **90**:9,9
veto [3] **106**:7,7,16
view [24] **8**:17 **11**:15 **25**:10
  29:13 **41**:7 **42**:3,7 **46**:22
  47:17 **49**:7 **60**:22 **73**:23 **76**:
  9 **84**:15 **87**:13 **88**:2 **89**:1,5,
  24 **93**:24 **94**:23 **96**:12 **97**:6,
  7
violate [1] **76**:11
violation [1] **64**:2
violations [1] **89**:9
vis-à-vis [3] **41**:14,16 **83**:
  11
void [1] **44**:8
volunteers [1] **28**:2

W

wait [2] **64**:5 **104**:20
waived [1] **99**:25
wandering [1] **68**:8
wanted [6] **18**:2,7 **19**:17,18
  75:23 **109**:6
wants [6] **27**:5,6 **53**:21 **55**:
  18 **57**:19 **99**:23
Washington [2] **1**:13,22
way [33] **7**:12,17 **8**:3 **12**:15
  16:23 **18**:4 **22**:25 **25**:18 **29**:
  16 **30**:23 **32**:1,14 **33**:14 **35**:
  12 **40**:2,20,20 **42**:11 **47**:5,
  15 **56**:14 **58**:22 **64**:20 **71**:
  12 **74**:19 **75**:25 **81**:9,22 **94**:
  19,21 **102**:5 **107**:19 **112**:7
ways [5] **52**:9 **74**:21 **81**:20
  95:4 **111**:14
welcome [2] **5**:6 **46**:17
whatever [1] **61**:6
whatsoever [1] **20**:20
Whereupon [1] **112**:22
wherever [1] **27**:16
whether [34] **8**:19,22,23 **10**:
  1 **11**:25,25,25 **13**:20,24 **24**:
  4 **39**:19 **42**:13 **43**:10 **45**:7
  49:3 **55**:3 **56**:9,10 **57**:4,9

72:7,9 **80**:3,5 **82**:8,10 **89**:
  15,25 **95**:24 **104**:14 **105**:15
  107:10,13 **112**:16
whim [1] **16**:4
who's [3] **63**:13 **104**:14 **110**:
  12
whoever [4] **10**:11,12 **24**:
  17,21
whole [2] **38**:13 **54**:19
will [24] **3**:3,16 **6**:11,14 **8**:2,
  6 **15**:14 **16**:17,23 **17**:15 **19**:
  4 **20**:11,18 **21**:14 **27**:4 **35**:
  18 **46**:3 **52**:21 **55**:17 **56**:11
  59:13 **89**:14 **106**:5 **112**:15
win [1] **97**:6
window [2] **86**:20 **91**:8
withdraw [4] **48**:4,5 **52**:16
  107:16
within [7] **23**:10 **33**:20 **34**:1,
  1,2 **73**:3 **98**:8
without [7] **51**:8 **60**:23 **61**:
  2 **76**:24 **81**:23 **84**:7 **100**:16
wonder [1] **40**:4
wondering [1] **23**:20
word [19] **6**:2,2 **14**:23 **27**:1
  28:12 **39**:25 **41**:6,25 **46**:25
  63:24 **67**:6 **75**:3 **77**:5 **96**:
  13 **105**:22 **106**:4 **107**:13
  109:11 **110**:10
words [1] **46**:24
work [7] **26**:4 **43**:5 **44**:4 **56**:
  1 **61**:1 **84**:10 **92**:6
works [3] **64**:12,25 **94**:11
write [1] **102**:5
written [2] **43**:22 **101**:16
wrote [1] **60**:23

Y

year [8] **17**:8,10 **23**:10,10
  49:15 **83**:23 **84**:3,4
years [2] **81**:14 **89**:7
Yellen [2] **77**:7 **102**:23