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,)) No. 24-316 v. BRAIDWOOD MANAGEMENT, INC.,) ET AL.,) Respondents.) _ _ _ _ _ _ _ _ _ _ _

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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.,) Petitioners,) 6 7) No. 24-316 v. 8 BRAIDWOOD MANAGEMENT, INC.,) 9 ET AL.,) 10 Respondents.) 11 . _ _ _ _ _ _ _ _ _ _ _ 12 13 Washington, D.C. 14 Monday, April 21, 2025 15 The above-entitled matter came on for oral 16 17 argument before the Supreme Court of the United States at 10:03 a.m. 18 19 20 APPEARANCES: 21 HASHIM M. MOOPPAN, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf 22 of the Petitioners. 23 24 JONATHAN F. MITCHELL, ESQUIRE, Austin, Texas; on behalf of the Respondents. 25

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1 PROCEEDINGS 2 (10:03 a.m.) 3 CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 24-316, 4 Kennedy versus Braidwood Management. 5 6 Mr. Mooppan. 7 ORAL ARGUMENT OF HASHIM M. MOOPPAN ON BEHALF OF THE PETITIONERS 8 MR. MOOPPAN: Mr. Chief Justice, and 9 may it please the Court: 10 11 Task Force members are inferior 12 officers because they are subject to ample supervision by the Secretary in issuing 13 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 2.2 Task Force recommendations and prevent them from 23 taking effect. During the minimum interval period, he can direct the Task Force to rescind 24 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 obtain his pre-approval before they issue any 3 recommendation at all. 4 Given these collective powers of 5 6 supervision, the Task Force cannot issue final 7 recommendations that bind the public unless the 8 Secretary permits them to do so. Respondents' contrary argument rests 9 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 avoidance, especially since the language itself 20 21 contemplates some amount of political 2.2 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 appropriate to hold instead that Task Force 3 members must be appointed by the president and 4 confirmed by the Senate. 5 6 I welcome this Court's questions. JUSTICE THOMAS: Before we get to the 7 constitutional problems, what's the statutory 8 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 the power to exercise all functions and duties 13 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 or the principal officer who would have the 18 19 authority who would delegate it to subordinates. 20 MR. MOOPPAN: Well, it's not just a 21 delegation, Your Honor. The Reorganization Act 2.2 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.

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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	

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1 constitutional matter, but as a statutory 2 matter, and I took your question to be, where is the statutory authority to do this? Before the 3 ACA, it had to be the case that the Secretary or 4 the director had the authority. It would not be 5 6 constitutional for the president to select and 7 the Senate to confirm these individuals before the ACA because, before the ACA, everyone agrees 8 they weren't officers. And the Senate has no 9 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 just with using the operative term "convene" and 18 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 2.2 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

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should be construed, there is no other provision anywhere in the code that says who will pick these people. So the most natural way of reading a provision that says he shall convene the Task Force is to also select the people who will serve on the Task Force. JUSTICE SOTOMAYOR: Don't you rely --CHIEF JUSTICE ROBERTS: This is --JUSTICE SOTOMAYOR: I'm sorry. CHIEF JUSTICE ROBERTS: What the Task Force does is fairly technical medically and scientifically. I mean, is the Secretary really supposed to be -- be in the position of going down the line and saying, yeah, I mean, I know you think we should use this particular thing with this atomic structure and all that kind of stuff, but I've got a different view on that? Is that -- is that a pertinent consideration in

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.

deciding whether they're adequately supervised?

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

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

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

25 The Fifth Circuit didn't address the

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antecedent question whether the Secretary, 1 2 indeed, has the power to appoint. What do we do 3 about that? Should we -- should we remand the case to -- to assess that in the first instance? 4 Justice -- as Justice Thomas's questions point 5 6 out, there seems to be some -- some reason to 7 question that. MR. MOOPPAN: Well, so I quess what I 8 9 would say is the following: There is certainly no removal restriction in the statute, so 10 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 premise, one that the Fifth Circuit hasn't 24 25 addressed and --

1 MR. MOOPPAN: So --2 JUSTICE GORSUCH: -- and is really 3 being addressed here for the first time, as you point out. And -- and, therefore, would you 4 5 object to a remand for that, consideration of 6 that question? 7 MR. MOOPPAN: Well, we think it is fully briefed here, and we think the Court is 8 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 colloquy with Justice Thomas, I don't think the 20 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

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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 easy question because, if you agree with me it's 4 at least in the director, the Reorganization 5 6 Act, by its --7 JUSTICE GORSUCH: I understand you think it's easy. Counsel always thinks it's 8 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 court's passed on the question. And so, again, 18 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

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1 director. So, if the director has the power, 2 the Secretary has the power. 3 JUSTICE SOTOMAYOR: And that includes, doesn't it, subdivision (b)(2), which transfers 4 to the Secretary the power to make such 5 6 provisions as she shall deem appropriate, 7 authorizing the performance of any of the functions of the director? 8 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 appointing them, then the director appoints 13 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 Force is an advisory board. But that's 21 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.

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1 JUSTICE SOTOMAYOR: Now the Chief 2 asked you --MR. MOOPPAN: The director --3 JUSTICE SOTOMAYOR: -- the Chief asked 4 you a question about supervising technical 5 advice. That might be said -- be true of even 6 7 us. We're given law clerks to help us on some of the things we don't know anything about. 8 9 That's the nature of an agency, isn't it, that they hire experts to help the 10 decisionmakers come to a conclusion? 11 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 contribute their expertise, but, ultimately, the 19 20 final decision power is in a politically 21 accountable head of an agency. 2.2 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 has described administrative law judges in -- in 4 Butz versus Economou. 5 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. JUSTICE ALITO: I mean, he's -- he is 11 12 counting on you to exercise a degree of independent judgment. But, if somebody's 13 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. 2.2 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 that they have both the duty and the power to 8 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 exercise their best scientific judgment. 14 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. Still, if the Task Force rates 20 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 around that is through a really -- some really 24 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 an incredibly odd way to go about conferring 4 that authority? 5 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 recommendation. Our point is simply that if the 13 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 to pass a bill. But, if the Senate doesn't also 18 19 agree with the bill, it doesn't become a law. JUSTICE ALITO: Well, under the 20 21 argument that you just made, why can't the 2.2 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

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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 inferiority argument? Because what if it's a 3 big priority of the president to have these 4 AIDS-prevention drugs available and the Task 5 6 Force says no, not -- not going to do it? 7 I mean, doesn't it seem then that that insulates them, especially if -- you know, 8 Justice Alito said, well, what if you fire him 9 and say: I'm going to appoint a Task Force who 10 11 will approve these as preventative care? 12 MR. MOOPPAN: So two points about that, Your Honor. The first is I think this 13 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 removable at will by the Commission, they were 18 19 inferior officers. Even though it was conceded 20 there was no statutory authority whatsoever for the Commission to force the PCAOB --21 2.2 JUSTICE BARRETT: So that's enough. 23 Your position -- because it was a little bit difficult to tell in your brief. You're saying 24 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 the at-will removal power plus the powers of 4 supervision we've talked about. But, 5 6 critically, those are powers of supervision to 7 block recommendations. Your -- you asked me, well, what about 8 forcing them to make a recommendation? 9 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 to start. And Free Enterprise Fund already 3 blesses that arrangement. 4 JUSTICE KAGAN: Well, why is it that 5 6 in your brief and again here you're reluctant to 7 say that the removal power is sufficient? MR. MOOPPAN: Well, we just don't 8 9 think your -- the Court needs to go that far. This Court has always, in cases like Edmond and 10 Free Enterprise Fund, taken an incremental 11 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 2.2 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.

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

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

16 JUSTICE JACKSON: Mr. Mooppan, can I 17 go back to Justice Gorsuch's questions about at-will removal? Because he at least suggested 18 19 that we may not have at-will removal here, and I 20 guess I'm wondering about the presumptions in our law related to the removability of officers. 21 2.2 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, at-will removal is at play? 25

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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 here. The only colorable dispute is whether 4 there's actually appointment authority --5 JUSTICE JACKSON: Right. And what 6 7 does our law say about that situation? I mean, part of the problem here, I think, is that we 8 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 2.2 has at-will removal power because --23 JUSTICE JACKSON: And so do you think we need to get to the bottom of who it is --24 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 that the Secretary does have appointment 4 authority to defeat their claim. We think that 5 6 the Secretary does have appointment authority. 7 We think it's clear enough from the statute. JUSTICE JACKSON: Who would it be if 8 9 it isn't the Secretary? MR. MOOPPAN: Well, I -- in my view, 10 11 the only other colorable reading of the statute 12 is that it would be the director because the statute says the director shall convene. 13 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 statute the way we suggest, that when it says 18 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. 2.2 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. But the reason that doesn't work, as I 4 was discussing earlier, is, before the ACA, 5 these were not officers. And if they were not 6 7 officers, it would be unconstitutional for the Senate to have any role in their confirmation. 8 9 So you cannot read the statute to have presidential appointment and Senate confirmation 10 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. JUSTICE KAVANAUGH: And then --21 2.2 because that comes from the at-will removal power, correct? 23 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, there will be -- they can consider what the 4 Secretary wants, they may be even influenced by 5 the fact that if they don't do what he wants, 6 7 they might get removed, but it's still ultimately their call as a statutory matter. 8 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 "independent" in this context have any different 13 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 "independent" to underscore that it's not just 4 that they have the power to make the judgment 5 based on their best scientific judgment; they 6 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 "independent" here does mean independent from 13 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 2.2 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

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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 --JUSTICE KAVANAUGH: 5 That's okay, 6 right? 7 MR. MOOPPAN: Yes. The analogy I would give you is the Benefits Review Board in 8 the Department of Labor. So the Benefits Review 9 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

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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 -exercise the types of review we've said just --4 JUSTICE KAGAN: I mean, it does 5 6 suggest that Congress was thinking in some circumstances it would not be practicable. 7 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 under that statute both because it has that 20 21 language in it and because the canon of 2.2 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

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

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

MR. MOOPPAN: Well, yes, and --13 14 JUSTICE KAVANAUGH: That they can only review the adjudication after it's been made. 15 16 MR. MOOPPAN: Well, but they also --17 you know, as the Benefits Review Board says, you can also influence -- you have at-will removal, 18 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 their power is still to make the decision based 24

25 on their best judgment.

1 Perhaps one way of making the point 2 is --3 JUSTICE KAVANAUGH: And that's -- so you're making the analogy, though, to 4 adjudicators here, right? 5 6 MR. MOOPPAN: Yeah. 7 JUSTICE KAVANAUGH: You think that's a good analogy? And because their decision --8 recommendations can be reviewed before they take 9 effect, it's similar to all the adjudication 10 11 cases where there's been supervising --12 supervisor review of the ultimate decision? MR. MOOPPAN: That's right. And one 13 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 2.2 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

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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. Justice Thomas, anything further? 8 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 2.2 Honor. 23 JUSTICE THOMAS: Is the Task Force an 24 agency? 25 MR. MOOPPAN: We think the Task Force

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1 is within the AHRQ and within PHS, so it's within --2 3 JUSTICE THOMAS: So what -- what 4 supports that? MR. MOOPPAN: Well, it is an entity 5 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? 2.2 JUSTICE ALITO: No. 23 CHIEF JUSTICE ROBERTS: No? 24 Justice Sotomayor? 25 JUSTICE SOTOMAYOR: There are any

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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 their oath more seriously, wouldn't it, because 9 they're not afraid of losing a government job? 10 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 --2.2 MR. MOOPPAN: Right. 23 JUSTICE SOTOMAYOR: -- independently. 24 MR. MOOPPAN: But I -- I would say --I -- I wouldn't say that means that the removal 25

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1 power isn't a means of supervision and 2 influence. 3 JUSTICE SOTOMAYOR: Obviously. But I go back to the examples I've made, which is my 4 law clerks I ask to give me their independent 5 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 choose to ignore your obligation, but that's not 18 something we presume you'll do? 19 20 MR. MOOPPAN: Correct. 21 JUSTICE SOTOMAYOR: Thank you. 2.2 CHIEF JUSTICE ROBERTS: Justice Kagan? 23 Justice Gorsuch? JUSTICE GORSUCH: So I understand that 24 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? MR. MOOPPAN: So not quite, Your 8 Honor. I -- I -- the basis for the distinction 9 is coming from 299b-4(a)(6). We think the 10 11 statutory language says that they shall be 12 independent in the recommendations made. And so we think that means that they get to make their 13 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. 2.2 MR. MOOPPAN: -- to block them, we 23 agree, is both 202 --24 JUSTICE GORSUCH: Yeah. 25 MR. MOOPPAN: -- and the

1 Reorganization Act.

JUSTICE GORSUCH: Okay. And focusing on 202 in particular and putting aside the Reorganization Act for the moment, what in that empowers the Secretary to stop a recommendation 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.

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

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

Because of b-4(a)(6), we acknowledgethat the specific governs the general, and they

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1 have to be independent in making their 2 recommendations. 3 JUSTICE GORSUCH: Yeah. MR. MOOPPAN: But that doesn't mean 4 that they can't be blocked on the back end. 5 6 JUSTICE GORSUCH: Appreciate that. 7 Thank you. CHIEF JUSTICE ROBERTS: Justice 8 9 Kavanauqh? 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. 2.2 CHIEF JUSTICE ROBERTS: Justice 23 Barrett? 24 JUSTICE BARRETT: I just want to 25 clarify what you mean by the word "independent"

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

I -- I wonder -- I mean, I was 4 thinking of a law clerk example myself. Does 5 6 "independent" even have to mean independent of 7 the Secretary? Because it seems to me that I could give my law clerk some advance direction. 8 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.

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

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

So they're not independent of me or my 4 instruction even though I could say they were 5 independent in a very real sense of the word. 6 7 But I take it that you don't adopt that view? 8 So, Your Honor, we could MR. MOOPPAN: 9 have taken an even narrower interpretation of "independence" along the lines you're 10 11 suggesting. We thought the better reading of 12 the statute in light of its context is the one we have articulated, where there is independence 13 in the recommendation made even vis-à-vis the 14 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 think Mr. Mitchell has a really maximalist view, 3 i mean, at --4 5 MR. MOOPPAN: Right. 6 JUSTICE BARRETT: -- at a minimum, I 7 think it shows that the maximalist view isn't 8 necessary. MR. MOOPPAN: I -- I think that's 9 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 question is whether there is adequate 13 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 2.2 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. So let me just invite you to explain how that 4 would work in terms of deciding who has the 5 better reading of "independence." 6 7 MR. MOOPPAN: Sure. And, you know, we do think we have the better reading. But, if 8 9 you thought there was ambiguity here about what the scope of "independence" was or whether the 10 11 appointment power was vested in the Secretary 12 rather than just the director, this Court obviously reads statutes to avoid constitutional 13 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 reinforce that the Secretary has adequate 21 2.2 supervision so that the statute, as written by 23 Congress, can continue to operate. And Mr. Mitchell's only real response 24 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

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1 anyone else who has been appointed as a 2 principal officer. 3 The governing statutes make this Section 300gg-13(a)(1) gives the Task 4 clear. Force alone the prerogative to impose preventive 5 care coverage mandates on insurers regardless of 6 7 whether the Secretary approves or disapproves a Task Force recommendation. 8 And Section 299b-4(a)(1) and (a)(6)9 10 require the Task Force members and their recommendations be kept independent and, to the 11 12 extent practicable, protected from any type of 13 political pressure. These statutes cannot co-exist with a 14 15 regime in which the Secretary can overrule the 16 Task Force coverage recommendations or deny them binding effect. 17 18 The Court also has no authority to 19 sever Section 299b-4(a)(6), as proposed by the government. The remedy prescribed by this Court 20 21 must take the form of a final judgment to be entered by the district court on remand. 2.2 And a federal district court has no 23 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. Congress has chosen to create an 5 6 independent Task Force and shield it from 7 political pressure, and the plaintiffs' proposed remedy honors that congressional decision. 8 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 2.2 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 to the extent practicable. 4 And we don't see any way that 5 6 statutory language can be squared with the 7 regime envisioned by the government, where the Secretary can come in and influence the Task 8 Force decisions on the front end, which 9 Mr. Mooppan once again acknowledged at oral 10 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. Number one, Mr. Mooppan's proposed 20 reading of subsection (a)(6) does not avoid any 21 2.2 of the constitutional problems that occurred. 23 Under the government's interpretation of subsection (a)(6), the Task Force members are 24 25 still principal officers because they have

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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 conferred prior to their decision to withdraw. 5 6 That means they have final decision-making 7 authority that's not subject to direction and 8 supervision. 9 The second point --JUSTICE JACKSON: I don't -- I'm 10 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 consideration of what these recommendations are? 20 21 That's one question. 2.2 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 Section 299b-4(a)(6), if the Court were to adopt 6 7 that view, the Secretary would have the ability to overrule Task Force decisions to confer A or 8 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 --2.2 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 don't like what you did or didn't do and you're 4 5 out. 6 MR. MITCHELL: That doesn't make them 7 into inferior officers. And Arthrex holds as much because Arthrex acknowledges situations in 8 9 which a principal officer can, through informal means, influence the decisionmaking of a 10 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. 2.2 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

found that is okay. 1 2 MR. MITCHELL: But they also have all 3 their decisions subject to review by a principal officer. What this Court said in Edmond was 4 that the reason those judges were deemed 5 6 inferior was because they could not issue any 7 final decision on behalf of the United States without being allowed to do so by a principal 8 officer. That is --9 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 2.2 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

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1 SEC could review and alter any rulemaking done 2 by the board. The SEC could review and overrule any sanction that was being imposed by the 3 board. And if you look at page --4 JUSTICE GORSUCH: But what about a 5 6 non-action by the board? 7 MR. MITCHELL: Well, if you look at page 504 of the Court's opinion in Free 8 Enterprise Fund, it lists all the ways in which 9 the SEC had these oversight authorities. And 10 11 this is not -- with all respect, Your Honor, 12 this is not a situation of non-action. When the Task Force decides to issue a C, D, or I rating 13 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 doesn't hold up here. There will be situations 21 2.2 in which the Task Force can take affirmative 23 actions that cause a certain type of preventive care not to receive the A or B rating. And the 24

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government concedes that's unreviewable, so that

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1 means they're still principal officers.

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

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 would have to conclude that there was vesting of 13 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 officer argument or if the Court wants to impose 21 2.2 the severance remedy suggested by the

23 government. If the Court --

JUSTICE BARRETT: So, if we disagreedwith your principal officer argument, you would

1 say, say that you disagree with our principal 2 officer argument but then remand to the Fifth 3 Circuit to give them a crack at the appointment? 4 MR. MITCHELL: I think there would have to be a remand in that situation, Justice 5 Barrett, unless the Court thought the issue was 6 7 so open and shut. JUSTICE SOTOMAYOR: You think -- why 8 do you think that the Fifth Circuit didn't reach 9 it? I saw that this --10 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 --MR. MITCHELL: Well, if I can defend 21 22 the court of appeals for a moment, Justice 23 Sotomayor. 24 JUSTICE SOTOMAYOR: Yes. 25 MR. MITCHELL: They did not need to

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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 Congress vested the appointment authority in the 4 Secretary. You only need to reach that question 5 if you think they're inferior officers because 6 7 even inferior officers still need to be appointed by the president and the Senate unless 8 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 proposed by the government is premised on the 20 21 idea that the Secretary has constitutional 2.2 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 considered inferior officers. 4 JUSTICE SOTOMAYOR: Thank you. 5 6 JUSTICE JACKSON: I quess I don't 7 understand why you're separating the principal officers and the removability. I thought 8 9 whether or not they are principal officers in part turns on whether or not they are removable 10 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 never held that that --19 20 JUSTICE JACKSON: I understand, but 21 you said the -- the --2.2 MR. MITCHELL: -- is the only factor, but it's one --23 24 JUSTICE JACKSON: -- you said the 25 Fifth Circuit didn't have to really go into

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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 examining such things as how they are appointed 5 6 and how they are removed. 7 MR. MITCHELL: The question Justice Sotomayor asked was why didn't the Fifth Circuit 8 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 2.2 brief --JUSTICE KAGAN: Why -- no, please. 23 24 JUSTICE KAVANAUGH: In the reply 25 brief, the government came back with Hartwell.

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1 Do you want to address that case? MR. MITCHELL: Yeah. Hartwell is not 2 3 on point because, in Hartwell, the statute required the Secretary of the Treasury to 4 specifically approve the appointment of that 5 inferior officer. So Hartwell concluded that 6 7 was enough to vest the appointment power in the 8 Secretary of the Treasury. 9 We don't have anything like that in these statutes. Nothing in any of the statutes 10 11 here requires the Secretary of Health and Human 12 Services to affirmatively approve the appointment of Task Force members. 13 14 Now --15 JUSTICE KAVANAUGH: And I quess 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 2.2 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 is, under the Constitution, who can appoint. 3 The statute doesn't say anything about who 4 appoints. So anybody can appoint them. The 5 6 AHRQ director appointed them for a time, and 7 that was --JUSTICE KAVANAUGH: Well, if you lose 8 your principal -- I think that's important. 9 Ιf you lose your principal officer argument --10 11 MR. MTTCHELL: Mm-hmm. 12 JUSTICE KAVANAUGH: -- so that's the premise, not saying you will --13 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 Energy could appoint. The President could 2.2 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

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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 Reorganization Act and 299 are not enough to --8 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 appointment before it can take effect. 18 19 JUSTICE KAGAN: But is -- is -- is --20 MR. MITCHELL: We don't have anything 21 remotely like that here. 2.2 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? MR. MITCHELL: Yes, because this was 8 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 2.2 doubt you could find another where Congress has 23 set up a board and said, you know -- just not said who should -- who should --24 MR. MITCHELL: Well, all they said --25

1 JUSTICE KAGAN: -- who should make up 2 the board? 3 MR. MITCHELL: All they said is that the AHRO director shall convene the Task Force. 4 And "convene" does not mean appoint, as Justice 5 Thomas mentioned earlier. 6 7 JUSTICE KAGAN: I know. JUSTICE BARRETT: But it could. 8 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 we're saying is the statute doesn't forbid other 18 19 people from appointing. 20 The president could appoint the A --21 the members of the Task Force. He could have 2.2 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

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1 the Senate. There is no statute that forbids 2 the president to appoint. JUSTICE GORSUCH: Well, if "convene" 3 does mean appoint, then -- then we do have a 4 problem on -- on an inferior officer theory, 5 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 officer --10 JUSTICE GORSUCH: Well, even on the 11 12 inferior --MR. MITCHELL: -- by someone who's not 13 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. 2.2 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

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create not simply a constitutional question but 1 a constitutional violation even --2 3 JUSTICE KAVANAUGH: Well, that's where you -- that's where you --4 JUSTICE JACKSON: But wait. Why? 5 6 JUSTICE KAVANAUGH: -- pull in 299(a), 7 which says the Secretary can carry out -- shall 8 carry out the statutory provisions, acting through the director. I mean, that's their 9 10 response to that, right? 11 MR. MITCHELL: Maybe -- maybe that 12 works, but, again, the question Justice Gorsuch was asking me is, if (a)(1) is construed to vest 13 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 2.2 essentially fixes that problem because it says 23 that the Secretary can carry out the duties of the director. 24 25 MR. MITCHELL: Maybe that works. But

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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 AHRQ director, who is not even a head of 4 department, the AHRQ director can't even appoint 5 inferior officers. And the government agrees 6 7 with us on this much, right? One thing we all agree on is that the 8 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 2.2 the government's suggesting a remedy of severance when, at the very least, we should be 23 entitled to an injunction that restrains the 24 25 enforcement of --

1 JUSTICE KAVANAUGH: Well, I --2 MR. MITCHELL: -- the previously 3 issued Task Force recommendations. JUSTICE KAVANAUGH: -- I don't want to 4 5 belabor it, but I think --6 MR. MITCHELL: Yeah. 7 JUSTICE KAVANAUGH: -- to Justice Gorsuch's point, which is a good one, they're 8 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 to appoint the Task Force. 18 19 JUSTICE KAVANAUGH: Right. MR. MITCHELL: And we've never 20 disputed that. The question is --21 2.2 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

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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

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

4 JUSTICE KAGAN: But what if it's -what if it's investing it in the director 5 6 subject to the supervision and control of the 7 Secretary? So there aren't 14 other people wandering around. It's in the director because 8 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.

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1 JUSTICE BARRETT: Go ahead, Justice 2 Kavanaugh. But doesn't that prove the point there 3 are all of these questions, and shouldn't we 4 leave this to the Fifth Circuit --5 MR. MITCHELL: Yeah. 6 7 JUSTICE BARRETT: -- on remand if you lose the principal officer point? 8 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 this question or any court should reach this 13 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 aside. 3 MR. MITCHELL: If the Court disagrees 4 with us, if they reject our principal officer 5 6 argument, that's the question that would have to 7 be resolved by the Fifth Circuit on remand, Justice Kavanaugh. 8 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 --MR. MITCHELL: And I think the head of 17 18 department would have to exercise that 19 authority, first of all. JUSTICE GORSUCH: Well, what if --20 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. MR. MITCHELL: I don't think there 2 3 has. I think the Secretary would have to approve the appointment for it to be valid under 4 5 Hartwell. 6 JUSTICE GORSUCH: Yeah, I -- yeah. 7 So -- so you're saying that under -- under any circumstance -- vested in 15 different places, 8 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 --JUSTICE SOTOMAYOR: I'm sorry, 13 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 2.2 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

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1 Secretary has the authority to do any of that. 2 JUSTICE SOTOMAYOR: You think that the 3 Constitution requires him -- giving Justice Kagan's example -- that the director is subject 4 to the supervision of the Secretary? 5 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. 2.2 JUSTICE SOTOMAYOR: All right. 23 MR. MITCHELL: Now the -- the other --JUSTICE SOTOMAYOR: I just -- I -- I'm 24 25 having a difficult time understanding.

1 JUSTICE KAVANAUGH: Do you -- you 2 accept Hartwell. You just say this doesn't fall within Hartwell? 3 MR. MITCHELL: That's right. That's 4 5 right. And, again, all these issues probably 6 should be remanded to the Fifth Circuit if the 7 Court thinks it necessary to reach this point 8 because, number one, the Fifth Circuit didn't 9 resolve the question below. 10 11 There's very little briefing on this 12 issue. We barely discussed this in our brief. There's a little bit of a more robust discussion 13 in the Solicitor General's reply brief. But 14 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 first view. 23 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 reach that. 5 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 know, there is a way, and during the colloquy 19 20 with your friend on the other side, a lot of us 21 were asking, you know, ways that you can 2.2 construe "independence" more narrowly. 23 Why wouldn't we do that for the sake of constitutional avoidance? I mean, I assume 24 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 "independence," but it's also the provision that 4 says that the Task Force members have to be 5 6 protected from political pressure to the extent 7 practicable. So that -- that is a maximalist interpretation that's in the statute itself. 8 9 That language appears there. 10 But I think, secondly, the statute 11 is --12 JUSTICE KAGAN: Well, I don't know. Ι 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

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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 these types of extreme measures. But the -- the 4 reason I don't think constitutional avoidance is 5 even relevant here, Justice Barrett, is because 6 7 the statute is constitutional no matter how it's construed. Even if the Court were to adopt our 8 9 view of the meaning of "independent," there's no constitutional problem with the statute. 10 Ιt 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 2.2 different Article II direction, we usually don't 23 interpret statutes to create independent agencies without some indication that's stronger 24 25 than what we have here that this is really

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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
б	"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.

MR. MITCHELL: It is, that's right, 1 2 because it has to be in the statute. 3 Otherwise --JUSTICE KAVANAUGH: And then it 4 5 says --6 MR. MITCHELL: -- there's an 7 Appointments Clause problem. 8 JUSTICE KAVANAUGH: And -- and many of them, although not all, say the for-cause 9 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 people with the Senate's advice and consent. 21 Ιt 22 was only when the Affordable Care Act for the 23 first time gave the Task Force real powers as officers of the United States --24 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 don't go around just creating independent 4 agencies. More -- more -- more often we destroy 5 6 independent agencies. 7 (Laughter.) MR. MITCHELL: That seems to be --8 9 JUSTICE KAGAN: You know, the idea that we would take a statute which doesn't set 10 11 up an independent agency and declare it one 12 strikes me as pretty inconsistent with everything that we've done in this area. 13 14 MR. MITCHELL: In terms of construing 15 statutes --16 JUSTICE KAGAN: In terms of --MR. MITCHELL: -- to maximize 17 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

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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 can direct and supervise the decisions of these 4 Task Force members. It's the question whether 5 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. MR. MITCHELL: Right. 18 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 --MR. MITCHELL: Right. 5 JUSTICE KAGAN: -- at least in certain 6 7 contexts. But the Court has said it again and again. So why doesn't it get you, if not a 8 9 hundred percent of the way there in a context like this, pretty near there? 10 11 MR. MITCHELL: I think that argument 12 would have more force if it weren't for the opinion in Arthrex. And if we were litigating 13 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 these could be inferior officers. 17 18 But, if you look at the Arthrex opinion, pages 15 and 16, where Arthrex catalogs 19 20 all the ways in which the PTO Director can 21 influence the decisionmaking of these 2.2 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

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

You know, again, if Arthrex wasn't 6 7 there, I think we would have an interesting discussion about whether the test for principal 8 officer status should be this formalistic test 9 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 to influence the Task Force. But Arthrex 13 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 me to be fairly unusual, which is the 2.2 23 requirement that the Secretary establish this minimal interval after the recommendation is 24 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 secretarial control that we can look to when we 4 try to understand the relationship between the 5 6 Secretary and these members and their 7 recommendations? MR. MITCHELL: I think it has the 8 opposite implication, Justice Jackson, because 9 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 Secretary to determine when these preventive 13 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 binding recommendations, I guess I'm struggling 20 to understand what the point of deferring them 21 2.2 or allowing the Secretary to intervene and defer 23 them for at least a year, what is -- what is the point of that? 24 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

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1 this to be a statute in which there is

2 secretarial control?

3 MR. MITCHELL: We dispute all those claims Mr. Mooppan made about what the Secretary 4 can do during that minimum time interval because 5 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 quarantee. 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 he can't. And so why would we read the statute 18 19 to prevent the Secretary from exercising the 20 control that is necessary to make it 21 constitutional in this situation? 2.2 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, because, number one, they're still principal 4 officers because they have unreviewable 5 discretion when it comes to decisions not to 6 7 impose an A or B rating. Number two, even if Your Honor's 8 proposed reading of the statute makes the Task 9 Force members into inferior officers, Congress 10 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 2.2 time should not be enforceable until the Task 23 Force members receive a new appointment that is constitutional and they reissue the A or B 24 25 ratings in response to that constitutional

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1 appointment. 2 CHIEF JUSTICE ROBERTS: Thank you, 3 counsel. Justice Thomas? 4 Justice Alito? 5 JUSTICE ALITO: Would you comment on 6 7 Mr. Mooppan's just -- argument that a distinction can be made under his understanding 8 9 of what the Secretary can do between pressure to get rid of a recommendation and pressure to 10 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 has to be immunized from political pressure to 20 21 the extent practicable. I just don't see how 2.2 that distinction could be squared with anything in the text of the statute. 23 24 I think what Mr. Mooppan is trying to 25 do is salvage some role for 299b-4(a)(6) because

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1 it's not plausible, I think, even on the 2 government's view to allow the earlier enacted statutes, such as Section 202 and Reorganization 3 Plan, to completely swallow up these 4 later-enacted guarantees of independence. 5 6 So they're trying to draw some line. 7 But there's nothing in the text of the statute that can provide an anchor for the distinction 8 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 -and then how much more of the statute would have 14 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 statute needs to be jettisoned in order to make 21 2.2 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. But, if the Court even rejects that 4 view, there's still the problem that the Task 5 6 Force was appointed by the AHRQ director for 13 7 years between 2010 in March and June of 2023, and there has to be some remedy issued for those 8 admitted constitutional violations. 9 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 that they were inferior officers. 21 2.2 MR. MITCHELL: If the Court thinks 23 they're inferior officers, there should be a remand, in our view, to the Fifth Circuit to 24 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 the briefing is. 5 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 appointment power in the Secretary. Then what? 10 11 MR. MITCHELL: Then there has to be 12 some remedy or --JUSTICE ALITO: And what -- that's 13 14 what I'm asking. What would the remedy be? 15 MR. MITCHELL: The remedy would have to be an injunction that restrains the Secretary 16 from enforcing any of the Task Force coverage 17 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 2.2 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

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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

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do that. The Fifth Circuit --1 JUSTICE SOTOMAYOR: Well, for the same 2 3 grounds. But, if we say that they're inferior officers, that --4 MR. MITCHELL: Right. So here's why 5 that doesn't work. This is the ratification 6 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 reverse that part of the Fifth Circuit's ruling. 21 2.2 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 properly before this Court, that document is 5 invalid because the Fifth Circuit's right, 6 7 Secretary Becerra doesn't have the authority. But, even if he did, that needs to go through 8 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 been given to one of the agencies in the federal 13 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 vesting issue for now, that your argument really 20 21 does rise and fall on how we read that 2.2 "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. But we want them to approach their jobs with a 4 spirit of independent-ness. 5 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? MR. MITCHELL: Well, even if Your 20 Honor reads the statute that way, they're still 21 2.2 principal officers under Arthrex because, under 23 that view that Your Honor is describing of "independence," there's no authority in the 24 25 Secretary to formally review and formally

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1 reverse the decisions the Task Force is making 2 in either direction. 3 And that's what Arthrex says is key. There may be informal ways the Secretary can 4 influence the Task Force, such as removal or 5 threatened removal or other types of tactics, 6 7 but Arthrex discusses all these types of informal means of influence -- again, pages 15 8 9 and 16 of the opinion -- and it says that's not 10 good enough. JUSTICE KAGAN: Oh, okay. So then I'm 11 12 going to say then it -- then your argument depends on a pretty aggressive read of 13 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 dealing here with a particular kind of officer. 20 21 MR. MITCHELL: I just -- I don't think 2.2 that's an aggressive reading at all because 23 Arthrex says the touchstone for principal officer status is whether there is formal review 24 available of the relevant official's 25

1 decisionmaking.

25

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 recommendation, that's useless when it comes to 21 2.2 Section 300qq-13(a)(1) because what matters is 23 what the Task Force says. It's not what the 24 Secretary says.

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JUSTICE KAGAN: Thank you.

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1 CHIEF JUSTICE ROBERTS: Justice 2 Gorsuch? 3 JUSTICE GORSUCH: If I understood your exchange with Justice Sotomayor -- and I just 4 want to make sure I do, Mr. Mitchell -- your 5 view is, if -- if you should win either on the 6 7 view that they're principal officers or if we should remand on the basis that they're inferior 8 9 officers who may not have been appointed by the 10 Secretary --11 MR. MITCHELL: Mm-hmm. 12 JUSTICE GORSUCH: -- that the ratification of the Secretary of the Task 13 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 not properly before this Court. That's not --4 JUSTICE GORSUCH: That was my -- that 5 6 was my next question --7 MR. MITCHELL: Right. I mean, it's 8 not within the scope of the question presented. JUSTICE GORSUCH: -- which is I didn't 9 see that in -- in this case. 10 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 2.2 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

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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	Dut and there we have the

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. CHIEF JUSTICE ROBERTS: Justice 5 6 Kavanauqh? 7 JUSTICE KAVANAUGH: Your theory, I 8 think, depends on us treating the Task Force as 9 this massively important agency that operates with unreviewable authority --10 11 MR. MITCHELL: Mm-hmm. 12 JUSTICE KAVANAUGH: -- to make really critical decisions that are going to affect the 13 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 treated it such. 2.2 23 And I just don't see indications of that. And it's a big-picture question 24 25 related --

1 MR. MITCHELL: Yeah. 2 JUSTICE KAVANAUGH: -- related to my 3 earlier question. But I just don't see the indicators that: Oh, this Task Force, called a 4 Task Force, is more powerful than the Secretary 5 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 2.2 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

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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 Congress would write the statute this way 5 because it's perfectly consistent with this 6 7 Court's current doctrine. They are not exercising executive 8 9 power. So Myers and those line -- and all those lines of cases about how the president has to 10 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 2.2 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 Article II and the Vesting Clause. Thank you. 4 CHIEF JUSTICE ROBERTS: Justice 5 6 Barrett? 7 Justice Jackson? JUSTICE JACKSON: So I think your 8 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 your own judgment. 18 19 MR. MITCHELL: Right. 20 JUSTICE JACKSON: Your response in your discussion with her was: Well, even if 21 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 test in Arthrex is that there is -- there has to 4 be formal review available, and we don't have 5 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 Secretary over this entire thing, and he says 10 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. 2.2 JUSTICE JACKSON: This is important. 23 MR. MITCHELL: Please. JUSTICE JACKSON: Because this is the 24 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

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1 given legal force and effect, not the 2 recommendations of the Secretary. 3 So, if we were to adopt Justice Kagan's proposed interpretation of the word 4 "independent," the Task Force will make its 5 6 independent recommendations, but the Secretary 7 has no ability to veto them. He can try to veto them. He can issue a document saying: I, 8 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 2.2 preventive care insurers must cover. 23 JUSTICE JACKSON: Okav. 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? REBUTTAL ARGUMENT OF HASHIM M. MOOPPAN 7 ON BEHALF OF THE PETITIONERS 8 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 "independent" way more broadly than necessary, 19 20 and creating constitutional problems rather than 21 solving it. He recognizes that, and so he falls 2.2 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,

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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 had lots of power over the PCAOB, which is true, 4 but, if you look at page 504 of Free Enterprise 5 6 Fund, this is what the Court said: The Act 7 nowhere gives the Commission effective power to start, stop, or alter individual board 8 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.

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

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

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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. Among other things, it doesn't answer what 4 happens if three different people all purport to 5 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 someone has to pick them, the word "convened" 10 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 2.2 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

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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 appointing. We agree that if the director did 4 it instead and the Secretary had nothing to do 5 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 Hartwell. In Hartwell, as you pointed out, 17 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 2.2 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

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

So, for all those reasons, there's 4 just no real good reason to remand this to the 5 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

these are inferior officers, prospectively he's not entitled to any remedy, and retrospectively there will need to be a remand to figure out whether the old recommendations either have to be enjoined or can be ratified by the Task Force. Thank you.

CHIEF JUSTICE ROBERTS: Thank you,
 counsel.
 The case is submitted.

22 (Whereupon, at 11:30 a.m., the case 23 was submitted.) 24

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