No.

In the Supreme Court of the United States

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

BRAIDWOOD MANAGEMENT, INC., ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The U.S. Preventive Services Task Force (Task Force), which sits within the Public Health Service of the Department of Health and Human Services (HHS), issues clinical recommendations for preventive medical services, such as screenings and medications to prevent serious diseases. Under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, health insurance issuers and group health plans must cover certain preventive services recommended by the Task Force without imposing any cost-sharing requirements on patients. 42 U.S.C. 300gg-13(a)(1). The question presented is as follows:

Whether the court of appeals erred in holding that the structure of the Task Force violates the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, and in declining to sever the statutory provision that it found to unduly insulate the Task Force from the HHS Secretary's supervision.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants/cross-appellees below) are Xavier Becerra, in his official capacity as Secretary of Health and Human Services; Janet Yellen, in her official capacity as Secretary of the Treasury; Julie A. Su, in her official capacity as Acting Secretary of Labor; and the United States of America.

Respondents (plaintiffs-appellees/cross-appellants below) are Braidwood Management, Inc., John Scott Kelley, Kelley Orthodontics, Ashley Maxwell, Zach Maxwell, and Joel Starnes. Additional respondents (plaintiffs-cross-appellants below) are Joel Miller and Gregory Scheideman.

RELATED PROCEEDINGS

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

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

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

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

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The Solicitor General, on behalf of Xavier Becerra, Secretary of Health and Human Services (HHS); Janet Yellen, Secretary of the Treasury; Julie A. Su, Acting Secretary of Labor; and the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-48a) is reported at 104 F.4th 930. The memorandum opinions and orders of the district court (App., *infra*, 49a-84a, 85a-136a) are reported at 666 F. Supp. 3d 613 and 627 F. Supp. 3d 624.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. App., *infra*, 137a-143a.

STATEMENT

Congress has long instructed the U.S. Preventive Services Task Force (Task Force) to recommend preventive medical services, such as screenings and medications to avoid serious health conditions. The Task Force sits within the Public Health Service, over which the Secretary of HHS (Secretary) exercises supervisory authority. In the Patient Protection and Affordable Care Act (ACA or Act), Pub. L. No. 111-148, 124 Stat. 119, Congress required that health insurance issuers and group health plans cover certain preventive services recommended by the Task Force without imposing any cost-sharing requirements on patients. 42 U.S.C. 300gg-13(a)(1). The court of appeals held that the Task Force's structure violates the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, even though the court agreed that the Secretary may remove Task Force members at will. And the court then declined to sever the statutory provision that it found to unduly insulate the Task Force from oversight by the Secretary. The court's holding jeopardizes healthcare protections that have been in place for 14 years and that millions of Americans currently enjoy.

A. Legal Background

1. Preventive services include screenings and medications to avoid serious health conditions. Such "services can help people avoid acute illness, identify and treat chronic conditions, prevent cancer or lead to earlier detection, and improve health." HHS, *Issue Brief—Access to Preventive Services without Cost-Sharing: Evidence from the Affordable Care Act* 1 (Jan. 11, 2022), https://perma.cc/BGV4-N8U2 (*Access to Preventive Services*). Overall, "[u]se of preventive services results in a healthier population and reduces health care costs by helping individuals avoid preventable conditions and receive treatment earlier." 78 Fed. Reg. 39,870, 39,872 (July 2, 2013).

In 1984, the Public Health Service within HHS convened the first panel of the Task Force, composed of "nationally recognized non-Federal experts in prevention and evidence-based medicine." D. Ct. Doc. 65, at 70 (Jan. 28, 2022). For four decades, the Task Force has "worked to fulfill its mission of improving the health of all Americans" by evaluating the evidence for various treatments and services to promote public health. *Ibid.* The Task Force "review[s] the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community, and updating previous clinical preventive recommendations." 42 U.S.C. 299b-4(a)(1). It publishes its recommendations "in the Guide to Clinical Preventive Services," a resource for medical professionals, Congress, and other policy makers. *Ibid.* Task Force recommendations have been cited by this Court as a medical authority concerning "which tests are most

usefully administered and when," *Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424, 441 (1997), and by President Bush in "encourag[ing] all women to consult with their physicians to obtain appropriate [breast cancer] screenings," Proclamation No. 7711, *National Breast Cancer Awareness Month, 2003*, 3 C.F.R. 115 (2003 Comp.).

Congress codified the Task Force's role in 1999 by authorizing the Director of the Agency for Healthcare Research and Quality (AHRQ), an agency within the Public Health Service, to "periodically convene" the Task Force. Healthcare Research and Quality Act of 1999, Pub. L. No. 106-129, sec. 2(a), § 915(a)(1), 113 Stat. 1659; see 42 U.S.C. 299b-4(a)(1). The Task Force is currently composed of 16 members who are appointed for four-year terms, D. Ct. Doc. 65, at 71, although there are no statutory restrictions on a member's removal before the expiration of his or her term, see 42 U.S.C. 299b-4(a) (2018 & Supp. IV 2022). Congress specified that "[a]ll members of the Task Force * * * and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure." 42 U.S.C. 299b-4(a)(6).

At the same time, Congress has given the Secretary significant supervisory authority over the Public Health Service, which includes AHRQ and the Task Force. In Reorganization Plan No. 3 of 1966 (Reorganization Plan), 80 Stat. 1610, the Secretary was transferred "all functions of the Public Health Service" and its "officers," "employees," and "agencies," § 1(a), 80 Stat. 1610; see Pub. L. No. 98-532, 98 Stat. 2705. The Secretary was further empowered to "make such provisions as he shall deem appropriate authorizing the performance of

any of the functions transferred to him by the provisions of this reorganization plan by any officer, employee, or agency" of the Public Health Service or HHS. § 2, 80 Stat. 1610. And the Secretary is also authorized to "supervis[e] and direct[]" the Public Health Service, 42 U.S.C. 202, and to "carry out" AHRQ's mission and duties by "acting through [its] Director," 42 U.S.C. 299(a).

2. The ACA seeks to ensure that all Americans have access to quality, affordable health insurance coverage. One of the Act's reforms requires health insurance issuers and group health plans to cover certain preventive services without imposing copayments, deductibles, or other cost-sharing charges. 42 U.S.C. 300gg-13. Congress did not create a fixed list of covered preventive services, but rather provided for coverage of categories of services based on the current recommendations of medical experts, including the Task Force. The Act accordingly requires coverage for "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force." 42 U.S.C. 300gg-13(a)(1).[1] The Act further specifies that "[t]he Secretary shall establish a minimum interval between the date on which a recommendation * * * is issued" and the date on which issuers and plans must cover the recommended service without cost sharing for a new plan year. 42 U.S.C. 300gg-13(b).

Since the ACA's enactment, millions of Americans

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[1] The Task Force issues "A" recommendations for services that have a high certainty of a substantial net benefit; "B" recommendations for services that have at least a moderate certainty of a moderate net benefit; and "C" recommendations for services that have at least a moderate certainty of a small net benefit. D. Ct. Doc. 65, at 117.

have enjoyed coverage without cost sharing for critical preventive services that are proven to save lives. See *Access to Preventive Services* 1; D. Ct. Doc. 121-1, at 2 (Apr. 12, 2023). The Task Force's current recommendations give "A" or "B" ratings to more than 50 preventive services. U.S. Preventive Servs. Task Force, *A & B Recommendations*, https://perma.cc/FC9Y-Y3DN (*A & B Recommendations*). Among many other things, those services include screenings to detect lung, cervical, and colorectal cancer; screenings to detect diabetes; statin medications to reduce the risk of heart disease and strokes; medications to prevent HIV; physical therapy for older adults to prevent falls; and eye ointment for newborns to prevent blindness-causing infections. *Ibid.*

B. The Present Controversy

1. Respondents are four individuals and two small businesses who object to Congress's directive that health insurance issuers and group health plans generally must cover preventive services without cost sharing. App., *infra*, 7a. Five of the six respondents "do not currently participate in the health care market." *Id.* at 62a; see D. Ct. Doc. 111-1, ¶ 5 (Jan. 6, 2023); D. Ct. Doc. 111-2, ¶¶ 5-6 (Jan. 6, 2023); D. Ct. Doc. 111-3, ¶ 5 (Jan. 6, 2023). Those respondents nonetheless object to the ACA's requirement that issuers and plans cover preexposure prophylaxis (PrEP) medications, which the Task Force has assigned an "A" rating based on their effectiveness at preventing HIV infection in certain at-risk individuals. See D. Ct. Doc. 14, at 8, 10-11 (July 20, 2020). Those respondents state that PrEP medications "encourage and facilitate homosexual behavior," which conflicts with their religious beliefs. *Id.* at 8.

Braidwood Management is the only respondent that currently participates in the health insurance market. App., *infra*, 55a. Braidwood offers coverage to its approximately 70 employees through a self-insured plan. *Ibid.* Its owner wishes to exclude from that plan "coverage of preventive care such as * * * PrEP drugs" because he "objects to coverage of those services on religious grounds." *Ibid.* Braidwood does not allege, however, that any of its employees have ever sought coverage for PrEP medications.

2. Respondents filed this suit in the United States District Court for the Northern District of Texas. As relevant here, respondents contend that the Task Force's structure violates the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, because, in their view, Task Force members are principal officers of the United States who have not been appointed by the President with the advice and consent of the Senate. App., *infra*, 8a. Respondents' operative complaint seeks injunctive and declaratory relief but does not seek vacatur under Section 706(2) of the Administrative Procedure Act (APA), 5 U.S.C. 706(2). D. Ct. Doc. 14, at 13-18. After this suit was filed, the Secretary ratified all Task Force "A" and "B" recommendations then currently in effect. D. Ct. Doc. 65, at 6.[2]

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[2] Respondents also asserted various other claims, including Appointments Clause challenges to two other bodies within HHS—the Advisory Committee on Immunization Practices (ACIP) and the Health Resources and Services Administration (HRSA)—that issue recommendations and guidelines that insurance issuers and group health plans are required to cover without cost sharing. See App., *infra*, 5a-6a, 8a; 42 U.S.C. 300gg-13(a)(2)-(4). The district court rejected those Appointments Clause challenges, App., *infra*, 102a-106a, but the court of appeals reversed and remanded for consideration of respondents' argument that the Secretary's ratification of

The district court granted summary judgment to respondents. App., *infra*, 85a-136a. The court held that Task Force members are principal officers who must be appointed by the President with the advice and consent of the Senate. *Id.* at 115a. The court acknowledged that "no statute forbids" the "Secretary[] or AHRQ Director from firing any member of" the Task Force. *Id.* at 119a. But the court nonetheless concluded that Task Force members "have no superior," because the Secretary "neither directs nor supervises [the Task Force] or its members." *Id.* at 115a-116a.[3]

The district court declined to construe or sever the relevant statutory provision to avoid the Appointments Clause problem it identified. App., *infra*, 80a-82a. Specifically, the court rejected the government's argument that the provision rendering Task Force members and their recommendations "independent and, to the extent practicable, not subject to political pressure," 42 U.S.C. 299b-4(a)(6), could plausibly be read to allow the Secretary to review the Task Force's "A" and "B" recommendations before they bind insurance issuers and group health plans. App., *infra*, 81a. The court observed that even if the statute could be read to "*permit* the Secretary to authorize or reject [Task Force] recommendations *post hoc*," it "would not *compel* him to take such action." *Ibid.* The court recognized that this Court in *United States* v. *Arthrex, Inc.*, 594 U.S. 1 (2021), had

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ACIP and HRSA recommendations and guidelines required notice and comment under the APA, *id.* at 43a-47a. Those separate claims are not at issue in this petition.

[3] In the district court, the government primarily contended that Task Force members are not officers of the United States subject to the Appointments Clause. See D. Ct. Doc. 64, at 50-56 (Jan. 28, 2022); App., *infra*, 107a-114a.

"cur[ed]" an Appointments Clause violation by severing a statutory provision to ensure that administrative patent judges' decisions would "be subject to the review of the PTO Director." App., *infra*, 81a. But the district court deemed *Arthrex* "inapplicable" based on its view that the Task Force is not "subject to the Secretary's 'supervision and direction.'" *Ibid.* (citation omitted).

As a remedy for the identified Appointments Clause violation, the district court not only granted party-specific relief, but also ordered "[u]niversal" relief based on its reading of Section 706(2) of the APA, even though respondents had not raised an APA claim in their operative complaint. App., *infra*, 72a (emphasis omitted). The court vacated "[a]ll agency action taken to implement or enforce the preventive care coverage requirements in response to an 'A' or 'B' recommendation by the * * * Task Force on or after March 23, 2010." *Id.* at 83a. And the court also granted a nationwide injunction barring the government from "implementing or enforcing" the ACA's preventive-services "coverage requirements in response to an 'A' or 'B' rating from the Task Force in the future." *Ibid.*

3. The government sought a stay pending appeal of the district court's universal remedies. After the court of appeals heard oral argument on the government's stay motion, the parties stipulated to a stay of the universal remedies, and the court of appeals entered a corresponding stay. C.A. Doc. 153-2 (June 13, 2023). While the appeal was pending, the Secretary ratified the AHRQ Director's appointment of the current members of the Task Force and appointed those members himself on a prospective basis. See Secretary of HHS, *Ratification of Prior Appointment and Prospective Appointment:*

Appointment Affidavits (June 28, 2023), https://perma.cc/8TAA-7AMN.

4. The court of appeals affirmed the district court's holding that the Task Force's structure violates the Appointments Clause but reversed the district court's grant of universal relief. App., *infra*, 1a-48a.

a. The court of appeals held that Task Force members are principal officers who had not been properly appointed. App., *infra*, 26a. The court acknowledged that "an officer's removability" is "perhaps the most important" "hallmark[] of inferiority." *Id.* at 17a. And it "agree[d] with the Government that the HHS Secretary may remove members of the Task Force at will." *Id.* at 18a. But the court believed that "another important consideration * * * is the extent to which the Task Force's work can be supervised by a higher-ranking executive official, like Secretary Becerra." *Id.* at 20a.

"On that front," the court of appeals reasoned that it could not "say that any such supervision exists—as a matter of law or reality." App., *infra*, 20a. Citing Section 299b-4(a)(6), the court took the view that "the Task Force cannot be 'independent' and free from 'political pressure' on the one hand, and at the same time be supervised by the HHS Secretary, a political appointee, on the other." *Ibid.* The court construed "independent" to mean "free[] from outside control," as opposed to simply "unbiased." *Id.* at 21a n.59. And the court declined to read Section 299b-4(a)(6)'s phrase, "to the extent practicable," to give the Secretary a level of control necessary to avoid any constitutional problem. 42 U.S.C. 299b-4(a)(6); see App., *infra*, 21a-23a.

The court of appeals then "resolve[d] the competing considerations" bearing on the status of Task Force members—at-will removability coupled with allegedly

unreviewable authority—"in favor of holding that the Task Force members are principal officers." App., *infra*, 24a. The court believed that this Court's decision in *Arthrex* was largely "dispositive," because "[l]ike the [Patent Trial and Appeal Board at issue in *Arthrex*], the Task Force can, and does, issue legally binding decisions without any review by a higher-ranking officer." *Ibid.* "It is no answer," the court concluded, "that the HHS Secretary can exercise indirect control over the Task Force's recommendations through his removal power." *Id.* at 25a.

The court of appeals also declined to sever Section 299b-4(a)(6) and allow the Secretary to review Task Force "A" and "B" recommendations on that basis. App., *infra*, 30a-33a. The court acknowledged that "[i]f [it] were to 'sever' § 299b-4(a)(6)," the Secretary's review of Task Force recommendations "would not conflict with any other applicable statutory provision." *Id.* at 31a. But the court found it "far from clear" how a "decision to disregard § 299b-4(a)(6) would also thereby *empower* the Secretary to begin reviewing, and possibly rejecting, the Task Force's recommendations." *Ibid.* (footnote omitted). The court further opined that the Secretary's authority over the Public Health Service does not extend to the Task Force because, in the court's view, the Task Force is "an[] advisory council, board, or committee" exempt from secretarial control. *Id.* at 31a-32a (quoting § 1(b), 80 Stat. 1610). For those reasons, the court was "unable to track the Supreme Court's severability analysis in *Arthrex*," and concluded that "with or without § 299b-4(a)(6), the constitutional problem persists." *Id.* at 32a-33a.

b. The court of appeals next held that there "was no basis" for the district court's grant of "universal remedies." App., *infra*, 34a. The court observed that, "notwithstanding notable skepticism" about the availability of universal vacatur under the APA, the Fifth Circuit "has understood vacatur under § 706(2) to be a remedy that affects individuals beyond those who are parties to the immediate dispute." *Id.* at 34a-35a. And the court stated that under Fifth Circuit precedent, universal vacatur is "the 'default' remedy for unlawful agency action." *Id.* at 36a (citation omitted). Accordingly, the court found that the district court did not err by refusing to consider "the various equities at stake before determining" that vacatur was warranted. *Ibid.*

The court of appeals observed, however, that under Fifth Circuit precedent, "one of the minimal requirements to be entitled to th[e] 'default' APA remedy is, perhaps unsurprisingly, an APA claim." App., *infra*, 37a. Because respondents had failed to plead an APA claim in their operative complaint, the court rejected the "district court's decision to vacate all agency actions taken to enforce the Task Force's recommendations." *Id.* at 39a. And "without any basis to seek universal vacatur," the court held that respondents correspondingly "lack any basis for an injunction of the same breadth." *Id.* at 42a-43a. The court of appeals therefore limited the district court's injunction so that it bars the government only from enforcing the preventive-services coverage requirements against respondents. *Id.* at 43a.

REASONS FOR GRANTING THE PETITION

The court of appeals relied on an erroneous understanding of the Appointments Clause to hold the Task Force's structure unconstitutional. The Secretary has the power to remove Task Force members at will and to

supervise the Public Health Service, of which the Task Force is a part. Under this Court's precedent, Task Force members are subordinate to the Secretary and serve as inferior officers. Indeed, the court of appeals identified no case in which an official who is removable at will by a principal officer is *herself* a principal officer. At minimum, the court of appeals should have severed the lone provision that it (incorrectly) perceived as unduly insulating the Task Force from secretarial control.

This Court's review is warranted because the court of appeals has held an Act of Congress unconstitutional and its legal rationale would inflict immense practical harms. Millions of Americans rely on insurance coverage for preventive services without cost sharing. If allowed to stand, the decision below would call into question the legal duty of insurance issuers and group health plans to cover Task Force "A" and "B" recommendations without cost sharing. Moreover, the decision could prompt district courts within the Fifth Circuit to universally vacate past agency actions implementing "A" and "B" recommendations and universally enjoin implementation of those recommendations moving forward. The petition should be granted.

A. The Decision Below Is Incorrect

This Court's precedents chart a clear path for resolving the Appointments Clause challenge here: Task Force members properly serve as inferior officers who are subordinate to the Secretary; and at minimum, the lone provision that respondents cite as unduly insulating Task Force members from secretarial control can be construed or severed to cure any constitutional defect. The court of appeals' contrary ruling lacks merit.

1. Task Force members properly serve as inferior officers who are subordinate to the Secretary

The court of appeals held that Task Force members are principal officers who must be appointed by the President with the advice and consent of the Senate because the Secretary lacks adequate supervisory authority over them. App., *infra*, 26a. That holding is incorrect.

a. The Appointments Clause distinguishes between "inferior Officers"—whose appointment Congress may vest "in the President alone, in the Courts of Law, or in the Heads of Departments," U.S. Const. Art. II, § 2, Cl. 2—and "principal (noninferior) officers," who must be appointed by the President with the advice and consent of the Senate. *Edmond* v. *United States*, 520 U.S. 651, 659 (1997); see *id.* at 659-660. "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President," because "[w]hether one is an 'inferior' officer depends on whether he has a superior." *Id.* at 662. Thus, inferior officers are "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663.

In determining whether adequate direction and supervision exists, the Court has emphasized that "[t]he power to remove officers * * * is a powerful tool for control." *Edmond*, 520 U.S. at 664. After all, "[o]nce an officer is appointed it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986) (citation omitted). As the D.C. Circuit has put the point, "[w]ith unfettered removal power, [a principal officer]

will have the direct ability to 'direct,' 'supervise,' and exert some 'control' over [another officer's] decisions." *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.*, 684 F.3d 1332, 1341 (2012) (citation omitted), cert. denied, 569 U.S. 1004 (2013).

This Court's cases have thus recognized that the unrestricted removability of an officer by someone other than the President is strong and likely dispositive evidence of inferior-officer status. In *Edmond*, the Court held that judges of the Coast Guard Court of Criminal Appeals were inferior officers in part because they could be removed by the Judge Advocate General "from [a] judicial assignment without cause." 520 U.S. at 664; see *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 707 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (noting that "*Edmond* was a relatively easy case" because "[t]he officers were removable at will"), aff'd in part, rev'd in part, and remanded 561 U.S. 477 (2010). And in *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), the Court "ha[d] no hesitation in concluding" that members of the Public Company Accounting Oversight Board were inferior officers once "the statutory restrictions on the [Securities and Exchange] Commission's power to remove Board members" had been severed. *Id.* at 510. That was true, the Court held, even though "the Board is empowered to take significant enforcement actions, and does so largely independently of the Commission." *Id.* at 504.

Similarly, in his dissent in *Morrison* v. *Olson*, 487 U.S. 654 (1988), Justice Scalia explained that if the independent counsel there had been "removable at will by the Attorney General, then she would [have been] sub-

ordinate to him and thus properly designated as inferior." *Id.* at 716. But because the statute made her "removable only for 'good cause'" and otherwise limited the Attorney General's oversight of her responsibilities, Justice Scalia reasoned that "she is not subordinate." *Ibid.* (citation omitted). Likewise, in a dissent in *Free Enterprise Fund*, which anticipated this Court's subsequent majority opinion, then-Judge Kavanaugh explained that "*Edmond* and the basic principles underlying Article II teach that the key initial question in determining whether an executive officer is inferior is whether the officer is removable at will" because "[r]emovability at will carries with it the inherent power to direct and supervise." 537 F.3d at 707. He concluded that "removable-at-will officers in the executive departments and agencies ultimately report not only to the President, but also to other superior officers in the Executive Branch chain of command" and therefore "may properly be considered inferior officers." *Id.* at 707 n.15.

Congress has long established important federal offices with substantial discretion and authority that have been understood to be inferior offices because their occupants may be removed at will by a principal officer. The Benefits Review Board in the Department of Labor issues final benefits-related orders that are not subject to further review by any Executive Branch officer. See 33 U.S.C. 921(b) and (c); *Pittson Coal Grp.* v. *Sebben*, 488 U.S. 105, 112 (1988). Yet in *United States* v. *Arthrex, Inc.*, 594 U.S. 1 (2021), this Court found Benefits Review Board members "potentially distinguishable" from the unconstitutionally appointed administrative patent judges there because Benefits Review Board

members "appear to serve at the pleasure of the appointing department head." *Id.* at 20-21. Similarly, the Federal Open Market Committee has final authority over decisions to contract or expand the supply of money in the United States, see 12 U.S.C. 263, and yet its members are inferior officers because the Federal Reserve Board of Governors "has the authority to remove them at will," *Appointment and Removal of Federal Reserve Bank Members of the Federal Open Market Committee*, 2019 WL 11594453, at *7 (Op. O.L.C. Oct. 23, 2019). And the Postmaster General is "[t]he chief executive officer of the Postal Service," 39 U.S.C. 203, and yet is an inferior officer under the Appointments Clause because he "serv[es] at the pleasure of the" Postal Service's Board of Governors, *Silver* v. *United States Postal Serv.*, 951 F.2d 1033, 1040 (9th Cir. 1991) (per curiam); see *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 150 (1996).

b. Applying those principles here, Task Force members are inferior officers. As both the court of appeals and district court recognized, "the HHS Secretary may remove members of the Task Force at will." App., *infra*, 18a; see *id.* at 119a. After all, the Secretary may appoint Task Force members when "acting through the Director" of AHRQ, 42 U.S.C. 299(a), who normally convenes the Task Force, 42 U.S.C. 299b-4(a)(1). See also §§ 1(a), 2, 80 Stat. 1610. And "the power of removal of executive officers [i]s incident to the power of appointment." *Myers* v. *United States*, 272 U.S. 52, 119 (1926); see *Free Enter. Fund*, 561 U.S. at 509. Nor is there any statutory text protecting Task Force members from removal. Cf. *Collins* v. *Yellen*, 594 U.S. 220, 248 (2021) ("When a statute does not limit the President's power

to remove an agency head, we generally presume that the officer serves at the President's pleasure."). Thus, because the Secretary (a principal officer) has "the power to remove [Task Force] members at will," the Court should "have no hesitation in concluding" that those members are inferior officers serving under the Secretary's direction. *Free Enter. Fund*, 561 U.S. at 510.

If further indicia of secretarial "oversight authority" were required to render Task Force members inferior officers, *Free Enter. Fund*, 561 U.S. at 510, the relevant laws here provide it. As noted above, Congress has empowered the Secretary to "supervis[e] and direct[]" the Public Health Service, 42 U.S.C. 202, which includes the Task Force. The Secretary is also permitted to perform "all functions of the Public Health Service" and its "officers," "employees," and "agencies," and to "make such provisions as he shall deem appropriate authorizing the performance of any of the functions * * * of the Public Health Service." §§ 1(a), 2, 80 Stat. 1610. And Congress gave the Secretary the more specific authority to "establish a minimum interval" before which issuers and plans must cover a Task Force "A" or "B" recommendation without cost sharing. 42 U.S.C. 300gg-13(b)(1). The sum total of those secretarial oversight authorities—especially in conjunction with unfettered removal power—ensure that the Task Force can be "directed and supervised at some level by [another officer] who w[as] appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663.

c. The court of appeals erred in holding otherwise. The court acknowledged that "an officer's removability" is "the most important" "hallmark[] of inferiority."

App., *infra*, 17a. And it "agree[d] with the Government that the HHS Secretary may remove members of the Task Force at will." *Id.* at 18a. But the court nonetheless found insufficient secretarial "supervision" of Task Force recommendations. *Id.* at 20a. The court was mistaken.

As an initial matter, the court of appeals identified no authority for the proposition that at-will removal is a constitutionally insufficient method through which a principal officer may supervise an inferior officer. Indeed, neither the court of appeals nor respondents have identified any case in which an official who was removable at will by a principal officer was herself a principal officer. This Court should reject that unprecedented and illogical outcome.

The court of appeals also misunderstood Section 299b-4(a)(6). As noted above, Section 299b-4(a)(6) provides that Task Force members and their recommendations "shall be independent and, to the extent practicable, not subject to political pressure." 42 U.S.C. 299b-4(a)(6). That provision helps ensure that Task Force members exercise their own best judgment, not regard themselves as mere representatives of the organizations or professions in which they serve, and not be influenced by outside pressures. See D. Ct. Doc. 65, at 72 (explaining the steps the Task Force takes to ensure public "confidence in the integrity of the process by which [it] makes its recommendations").

To the extent Section 299b-4(a)(6) is also understood to address the relationship of the Task Force to HHS, it does not support the court of appeals' holding here. Against the backdrop of the Secretary's broad authority over the Public Health Service, the reference to "independence" is most naturally read to require the Task

Force members to make "unbiased, independent judgments," even while subject to secretarial supervision with respect to their conduct and the effect of their recommendations. *Kalaris* v. *Donovan*, 697 F.2d 376, 394 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983). Indeed, administrative law judges and immigration judges are expected to issue decisions based on their own "independent judgment," *Butz* v. *Economou*, 438 U.S. 478, 513 (1978); see *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-267 (1954), but both sets of officials still properly serve as inferior—not principal—officers. See *Freytag* v. *Commissioner*, 501 U.S. 868, 882 (1991) (holding that special trial judges of the Tax Court were inferior officers, even though they exercised independent adjudicatory authority).

The court of appeals dismissed this reading of "independent" because of "its juxtaposition to the additional requirement that the Task Force not be 'subject to political pressure.'" App., *infra*, 21a n.59. But if *both* requirements simply "connote[] freedom from outside control," as the court posited, *ibid.*, then they would be redundant—a result this Court normally seeks to avoid. See, *e.g.*, *Ysleta del Sur Pueblo* v. *Texas*, 596 U.S. 685, 698-699 (2022). To give "effect" to both terms so that neither is "superfluous" or "insignificant," *ibid.* (citation omitted), the term "independent" is best read to clarify that the Task Force should bring to bear its expert, unbiased medical judgment.

Similarly, while Task Force recommendations may not be "subject to political pressure," the statute explicitly qualifies that requirement with the phrase "to the extent practicable." 42 U.S.C. 299b-4(a)(6). If greater secretarial supervision over Task Force recommendations is constitutionally necessary, as the Fifth Circuit

believed, then the phrase "to the extent practicable" can be readily interpreted to allow it. This Court construes statutes to "avoid" rendering them "unconstitutional" if "there is another reasonable interpretation available." *Edmond*, 520 U.S. at 658. Here, Congress plainly intended to allow a saving construction, if necessary, by qualifying the limitation on political pressure with the flexible phrase "to the extent practicable." 42 U.S.C. 299b-4(a)(6).

The court of appeals declined to adopt that construction because the court thought it would raise a "line-drawing problem" in determining which Task Force recommendations would be subject to secretarial review. App., *infra*, 22a. That is wrong. Any constitutionally necessary supervision would be of Task Force "A" and "B" recommendations alone because only those recommendations have binding effects on private parties. See 42 U.S.C. 300gg-13(a)(1). Accordingly, only those recommendations involve the exercise of "significant authority pursuant to the laws of the United States" that makes Task Force members federal officers in the first place. *Arthrex*, 594 U.S. at 13 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam)). The Task Force's *nonbinding* activities and recommendations (like its "C" recommendations and provision of technical assistance to medical professionals) would require no additional secretarial supervision, because those actions involve no significant exercise of federal power. See *id.* at 14 (evaluating supervision only of the powers "that make[] the [administrative patent judges] officers exercising 'significant authority' in the first place") (citation omitted).

The court of appeals also suggested that the government's reading of Section 299b-4(a)(6) is "inconsistent"

with Section 300gg-13(b)(1), which requires the Secretary to establish a minimum interval before Task Force "A" and "B" recommendations bind issuers and group health plans. App., *infra*, 23a. But the specific power to establish such an interval does not conflict with the Secretary's general supervisory power to review and reject recommendations. Instead, it simply gives the Secretary the further option of accepting a recommendation while delaying its effective date.

Finally, the court of appeals erred in viewing *Arthrex* as largely "dispositive" of the inferior-officer question here. App., *infra*, 24a. As an initial matter, the Court in *Arthrex* made clear that its decision did "not address supervision outside the context of adjudication," 594 U.S. at 23, which is not at issue here. But more fundamentally, the court of appeals overlooked the key distinction between *Arthrex* and this case: whereas the administrative patent judges in *Arthrex* were removable by the agency head only "for such cause as will promote the efficiency of the service," *id.* at 26 (quoting 5 U.S.C. 7513(a)), the Task Force members here are removable by the Secretary at will. Indeed, in describing the constitutional violation in *Arthrex*, the Court specifically emphasized that Congress had "insulat[ed]" the administrative patent judges' "offices from removal." *Id.* at 23. Accordingly, *Arthrex* only reinforces that an official's at-will removability is critical to the inferior-officer analysis.

2. Even if Task Force members were principal officers, Section 299b-4(a)(6) can be severed to cure the constitutional defect

Even if this Court were to conclude that Task Force members are unconstitutionally insulated from secretarial supervision, this Court's precedent teaches that

the proper course is to sever the provision creating such insulation. The court of appeals erred in declining to do so.

"'Generally speaking, when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" *Free Enter. Fund*, 561 U.S. at 508 (citation omitted). And "[b]ecause '[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions,' the 'normal rule' is that 'partial, rather than facial, invalidation is the required course.'" *Ibid.* (citations omitted; second set of brackets in original).

In *Arthrex*, for instance, after concluding that administrative patent judges' "unreviewable authority" was "incompatible with their appointment by the Secretary [of Commerce] to an inferior office," 594 U.S. at 23, the Court determined that the statute "cannot constitutionally be enforced to the extent that its requirements prevent the [Patent and Trademark Office] Director from reviewing final decisions rendered by" the administrative patent judges, *id.* at 25.[4] The Court thus "sever[ed]" the provision "shielding" the judges' decisions "from review" by the Director. *Id.* at 24. And without that provision, the Court reasoned that "the Director has the authority to provide for a means of reviewing" the relevant decisions "[b]ecause Congress has vested the Director with the 'power and duties' of

[4] The severability portion of the Chief Justice's opinion was joined by Justices Alito, Kavanaugh, and Barrett. *Arthrex*, 594 U.S. at 4. Justice Breyer issued a concurrence in part and dissent in part, joined by Justices Sotomayor and Kagan, in which he "agree[d] with [the] remedial holding" of the Chief Justice's opinion. *Id.* at 44. Thus, seven Justices concurred in the severability analysis.

the [Patent and Trademark Office]." *Id.* at 25 (citation omitted). Accordingly, the Court held that, following severance, the Director "may review" administrative patent judges' decisions and that the statute "otherwise remains operative." *Ibid.*

The same basic logic applies here. The constitutional defect perceived by the court of appeals was the absence of a "supervisory role for the Secretary" over "the Task Force's recommendations"; and in the court's view, that defect stemmed from Section 299b-4(a)(6)'s requirement that recommendations "be 'independent' and free from 'political pressure.'" App., *infra*, 20a, 23a. The court therefore should have severed Section 299b-4(a)(6)'s application to Task Force "A" and "B" recommendations, thus giving the Secretary "authority to provide for a means of reviewing" those recommendations. *Arthrex*, 594 U.S. at 25. And the court should have left the statute otherwise "operative," *ibid.*—particularly because "nothing in the statute's text or historical context makes it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred" a Task Force that cannot issue binding preventive-services recommendations as opposed to "a [Task Force] whose members are" supervised by the Secretary, *Free Enter. Fund*, 561 U.S. at 509 (citation omitted).

The court of appeals "agree[d] with the Government" that severing Section 299b-4(a)(6) would ensure secretarial supervision of the Task Force. App., *infra*, 31a. But the court found that a "decision to disregard § 299b-4(a)(6)" would not "also thereby *empower* the Secretary to begin reviewing, and possibly rejecting, the Task Force's recommendations." *Ibid.* (footnote omitted). Although the court recognized that "[s]uch secretarial

review would not conflict with any other applicable statutory provision," the court saw no affirmative "power to review the recommendations." *Ibid.*

That reasoning conflicts with *Arthrex*. There, the Court held that after severing the problematic provision, the Patent and Trademark Office Director "ha[d] the authority to provide for a means of reviewing" the relevant decisions. *Arthrex*, 594 U.S. at 25. In so doing, the Court relied on a general provision "vest[ing] the Director with the 'power and duties' of the [Patent and Trademark Office]" and emphasized that "[a] single officer has" long "superintended the activities of" that office. *Id.* at 24 (citation omitted). Likewise here, the Secretary has the power to "supervis[e] and direct[]" the Public Health Service, 42 U.S.C. 202, as well as the power to perform "all functions of the Public Health Service" and its "officers" and "agencies," § 1(a), 80 Stat. 1610. And the Secretary has superintended the Public Health Service's activities since 1966. See 80 Stat. 1610. Under *Arthrex*, the Secretary's longstanding background authority to supervise and perform the Public Health Service's functions would amply provide for secretarial review of Task Force "A" and "B" recommendations following the severance of Section 299b-4(a)(6).

The court of appeals' error stemmed in part from a fundamental misconception of the Reorganization Plan, 80 Stat. 1610. As noted above, the Reorganization Plan allows the Secretary to exercise power over "all functions of the Public Health Service," but it creates an exception for "the functions vested by law in any advisory council, board, or committee of or in the Public Health Service." § 1, 80 Stat. 1610. The court believed that the

exception applies to the Task Force and that the Secretary therefore lacks power over the Task Force. App., *infra*, 31a-32a. The court was incorrect.

The exception for "any advisory council, board, or committee" does not apply to the Task Force. § 1(b), 80 Stat. 1610. Instead, the exception applies to federal advisory committees or councils that have purely recommendatory duties, like the Surgeon General's advisory committee that issued a landmark report on the health effects of smoking just two years before the Reorganization Plan's adoption. See Public Health Serv., U.S. Dep't of Health, Educ., and Welfare, *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Serv.* (1964), https://perma.cc/8YPT-M9MB. Indeed, the Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770 (1972), enacted shortly after the HHS Reorganization Plan, uses the same basic terminology, referring to "committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch." § 2(a), 86 Stat. 770; see 5 U.S.C. 1002(a) (Supp. IV 2022). And FACA makes clear that "the function of advisory committees should be advisory only." § 2(b)(6), 86 Stat. 770; see 5 U.S.C. 1002(b)(6) (Supp. IV 2022).

The Task Force is not an advisory body covered by the Reorganization Plan's exception. Congress expressly provided that the Task Force is not subject to FACA. 42 U.S.C. 299b-4(a)(5) (Supp. IV 2022) ("[T]he Task Force is not subject to the provisions of chapter 10 of Title 5."). And Task Force "A" and "B" recommendations are not merely advisory but instead may bind private insurance issuers and group health plans. 42 U.S.C. 300gg-13(a)(1). The court of appeals offered no

reason why Congress would create a body within the Public Health Service whose decisions would bind the public at large, and then choose *not* to grant the Secretary authority to oversee that body—even though the Secretary is vested with all other authority in the Public Health Service. The more natural reading is that Congress authorized the Secretary to oversee the Task Force, just as the Secretary oversees the other components of the Public Health Service that exercise significant federal power.

B. The Decision Below Warrants Review

This Court should grant the petition for a writ of certiorari because the Fifth Circuit's decision declares the Task Force's structure unconstitutional and threatens enormous legal and practical consequences.

1. The Court's intervention is necessary because the court of appeals held that "constitutional problems * * * inhere in the Task Force's" structure. App., *infra*, 30a. The Court has recognized that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty" of the Federal Judiciary. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). Accordingly, "when a lower court has invalidated a federal statute," the Court's "usual" approach is to grant certiorari. *Iancu* v. *Brunetti*, 588 U.S. 388, 392 (2019). Indeed, the Court applies a "strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional." *Maricopa Cnty.* v. *Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (statement of Thomas, J., respecting the denial of the application for a stay). And the Court has repeatedly reviewed such decisions even in the absence of a circuit conflict. See, *e.g.*, *SEC* v. *Jarkesy*, 144 S. Ct. 2117, 2127 (2024); *Haaland* v. *Brackeen*, 599

U.S. 255, 272 (2023); *United States* v. *Vaello Madero*, 596 U.S. 159, 164 (2022); *Arthrex*, 594 U.S. at 11; *Barr* v. *American Ass'n of Political Consultants, Inc.*, 591 U.S. 610, 618 (2020) (plurality opinion); *United States* v. *Sineneng-Smith*, 590 U.S. 371, 375 (2020). That course is especially warranted here because the court of appeals' decision is in serious tension with this Court's precedent and decisions of other courts of appeals rejecting similar Appointments Clause challenges in other contexts. See pp. 14-22, *supra*; *Intercollegiate Broad. Sys.*, 684 F.3d at 1340-1341.

2. This Court's review is also warranted because of the immense legal and practical significance of the court of appeals' decision. That decision holds that the Task Force has been unlawfully exercising governmental authority for the past 14 years. And the decision threatens to disrupt a key part of the ACA that provides healthcare protections for millions of Americans.

a. Even before the ACA's enactment, the medical community had recognized that increased use of preventive services would save more than 100,000 lives and billions of dollars each year. See American Lung Ass'n C.A. Amici Br. 13-14 (citing studies). And yet health insurance issuers and group health plans "had little incentive to cover preventive services, the benefits of which may only be realized in the future." D. Ct. Doc. 121-2, at 3 (Apr. 12, 2023). Because of that lack of coverage, Americans used preventive services at only about half the recommended rate. See Centers for Medicare & Medicaid Servs., HHS, *Background: The Affordable Care Act's New Rules on Preventive Care* (July 14, 2010), https://perma.cc/U8K5-MN95.

In the ACA, Congress sought to save lives, improve public health, and reduce healthcare spending by ensuring that Americans could receive preventive services without co-pays or other cost-sharing mechanisms. See 42 U.S.C. 300gg-13. As one Senator explained, "if you can detect a disease early, you can not only save lives, but you can save health care costs because the preventive services only cost a couple hundred dollars, and an operation you can avoid is tens of thousands of dollars." 155 Cong. Rec. 33,071 (2009) (statement of Sen. Cardin). Congress ultimately devoted an entire title of the Act to "Prevention of Chronic Disease and Improving Public Health." Tit. IV, 124 Stat. 538 (capitalization altered).

Congress's reform has proved effective. See American Pub. Health Ass'n C.A. Amici Br. 15-19. A review of numerous medical studies found that eliminating cost sharing has led to increased use of many preventive services, particularly among individuals with lower incomes. *Id.* at 15-16. In 2018, approximately 100 million Americans—6 in 10 privately insured people—received preventive services (including those recommended by the Task Force) that were covered without cost sharing under the ACA. American Lung Ass'n C.A. Amici Br. 16. Thus, millions of Americans with private insurance now have access to preventive services without cost sharing. See *Access to Preventive Services* 1; D. Ct. Doc. 121-1, at 2. And substantial evidence suggests "that ready access to preventive services without cost-sharing" has "improve[d] health outcomes" and "reduces the costs of health care delivery for all stakeholders." Blue Cross Blue Shield Ass'n C.A. Amicus Br. 10-11; see American Hosp. Ass'n C.A. Amicus Br. 15.

b. The decision below jeopardizes the availability of this critical care. Under the logic of that decision, no

one—not the Task Force or even the Secretary—can issue preventive-services recommendations that issuers and plans must cover under Section 300gg-13(a)(1). If that logic were accepted, then the list of covered preventive services would no longer include the most updated "clinical preventive recommendations." 42 U.S.C. 299b-4(a)(1). That result would run squarely counter to Congress's goal of ensuring "a healthier population" and "reduc[ing] health care costs by helping individuals avoid preventable conditions and receive treatment earlier." 78 Fed. Reg. at 39,872.

Absent this Court's intervention, even more damaging consequences could imminently follow. As noted above, the district court granted universal relief, vacating "[a]ll agency action taken to implement or enforce" the Task Force's "A" and "B" recommendations since March 23, 2010, and enjoining the government from "implementing or enforcing * * * coverage requirements in response to an 'A' or 'B' rating from the Task Force in the future." App., *infra*, 83a (citation omitted). The court of appeals reversed that universal remedy only on the ground that respondents had failed to assert an APA claim in their operative complaint. *Id.* at 37a, 42a-43a. But in so doing, the court emphasized that under Fifth Circuit precedent, universal vacatur is "the 'default' remedy for unlawful agency action," and courts need not consider "the various equities at stake before determining whether a party is entitled to vacatur." *Id.* at 36a (citation omitted). Thus, unless this Court grants review, a future plaintiff with Article III standing could bring an APA claim in a district court within the Fifth Circuit, challenge the Task Force's recommendations

on Appointments Clause grounds, and obtain a sweeping remedy that would render the Task Force preventive-services scheme inoperative nationwide.

Such a remedy would upend healthcare coverage for millions of Americans. Under that remedy, issuers and group health plans could eliminate coverage (or impose cost-sharing requirements) for any preventive services recommended by the Task Force since March 23, 2010. That would include, for example:

- *Statins for cardiovascular disease and stroke*: The Task Force has recommended the use of statins (medication that reduces cholesterol) to prevent heart disease and stroke for at-risk adults between the ages of 40-75. See *A&B Recommendations*, *supra*. Heart disease is the country's leading cause of death, and statin use significantly reduces the probability of heart attacks and strokes. D. Ct. Doc. 121-1, at 7. In turn, "[l]ower copayments for statin medications have been associated with higher levels of adherence." *Ibid*.
- *Lung cancer screenings*: The Task Force has recommended annual lung cancer screenings for at-risk adults between the ages of 50-80. See *A&B Recommendations*, *supra*. When lung cancer is caught at an early stage, the five-year survival rate is 61%; but when it is caught at a late stage, that rate is just 7%. D. Ct. Doc. 121-1, at 6. The ACA's requirement of coverage for lung cancer screenings without cost sharing is estimated to save approximately 10,000-20,000 lives per year. *Ibid.*

- *Diabetes screening*: The Task Force has recommended that certain at-risk adults receive screening for prediabetes and type-2 diabetes. See *A&B Recommendations*, *supra*. Type-2 diabetes is preventable and its progression can be delayed. United States of Care C.A. Amici Br. 22. Yet approximately $1 out of every $4 in American healthcare costs is spent on caring for people with diabetes, resulting in $307 billion in direct medical costs annually. Centers for Disease Control & Prevention, HHS, *Health and Economic Benefits of Diabetes Interventions* (May 15, 2024), https://perma.cc/YW5F-KLX4. Under the district court's reasoning and remedy in this case, insurers would no longer be required to provide cost-free coverage for many prediabetes screenings and interventions.

The preventive services just mentioned represent only a fraction of the services that would be jeopardized by a universal remedy. Other affected services include cervical and colorectal cancer screenings; hepatitis B and C screenings; physical therapy for older adults to prevent falls; ointments to prevent blindness in newborns; and nutritional supplements to support healthy pregnancies. See *A&B Recommendations*, *supra*; American Pub. Health Ass'n C.A. Amici Br. 8-14 (documenting these and other services).

If all post-2010 Task Force "A" and "B" recommendations became nonbinding nationwide, a material number of issuers and group health plans would be expected to "drop coverage or impose cost sharing for certain preventive services." D. Ct. Doc. 121-1, at 3; see Blue Cross Blue Shield Ass'n C.A. Amicus Br. 14-15. That expectation accords with pre-ACA experience, as many

issuers and plans did not then cover preventive services without cost sharing. See D. Ct. Doc. 121-2, at 3-4. And the expectation also accords with experience under the ACA, as many issuers and plans have not covered preventive services without cost sharing until the statute has required them to do so following a Task Force "A" or "B" recommendation. See *ibid.*

A recent survey suggests that if issuers and group health plans did impose cost-sharing requirements for preventive services, 40% of Americans would be unable or unwilling to pay out of pocket for those services. See D. Ct. Doc. 121-1, at 4. That survey is consistent with substantial literature suggesting that "the presence of cost-sharing, even if the amount is relatively modest, deters patients from receiving care." American Pub. Health Ass'n C.A. Amici Br. 17 (citation omitted). In turn, decreased use of preventive services would create "a sicker population" and "higher overall health care costs," D. Ct. Doc. 121-2, at 4—the precise problems that Congress sought to solve through the ACA.

"In our system of government, [it] is the responsibility of those chosen by the people through democratic processes" to "weigh [the] tradeoffs" involved in setting "public health" policy. *National Fed'n of Indep. Bus.* v. *Department of Labor*, 595 U.S. 109, 120 (2022) (per curiam). The Fifth Circuit's decision here overturns the policy choices of the people's representatives based on a novel and unsupported view about the proper structure of administrative agencies and a disregard for settled severability principles. This Court should grant review and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10326

BRAIDWOOD MANAGEMENT, INCORPORATED; JOHN SCOTT KELLEY, KELLEY ORTHODONTICS; ASHLEY MAXWELL; ZACH MAXWELL; JOES STARNES, PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

JOEL MILLER; GREGORY SCHEIDEMAN, PLAINTIFFS-CROSS-APPELLANTS

v.

XAVIER BECERRA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; UNITED STATES OF AMERICA; JANET YELLEN, SECRETARY, U.S. DEPARTMENT OF TREASURY, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY; JULIE A. SU, ACTING SECRETARY, U.S. DEPARTMENT OF LABOR, IN HER OFFICIAL CAPACITY AS SECRETARY OF LABOR, DEFENDANTS-APPELLANTS/CROSS-APPELLEES

[Filed: Jun 21, 2024]

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CV-283

Before WILLETT, WILSON, and RAMIREZ, *Circuit Judges*.

DON R. WILLETT, *Circuit Judge*:

The Affordable Care Act requires private insurers to cover certain kinds of "preventive care," including contraception, HPV vaccines, and drugs preventing the transmission of HIV. The plaintiffs are a group of individuals and businesses who have religious objections to these preventive-care mandates and challenged them on multiple grounds. They contend, among other things, that the preventive-care mandates are unlawful because the agencies that issued them violate Article II of the Constitution, insofar as their members are principal officers of the United States who have not been validly appointed under the Appointments Clause. In a series of summary-judgment rulings, the district court mostly agreed, vacating all agency actions taken to enforce the mandates under the Administrative Procedure Act and issuing both party-specific and universal injunctive relief.

Our decision today is something of a mixed bag. With respect to one of the challenged administrative bodies, the United States Preventive Services Task Force, we agree that the unreviewable power it wields—the power to issue preventive-care recommendations that insurers must cover by law—renders its members principal officers of the United States who have not been validly appointed under Article II of the United States Constitution. And because Xavier Becerra, in his capacity as the Secretary of the Department of Health and Human Services, has not validly cured the Task Force's constitutional problems, the district court properly enjoined the defendants from enforcing the preventive-care mandates to the extent they came at the recommendation of the Task Force. We think it was error, however, for the district court to have also vacated all agency actions taken to enforce the preventive-care

mandates and to universally enjoin the defendants from enforcing them.

With respect to the plaintiffs' cross-appeal and their Appointments Clause challenges against the other two administrative bodies at issue in this case, the Advisory Committee on Immunization Practices and the Health Resources and Services Administration, we agree with the Government that Secretary Becerra has the authority to ratify their recommendations and guidelines, but we reserve judgment on whether he has effectively done so. The district court had no opportunity to consider the plaintiffs' arguments that the Secretary's ratification memo suffers from multiple defects under the Administrative Procedure Act, and we decline to consider these arguments in the first instance.

Accordingly, we AFFIRM in part, REVERSE in part, and REMAND for further proceedings consistent with this opinion.

I

A

In 2010, Congress passed, and President Obama signed into law, the Patient Protection and Affordable Care Act (ACA).[1] As part of its stated goal of broadening health insurance coverage, the ACA requires private insurers to cover certain preventive-care services without "cost sharing"—that is, without requiring the insured to pay deductibles, copayments, or other out-of-pocket expenses.[2] The ACA does not define "preven-

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[1] Pub. L. No. 111-148, 124 Stat. 119 (2010).

[2] 42 U.S.C. § 300gg-13(a) ("A group health plan and a health insurance issuer offering group or individual health insurance shall,

tive care," nor does it provide a list or examples of which preventive-care services must be covered.[3] Instead, it empowers three agencies, all affiliated with the Department of Health and Human Services (HHS), to determine what services are required under four different categories of care.

The first and most important category of mandated coverage for purposes of this appeal includes "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force."[4] The Task Force is a body of sixteen volunteers "with appropriate expertise"[5] who serve four-year terms and "periodically convene" to make recommendations on covered preventive-care services.[6] Members of the Task Force are "convened" by the Director of the Agency for Healthcare Re-

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at a minimum provide coverage for and shall not impose any cost sharing requirements for" four different categories of preventive care).

[3] *See generally id.*; *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 664 (2020) ("The statute itself does not define 'preventive care and screenings,' nor does it include an exhaustive or illustrative list of such services. Thus, the statute does not explicitly require coverage for any specific form of 'preventive care.'").

[4] *Id.* § 300gg-13(a)(1).

[5] 42 U.S.C. § 299b-4(a)(1).

[6] Act of Dec. 6, 1999, Pub. L. No. 106-129, 113 Stat. 1659, § 915(a)(1). The district court found that, in practice, Task Force members' work entailed meeting "three times a year for two days in Washington, D.C. (paid for by taxpayers)," "frequent" emailing, "multiple conference calls each month," and "interaction with stakeholders." In all, "members devote approximately 200 hours a year outside of in-person meetings."

search and Quality[7] (a subagency within the Public Health Service, which in turn is a subagency within HHS). There is, however, no removal restriction on Task Force members before the expiration of their terms. The ACA instead provides that "[a]ll members of the Task Force . . . and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure."[8]

The second category of mandated coverage includes "immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved."[9] The Advisory Committee on Immunization Practices, or ACIP, is part of the Public Health Service and is thus "administered by the Assistant Secretary for Health under the supervision and direction of the [HHS] Secretary."[10] According to its charter, ACIP consists of fifteen members who serve four-year terms and are selected by the HHS Secretary. ACIP is also one of several advisory committees that report to the CDC Director, who in turn exercises authority delegated to him by the HHS Secretary.[11]

The third and fourth categories of mandated coverage include "evidence-informed preventive care and screenings provided for in the comprehensive guidelines

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[7] 42 U.S.C. § 299b-4(a)(1).

[8] *Id.* § 299b-4(a)(6).

[9] *Id.* § 300gg-13(a)(2).

[10] *Id.* § 202.

[11] *See* 80 Stat. 1610, Reorganization Plan No. 3 of 1966, § 1; *see also* 42 U.S.C. §§ 243, 247b.

supported by the Health Resources and Services Administration [HRSA]" for infants, children, and adolescents,[12] and "such additional preventive care and screenings" for women not already provided for by the Task Force.[13] Like ACIP, HRSA is part of the Public Health Service and is "administered by the Assistant Secretary for Health under the supervision and direction of the [HHS] Secretary,"[14] but it does not consist of "members," so to speak. Rather, it consists of offices and bureaus that report to the Office of the Administrator, who in turn reports to the HHS Secretary.[15]

Together, the Task Force, ACIP, and HRSA issue recommendations and guidelines for preventive-care services that most private insurers must cover by law.[16] These recommendations span a number of different healthcare services, ranging from cancer-detection procedures to physical therapy for older adults. The many amici in this case attest to the breadth and importance of these preventive-care services.

This is not to say, however, that all have gone without objection. As relevant here, in 2007, ACIP recommended the HPV vaccine for females ages eleven to twelve. Several years later, in 2011, HRSA issued guidelines recommending "contraceptive methods, sterilization procedures, and patient education and counsel-

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[12] 42 U.S.C. § 300gg-13(a)(3).

[13] *Id.* § 300gg-13(a)(4).

[14] *Id.* § 202.

[15] *See id.*

[16] *Id.* § 300gg-13(a).

ing for all women with reproductive capacity."[17] And most recently, in 2019, the Task Force issued an "A" recommendation for pre-exposure prophylaxis drugs (what the parties refer to as "PrEP" drugs), which prevent the transmission of HIV.

B

The plaintiffs in this case, four individuals and two businesses, take issue with the specific recommendations detailed above. The individual plaintiffs are Texas residents who provide health insurance coverage for themselves and their families, and the businesses are Christian-based for-profit companies that provide health insurance for their employees.[18] Collectively, they object to the preventive-care mandates on religious grounds and specifically allege that compulsory coverage of these services requires them to violate their religious beliefs "by making them complicit in facilitating homosexual behavior, drug use, and sexual activity outside of marriage between one man and one woman." For those reasons, the plaintiffs all wish "to obtain or

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[17] Some of these guidelines, codified in various parts of the Code of Federal Regulations, became known as the "contraceptive mandate." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 692 (2014).

[18] The district court found that four of the ten plaintiffs who objected to the preventive-care mandates for purely economic reasons —namely, Donovan Riddle, Karla Riddle, Joel Miller, and Gregory Scheideman—did not have standing. Although these plaintiffs are listed as cross-appellants in this appeal, they present no argument on appeal that the district court erred in its standing analysis. We will thus leave the district court's judgment in this respect undisturbed. *See Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 542 (5th Cir. 2019) ("Arguments in favor of standing, like all arguments in favor of jurisdiction, can be forfeited or waived.").

provide health insurance that excludes or limits coverage currently required by the preventive-care mandates."

To that end, they filed suit in the summer of 2020 and named as defendants the federal government and the Secretaries of the Department of Health and Human Services, the Department of the Treasury, and the Department of Labor in their official capacities.[19] Their operative complaint contains five claims, only one of which is now relevant on appeal. They contend that the structures of the Task Force, ACIP, and HRSA all violate the Appointments Clause of the U.S. Constitution, insofar as the members of each are acting as principal officers of the United States who have not been nominated by the President and confirmed by the Senate.[20] In their prayer for relief, the plaintiffs sought an injunction prohibiting the Government from enforcing the preventive-care mandates against them.

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[19] Some of the plaintiffs in this case had initially filed suit several years ago in what they say was a "response" to the nationwide injunction issued in *Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Penn. 2019). In that prior litigation, also in the Northern District of Texas, the plaintiffs obtained a permanent injunction prohibiting federal officials from enforcing the contraceptive mandate, thus essentially putting back in place the conscience-based exemptions issued during the Trump administration. *See DeOtte v. Azar*, 393 F. Supp. 3d 490, 514-15 (N.D. Tex. 2019). A panel of this court, however, later vacated that injunction as moot in light of *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657 (2020). *See DeOtte v. Nevada*, 20 F.4th 1055, 1060 (5th Cir. 2021).

[20] *See* U.S. Const. art. II, § 2, cl. 2.

In its second of three summary-judgment rulings,[21] the district court rejected the plaintiffs' Appointments Clause challenges against ACIP and HRSA but granted the motion with respect to the Task Force. In light of the latter ruling, the district court instructed the parties to file supplemental briefing on, among other things, the scope of relief that should be given with respect to the Task Force's recommendations. The parties obliged, and in its third and final summary-judgment order, the district court concluded that the plaintiffs were entitled to a universal injunction and vacatur under § 706 of the Administrative Procedure Act (APA). The district court specifically vacated all agency action taken to enforce the preventive-care mandates in response to the Task Force's recommendations and enjoined the Government from enforcing the preventive-care mandates against anyone.[22]

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[21] In its first, the district court ruled that, (1) in light of *DeOtte*, the plaintiffs' challenge to the contraceptive mandate was barred by *res judicata*, and (2) the plaintiffs' suggested construction of § 300gg-13(a) under the canon of constitutional avoidance—that it be read to encompass only those recommendations in effect at the time of the ACA's enactment—was unsupportable by the statute's plain text.

[22] In addition to the universal remedies, the district court also provided party-specific relief, declaring that some of the plaintiffs "need not comply with the preventive care coverage recommendations of [the Task Force] issued on or after March 23, 2010, because the members of the Task Force have not been appointed in a manner consistent with Article II's Appointments Clause." For good measure, the district court also enjoined the Government defendants "from implementing or enforcing the [recommendations] against" these plaintiffs.

C

The parties timely cross-appealed. The plaintiffs maintain that the structure of both ACIP and HRSA violate the Appointments Clause,[23] while the Government continues to defend the constitutionality of the Task Force and its recommendations.[24] The Government, moreover, sought a partial stay of the district court's judgment pending appeal. A separate panel of this court carried the motion and administratively stayed the district court's ruling to the extent it vacated and enjoined all agency actions taken to enforce the Task Force's recommendations.

After briefing and oral argument on the motion, the parties filed a joint stipulation agreeing to a partial stay. The plaintiffs specifically acknowledged that the district court's injunction was incapable of immunizing them from statutory penalties in the event the district court's

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[23] The plaintiffs also continue to press on appeal their argument that 42 U.S.C. § 300gg-13(a)(1)-(4) lacks an intelligible principle and therefore violates the nondelegation doctrine. They acknowledge, however, that their argument is foreclosed by our decision in *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436 (5th Cir. 2020).

[24] Notably, the Government does not contest the district court's determination that at least six of the plaintiffs have Article III standing. Standing, of course, implicates our subject-matter jurisdiction, so we cannot assume that the plaintiffs have it merely because the Government does not argue otherwise. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). Based on an independent review of the record and the plaintiffs' allegations, we are satisfied that they have alleged an injury in fact that is traceable to the defendants' conduct and redressable by a favorable judicial decision. *See Allen v. Wright*, 468 U.S. 737, 751 (1984).

judgment was later vacated or reversed,[25] so they agreed to withdraw their opposition to the motion in exchange for the Government's promise not to take any enforcement action against them for their refusal to cover the mandated preventive care between the date of the stipulation and the issuance of the mandate in this appeal. Part of the district court's judgment thus remains stayed before this court, and we now review its legal rulings de novo.[26]

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[25] We take no position on whether the plaintiffs' position on this point is in fact correct. It appears to be an open question and one that we have no reason to answer today. *Compare Edgar v. MITE Corp.*, 457 U.S. 624, 648-49 (1982) (STEVENS, J., concurring in part and concurring in the judgment) ("Neither the terms of the preliminary injunction nor prior equity practice provides any support for an interpretation of the District Court's order as a grant of total immunity from future prosecution."), *with id.* at 656 (MARSHALL, J., dissenting) (concluding that a federal court has "the power to issue a preliminary injunction that offers permanent protection from penalties for violations of the statute that occurred during the period the injunction was in effect."). This issue also seems to be contested in the academic literature as well. *Compare* Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 209 (1977) ("If the final judgment holds the statute valid, dissolves the interlocutory injunction, and denies permanent relief, state officials would be free to prosecute any violation within the limitations period."), *with* Michael T. Morley, *Erroneous Injunctions*, 71 EMORY L. J. 1137, 1183 (2022) ("To achieve its goal of preventing irreparable harm to a plaintiff's rights, a court must have authority to bar enforcement of a legal provision for actions the plaintiff performs while an injunction is in effect, even if that injunction is later reversed or vacated.").

[26] *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011).

II

The primary point of contention between the parties, and the subject of much of the district court's thorough analysis, is the constitutionality of the Task Force. The Government argued below that Task Force members were merely "private citizens" and did not qualify as officers under Article II. It has now abandoned that argument on appeal and concedes that Task Force members are indeed officers who, by dint of their power to issue legally binding recommendations on preventive care, exercise "significant authority pursuant to the laws of the United States."[27] The parties now dispute only whether Task Force members are "principal" or "inferior" officers and, depending on which, whether Secretary Becerra has effectively cured the constitutional problems that inhere in their recommendations.

A

We begin with the major premise of the plaintiffs' Appointments Clause challenge: that the sixteen members of the Task Force are "principal officers" of the United States who must be nominated by the President and confirmed by the Senate.

Article II, section 2, clause 2 of the Constitution, more familiarly known as the Appointments Clause, empowers the President to "nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[28] The Appointments Clause also

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[27] *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

[28] U.S. CONST. art. II, § 2, cl. 2.

empowers Congress to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[29] The Appointments Clause thus establishes two tiers of officers—principal and inferior—and provides different appointment processes for each. Principal officers must be appointed by the President and confirmed by the Senate, whereas the appointment of inferior officers may, by law, be vested in the President, judiciary, or department heads.[30]

The process for appointing officers of the United States, as outlined above, was by no means preordained. Perhaps owing to their experience under the English Crown and its unilateral appointments of royal governors, as well as the unsatisfactory solution provided by some early state constitutions to vest the appointment power exclusively with the legislature, the Framers fiercely debated the niceties of the appointments process.[31] "The framers came to Philadelphia mindful of the colonial legacy of monarchical appointment abuses," one scholar recounts, "yet equally fearful of legislative

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[29] *Id.*

[30] *Buckley*, 424 U.S. at 132 ("Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary.").

[31] *See Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) ("The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth-century despotism." (internal quotations and citations omitted)).

tyranny."[32] Understandably hesitant about concentrating the appointment power in either the President or Congress, the Framers "did what they did best—they compromised."[33] Hence the interbranch approach we have today.

"[T]he debate on the Appointments Clause was," to be sure, "brief," and the record we have on it from the convention is, alas, "sparse."[34] Sparser still is the record on the Founding generation's understanding of what, exactly, distinguished principal officers from inferior ones.[35] In their limited debates on the Appointments Clause, the Framers were "primarily concerned with whether Congress or the President would have the power *to appoint*, rather than *whom* they would appoint."[36] Justice Story, in his Commentaries on the Constitution, would later lament that the Framers failed to distinguish between "who are and who are not to be deemed *inferior* officers."[37]

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[32] Theodore Y. Blumhoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1069 (1987).

[33] *Id.* at 1070.

[34] *Freytag*, 501 U.S. at 883.

[35] There has, however, been helpful and in-depth research on the original meaning of the phrase "Officers of the United States." *See, e.g.*, Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443 (2018).

[36] Edward Susolik, Note, *Separation of Powers and Liberty: The Appointments Clause*, Morrison v. Olson, *and the Rule of Law*, 63 S. CAL. L. REV. 1515, 1544 (1990) (emphasis added).

[37] 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 397 (3d ed. 1858).

Unfortunately, the knowledge gap has not improved with time. In one of its first modern[38] Appointments Clause cases, *Morrison v. Olson*,[39] the Supreme Court echoed Justice Story's lamentation. "The line between 'inferior' and 'principal' officers is one that is far from clear," the Court observed, "and the Framers provided little guidance into where it should be drawn."[40] Unsurprisingly, then, in determining the status of the independent counsel in that case, the *Morrison* Court declined "to decide exactly where the line falls between the two types of officers."[41] Nevertheless, over a solo yet enduring dissent from Justice Scalia, the Court attempted to provide "[s]everal factors" guiding its decision, asking whether the officer (1) is removable by a

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[38] Like the ratification history, early cases interpreting the Appointments Clause's distinction between principal and inferior officers are also of limited utility. "In fact," one court has commented, "the earliest Appointments Clause cases often employed circular logic, granting officer status to an official based in part upon his appointment by the head of a department." *Landry v. FDIC*, 204 F.3d 1125, 1132-33 (D.C. Cir. 2000) (citing, *e.g.*, *United States v. Mouat*, 124 U.S. 303, 307 (1888)). The reasoning resonating from most Appointments Clause cases from the nineteenth and twentieth centuries can generally be characterized as a mixture of deference and pragmatism, looking to what Congress had done and the function of the office being evaluated. *See, e.g.*, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839); *United States v. Germaine*, 99 U.S. 508, 510 (1878); *United States v. Eaton*, 169 U.S. 331, 336 (1898); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352 (1931). Justice Scalia, for his part, called some these cases "sketchy precedent." *Morrison v. Olson*, 487 U.S. 654, 721 (1988) (Scalia, J., dissenting).

[39] 487 U.S. 654 (1988).

[40] *Id.* at 671 (citing 2 STORY, *supra* note 37, § 1536, at 397-98).

[41] *Id.*

higher official, (2) has only certain, limited duties, (3) has limited jurisdiction, and (4) has limited tenure.[42]

The functional "balancing test"[43] employed in *Morrison*, however, would not survive long. Writing for a nearly unanimous Court in *Edmond v. United States*[44] a decade later, and borrowing from his dissent in *Morrison*, Justice Scalia placed greater if not sole emphasis on subordination and supervisory responsibility. "Generally speaking," he wrote for the Court, "the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President."[45] So "we think it evident," he continued, "that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[46]

The Court has twice since "reaffirm[ed] and appl[ied] the rule from *Edmond* that the exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate."[47] First, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court held that, without statutory removal restrictions, members of the Accounting Oversight Board were inferior officers because the Securities and Exchange Commission could "remove Board

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[42] *Id.* at 671-72.

[43] *Id.* at 711 (Scalia, J., dissenting).

[44] 520 U.S. 651 (1997).

[45] *Id.* at 662.

[46] *Id.* at 663.

[47] *United States v. Arthrex, Inc.*, 594 U.S. 1, 27 (2021).

members at will" and exercise "other oversight authority" over the Board, like approve its issuance of rules and sanctions.[48] Then, in *United States v. Arthrex*, the Court held that members of the Patent Trial and Appeal Board were, effectively, principal officers because they had the "power to render a final decision on behalf of the United States" on the validity of existing patents without any "review by a superior executive officer."[49]

The general import of these Appointments Clause cases and others is that inferiority entails being controlled and supervised by a superior. At a high level, then, the inquiry can be a bit circular.[50] Yet there are some discernable hallmarks of inferiority from the precedent, perhaps the most important of which is an officer's removability.[51] As the plaintiffs acknowledge in

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[48] *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 510 (2010).

[49] *Arthrex*, 594 U.S. at 14 (quoting *Edmond*, 520 U.S. 651 at 655). We use the word "effectively" because we recognize that there was a disagreement between the majority and one of the dissents as to whether the majority had in fact held that PTAB members were principal officers. *Compare id.* at 23 ("The principal dissent repeatedly charges that we never say whether APJs are principal officers who were not appointed in the manner required by the Appointments Clause. . . . "), *with id.* at 46 (Thomas, J., dissenting) ("Although [the majority] cannot quite bring itself to say so expressly, it too appears to hold that administrative patent judges are principal officers under the current statutory scheme.").

[50] *Compare Principal Officer*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An officer with the most authority of the officers being considered for some purpose."), *with Inferior Officer*, Black's Law Dictionary (11th ed. 2019) ("An officer who is subordinate to another officer.").

[51] *See Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2191-92 (2020) ("The President's power to remove—and thus supervise—those who wield

their brief on cross-appeal, "at-will removal is the *sine qua non* of a dependent relationship." Indeed, removing an officer at will is, as the Court in *Edmond* put it, "a powerful tool for control."[52]

And on that score, we agree with the Government that the HHS Secretary may remove members of the Task Force at will. At-will removal is the background rule unless Congress clearly and expressly says otherwise,[53] and neither we nor the plaintiffs can identify anything in the ACA or elsewhere that displaces that background rule. Granted, the plaintiffs are quick to point out that 42 U.S.C. § 299b-4(a)(6) requires Task Force members to "be independent and, to the extent practicable, not subject to political pressure." And we agree that, on its face, this particular provision provides a level of protection to the Task Force members and their work. But we cannot go as far as to say that it is a clear

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executive power on his behalf follows from the text of Article II. . . . ").

[52] *Edmond*, 520 U.S. at 664.

[53] *See Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021) ("When a statute does not limit the President's power to remove an agency head, we generally presume that the officer serves at the President's pleasure."); *see also Shurtleff v. United States*, 189 U.S. 311, 315 (1903) (requiring "very clear and explicit language" in the statute to establish removal limitations). The plaintiffs contend that these cases merely stand for the proposition that there must be "clear statutory language before courts will enforce limits on the *President's* removal powers," not other executive officers', like the HHS Secretary. We see no reason, however, why the presumption would be limited to the President. If anything, such an artificial limitation would further disrupt the efficiency of the executive power that Article II contemplates, *see Seila L.*, 140 S. Ct. at 2197, and we are not in the business of thinking up limitations ourselves.

and express restriction on their removal. The provision does not resemble other provisions that more plainly restrict removal,[54] and if there were any doubt about the meaning of § 299b-4(a)(6), we are not predisposed to resolve it in the plaintiffs' favor. We generally construe statutes in a way that avoids, rather than invites, constitutional infirmity.[55] So we agree with the Government that, whatever else § 299b-4(a)(6) means, it does not inhibit the HHS Secretary from removing the Task Force members at his will.

We part ways with the Government, however, in its submission that our analysis should stop there. More specifically, we disagree that "the Secretary's at-will removal authority is," as the Government submits, "sufficient to render the Task Force members constitutionally subordinate." The case the Government cites for that proposition, *Free Enterprise Fund*, does not stand for it. To the contrary, it was the SEC's removal power, *along with* its oversight authority, that rendered members of the Accounting Oversight Board inferior officers.[56] The Supreme Court's decisions in *Edmond*

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[54] *E.g.*, 29 U.S.C. § 153(a) ("Any member of the [National Relations] Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause."); 15 U.S.C. § 2053(a) ("Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.").

[55] *See United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

[56] *See Free Enter. Fund*, 561 U.S. at 510 ("Given that the Commission is properly viewed, under the Constitution, as possessing

and *Arthrex* likewise demonstrate that removability is not the sole criterion by which to judge inferiority.[57] Indeed, another important consideration, if not equally so, is the extent to which the Task Force's work can be supervised by a higher-ranking executive official, like Secretary Becerra.

On that front, we cannot say that any such supervision exists—as a matter of law or reality. The statutory scheme, insofar as it concerns recommendations from the Task Force, contemplates complete autonomy. Indeed, we need look no further than the statutory provision we just addressed, 42 U.S.C. § 299b-4(a)(6), which again provides that "[a]ll members of the Task Force . . . , and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure." While § 299b-4(a)(6) is not a clear and express removal restriction, as we concluded above, it is a clear and express directive from Congress that the Task Force be free from any supervision. In our view, the Task Force cannot be "independent" and free from "political pressure" on the one hand, and at the same time be supervised by the HHS Secretary, a political appointee, on the other.

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the power to remove Board members at will, *and* given the Commission's oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a 'Hea[d] of Departmen[t].'" (alterations in original) (emphasis added)).

[57] *See Edmond*, 520 U.S. at 663 ("'[I]nferior officers' are officers whose work is directed and supervised at some level by others. . . . "); *Arthrex*, 594 U.S. at 17-18 ("[I]t certainly is the norm for principal officers to have the capacity to review decisions made by inferior adjudicative officers." (internal quotations omitted)).

Invoking the constitutional-doubt canon again, the Government resists this conclusion by emphasizing the qualifying language in § 299b-4(a)(6). By its terms, the provision says that the Task Force shall be free from political pressure only "*to the extent practicable*," and this qualifier, according to the Government, signals flexibility in our ability to construe the provision in a way to make the broader scheme constitutional. The Government, in other words, urges us to read "to the extent practicable" as "to the extent *constitutional*."

We decline to do so. The first flaw with the Government's argument is a textual one. Assuming "practicable" and "constitutional" are synonymous (a doubtful semantic proposition to start), the phrase "to the extent practicable" modifies only freedom from "political pressure," not "independent."[58] So even if we thought that § 299b-4(a)(6) provided some interpretive flexibility with respect to the amount of political pressure that the HHS Secretary could place on the Task Force, the terms of the provision prevent us from using that same flexibility with respect to the Task Force's statutorily required independence.[59] More fundamentally, though,

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[58] *See* 42 U.S.C. § 299b-4(a)(6) ("All members of the Task Force convened under this subsection, and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure.").

[59] The Government makes the point that "independence" in this context does not necessarily mean decisionmaking without supervision, but simply "unbiased" or "dispassionate" decisionmaking. This is a creative but unpersuasive argument. The most natural reading of "independent" in § 299b-4(a)(6), given its juxtaposition to the additional requirement that the Task Force not be "subject to political pressure," is one that connotes freedom from outside control.

even if we read § 299b-4(a)(6) to permit a level of review by the HHS Secretary "necessary to ensure conformity with constitutional requirements," as the Government invites us to do, it is unclear how much review that should be. If we were to read § 299b-4(a)(6) to allow the Secretary to review *all* the Task Force's recommendations, then the Task Force would have no political independence at all, contrary to the terms of the provision. And if we were to read § 299b-4(a)(6) to allow the Secretary to review only *some* of the recommendations (how many, we do not know), then that would invite an obvious line-drawing problem for which the provision provides no readily discernable solution. For understandable reasons, the Government does not offer any textually plausible way to draw the line,[60] and we decline to contort the provision in an effort to essentially guess what the constitutionally optimal amount of "political pressure" ought to be.[61]

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[60] One could read the Government's brief to suggest that we ought to draw the line between recommendations that have "A" and "B" ratings and those that do not; or, more finely, between those recommendations that have "A" and "B" ratings that specifically qualify under § 300gg-13(a)(1) and those that do not. Whichever way the Government might suggest such a line, we decline to draw it. Section 299b-4(a)(6) makes no distinction between types of recommendations, as § 300gg-13(a)(1) does, and our modest interpretive authority gives us no basis to begin picking and choosing how and when the HHS Secretary must exercise a power of review that is not otherwise contemplated by the statutory text.

[61] *See Seila L.*, 140 S. Ct. at 2211 ("Constitutional avoidance is not a license to rewrite Congress's work to say whatever the Constitution needs it to say in a given situation.").

We are also mindful that, however willing we may be to accept the Government's invitation to be "flexible," we cannot read § 299b-4(a)(6) in a way that is inconsistent with other parts of the statutory scheme. For example, under § 300gg-13(a)(1), insurers "shall" provide coverage for preventive-care services recommended by the Task Force, and under § 300gg-13(b)(1), the HHS Secretary "shall establish a minimum interval between the date on which a recommendation . . . is issued and the plan year with respect to which [the coverage requirement] is effective with respect to the service described in such recommendation or guideline." In other words, the HHS Secretary has no power over the content of the Task Force's recommendations; his authority extends to only *when* those recommendations become binding.[62] In short, the statutory scheme outlining the process by which the preventive-care recommendations are issued and made effective envisions no supervisory role for the Secretary, and that is especially clear in light of the express congressional preference that the Task Force be independent and not subject to political pressure.

Our conclusions regarding the various statutory provisions governing the respective roles of the Task Force and the HHS Secretary in issuing the preventive-care

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[62] *See* 42 U.S.C. § 300gg-13(b). The Government seems to suggest that the Secretary could fix the constitutional problem by refusing to give binding legal effect to the Task Force's recommendations under this provision. Assuming we were to embrace the Secretary's abdication of his statutory role as an ersatz solution to the broader structural problem, it is unclear to us how this proposal would change anything about the recommendations and guidelines that have already taken effect under § 300gg-13(b) and currently give rise to the plaintiffs' alleged injuries.

mandates are, thus far, twofold: (1) Task Force members are subject to at-will removal by the HHS Secretary; and (2) the Task Force's "recommendations" on legally mandated coverage of preventive care go unreviewed—and are unreviewable—by a higher-ranking officer. The Task Force members thus have attributes of both inferior and principal officers, and we now have the uneasy but necessary task of determining how to resolve the competing considerations.

In our view, the Supreme Court's decision in *Arthrex*, as informed by *Edmond*, requires us to resolve those considerations in favor of holding that the Task Force members are principal officers. As we have already briefly recounted above, the question presented in *Arthrex* was whether members of the Patent Trial and Appeal Board, or PTAB, were constitutionally appointed officers in light of their power to give the "final word" on the validity of challenged patents.[63] The Court answered that question in the negative, holding that the appointment of PTAB members as inferior officers was inconsistent with the "nature of their responsibilities"—specifically, their "power to render a final decision on behalf of the United States" on patent claims "without any . . . review by their nominal superior or any other principal officer in the Executive Branch."[64]

The similarities between the PTAB in *Arthrex* and the Task Force in this case are close, if not dispositive, of the issue before us. Like the PTAB, the Task Force can, and does, issue legally binding decisions without any review by a higher-ranking officer. Private insur-

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[63] *Arthrex*, 594 U.S. at 6.

[64] *Id.* at 13-14.

ers are legally required to cover its preventive-care recommendations,[65] and there is no way for the HHS Secretary (or anyone else) to review, revise, or otherwise reject those recommendations.[66] It is no answer, as the Government argues, that the HHS Secretary can exercise indirect control over the Task Force's recommendations through his removal power, because *post hoc* removal, as in *Arthrex*, does not change the fact that there is still "no means of countermanding the final decision [of the Task Force] already on the books."[67] The scheme the Supreme Court rejected in *Arthrex* thus mimics the scheme in this case in many material respects.

And yet we arguably have even more compelling reasons to be skeptical of the scheme's constitutionality here, because there was at least the prospect of Article III review of the PTAB's decisions in *Arthrex*[68] (which no one suggests we have of the Task Force's recommendations), and the unreviewable power the Task Force wields—promulgating preventive-care coverage mandated for private insurers—is indisputably significant.[69] Put simply, the Task Force exercises substantial power, and the absence of any supervision over this power

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[65] 42 U.S.C. § 300gg-13(a)(1).

[66] *See id.* §§ 300gg-13(b), 299b-4(a)(6).

[67] *Arthrex*, 594 U.S. at 16.

[68] *See id.* at 17 ("Review outside Article II—here, an appeal to the Federal Circuit—cannot provide the necessary supervision.").

[69] *See id.* ("*Edmond* calls [for] an appraisal of how much power an officer exercises free from control by a superior" to distinguish between inferior and principal officers.). As the Government has already conceded, the Task Force exercises "significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126.

"goes a long way," if not all the way, "toward resolving this dispute" about whether to classify members of the Task Force as principal officers.[70]

Accordingly, we hold that members of the Task Force are principal officers under Article II of the Constitution who must be—yet have not been—nominated by the President and confirmed by the Senate.[71]

B

Because we have concluded that members of the Task Force are principal officers of the United States, we need not address the effect of Secretary Becerra's affidavit, dated June 23, 2023, purporting to appoint the members as inferior officers.[72] Apart from that makeshift solution, however, the Secretary has also attempted to cure the constitutional defects in the Task Force's recommendations through ratification. The Government points us to a memo issued by Secretary Becerra dated January 21, 2022, purporting to ratify all the recommendations issued thus far by the Task Force. According to the Government, the Secretary's memo cures whatever defects afflict the Task Force's recommendations because they now have the imprimatur of a principal officer.

To our knowledge, neither we nor the Supreme Court[73] has embraced ratification as a remedy for an

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[70] *Id.* at 14.

[71] U.S. CONST. art. II, § 2, cl. 2.

[72] *See* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, RATIFICATION OF PRIOR APPOINTMENT AND PROSPECTIVE APPOINTMENT AFFIDAVIT (2023), https://perma.cc/8TAA-7AMN.

[73] As best we can tell, the Supreme Court has alluded to the notion of ratification at least once in an Appointments Clause case.

Appointments Clause issue. The remedial theory seems to be well established, however, in a few of our sister circuits. The D.C. Circuit, for example, has "repeatedly held that a properly appointed official's ratification of an allegedly improper official's prior action, rather than mooting [the] claim, resolves the claim on the merits by 'remedy[ing] [the] defect' (if any) from the initial appointment."[74] The Government represents that other circuits, such as the Second, Third, and Ninth, have followed suit.[75] Based on our reading of these cases, they rest on basic principles of agency, to the extent that ratification can retroactively effect actual authority for the improper official's disputed action.[76]

Assuming we were to also adopt the proposition that ratification can cure an improperly appointed official's prior actions, however, we would still be unconvinced that Secretary Becerra's purported ratification of the Task Force's recommendations cures the constitutional problem in this case. That is principally because, as we have already discussed, the Secretary does not have the statutory authority to either review, revise, or issue the preventive-care recommendations himself. That fact

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In *Edmond*, the Court mentioned in passing that the Secretary of Transportation had, in anticipation of a potential Appointments Clause problem, "issued a memorandum 'adopting'" a lower-level officer's assignments to inferior officers. 520 U.S. at 654.

[74] *Guedes v. Bur. of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019) (second and third alteration in original) (citation omitted).

[75] *See NLRB v. Newark Elec. Corp.*, 14 F.4th 152, 160-63 (2d Cir. 2021); *Kajmowicz v. Whitaker*, 42 F.4th 138, 152 (3d Cir. 2022); *CFPB v. Gordon*, 819 F.3d 1179, 1191-92 (9th Cir. 2016).

[76] *See* RESTATEMENT (THIRD) OF AGENCY § 4.02; *see also Williams v. Thrasher*, 62 F.2d 944, 946 (5th Cir. 1933).

alone is fatal to the Government's ratification theory. "[I]t is essential," the Supreme Court has held, "that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made."[77] In another one of its Appointments Clause cases, the D.C. Circuit has similarly adhered to the principle that "ratification can remedy a defect arising from the decision of an improperly appointed official . . . when . . . a properly appointed official has the power to conduct an independent evaluation of the merits and does so."[78] So even if we were to go along with the Government's ratification theory, the argument would fail on its own terms, because no agency relationship exists when the purported "principal" cannot do what his agent does. Nor, in the same vein, is an agent's relationship to his principal typically characterized by independence, as the Task Force's is with the HHS Secretary by statute.[79]

With respect to whether the HHS Secretary has principal-like authority over the Task Force, the Government mostly reasserts the same arguments it made on the principal-versus-inferior officer issue. For the same reasons we have already rejected those arguments, we can also reject them here. For the sake of completeness, though, we address one more, because it

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[77] *FEC v. NRA Pol. Victory Fund*, 513 U.S. 88, 98 (1994) (quoting *Cook v. Tullis*, 85 U.S. (18 Wall.) 332, 338 (1874) (emphasis omitted)).

[78] *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotation marks and citations omitted).

[79] *See* 42 U.S.C. § 299b-4(a)(6) ("All members of the Task Force convened under this subsection, and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure.").

too is equally applicable to the Government's theory of ratification. According to the Government, Secretary Becerra can supervise the Task Force by virtue of statutory hierarchy. The Task Force, the Government explains, is convened by a subagency within the Public Health Service, which in turn "is administered by the Assistant Secretary for Health under the supervision and direction of the [HHS] Secretary."[80] Based on this structure, the Government contends, the Task Force is effectively "under the supervision and direction of the Secretary."

We are not persuaded. The inference the Government asks us to draw is a plausible one, and statutory structure is indeed a key ingredient in the interpretive enterprise.[81] But relying on § 202 to show that the HHS Secretary plays a particular role in the statutory scheme, as the Government attempts to do, can in some sense beg the question. The Assistant Secretary is charged under § 202 to "administer" the Public Health Service, and he must do so as that body is currently constituted—with its various subagencies and their own statutory schemes. The Assistant Secretary, in other words, has no authority to reconfigure a legislative design by virtue of his duty to "administer" the Public Health Service, and the HHS Secretary, by the same token, has no more authority to do so just because he "supervis[es] and direct[s]" the Assistant Secretary's administration.[82] At most, they could "convene" and sup-

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[80] *Id.* § 202.

[81] *See, e.g.*, *United States v. Granderson*, 511 U.S. 39, 54 (1994) (using "text, structure, and history" to determine statutory meaning).

[82] 42 U.S.C. § 202.

port the Task Force, as those tasks have been delegated to the Director of the Agency for Healthcare Research and Quality,[83] but they cannot use the general pronouncement of § 202 to override the specific statutory provisions providing the Task Force independence and autonomy in the preventive-care process.[84]

Accordingly, we hold that Secretary Becerra's attempt to cure the constitutional defect in the Task Force's recommendations through ratification, as memorialized in his memo of January 21, 2022, is ineffective.

C

Recognizing the constitutional problems that inhere in the Task Force's statutorily required independence and distance from political pressure, the Government asks that we "sever the limitations on secretarial oversight in 42 U.S.C. § 299b-4(a)(6)." By this request, we understand the Government to ask that we essentially interpret the statutory scheme in a way that allows Secretary Becerra to disregard the limitations set forth in § 299b-4(a)(6).[85] Without those limitations, the Gov-

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[83] *Id.* § 299b-4(a)(1), (3).

[84] *See id.* §§ 299b-4(a)(6), 300gg-13(a)-(b); *see also Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973).

[85] *See Arthrex*, 594 U.S. at 23 ("In general, 'when confronting a constitutional flaw in a statute, we try to limit the solution to the problem' by disregarding the 'problematic portions while leaving the remainder intact.'" (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006))); *see also Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (describing a court's "negative power to disregard an unconstitutional enactment"). *Compare* Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 778 (2010) ("[J]udicial review is an exercise in determin-

ernment argues, the constitutional problem can be avoided: the Task Force need no longer be "independent" and "subject to political pressure,"[86] and Secretary Becerra can begin "to review and reject Task Force 'A' and 'B' recommendations before they would become effective under § 300gg-13."

The Government is half-right. If we were to "sever" § 299b-4(a)(6), we would indeed have no reason to ensure that the Task Force remained "independent" and not "subject to political pressure," as that provision requires. We can agree with the Government on that much. It is far from clear, however, how our decision to disregard § 299b-4(a)(6) would also thereby *empower* the Secretary to begin reviewing, and possibly rejecting,[87] the Task Force's recommendations. Such secretarial review would not conflict with any other applicable statutory provision, to be sure, but the Government does not explain from where the Secretary's power to review the recommendations would derive once we decide to disregard the command of § 299b-4(a)(6). As we have already observed, Congress contemplated a limited, ministerial role for the Secretary with respect to the preventive-care recommendations, as the mechanics of § 300gg-13(a)-(b) bear out, and the HHS Reorganization Plan No. 3 of 1996 further makes clear that any "functions vested by law in any advisory council, board,

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ing the extent to which superior law displaces inferior law."), *with* William Baude, *Severability First Principles*, 109 Va. L. REV. 1, 5-6 (2023) ("The severability question tries to answer what the law is—what *is* the law, in light of what the law *is not*?").

[86] 42 U.S.C. § 299b-4(a)(6).

[87] We note that it is only a possibility, and certainly not an inevitability, because of the Secretary's unexplained memo ratifying all the Task Force's recommendations *en masse*.

or committee of the Public Health Service"—such as the Task Force—would not be transferred to the HHS Secretary.[88] It is thus apparent that the Secretary could not exercise the supervisory power that the Government hypothesizes he would exercise in the absence of § 299b-4(a)(6).

For many of these reasons, we are unable to track the Supreme Court's severability analysis in *Arthrex*, as the Government urges us to do. The Court in *Arthrex*, of course, concluded that the offending provision—§ 6(c) of the America Invents Act—"cannot constitutionally be enforced to the extent that its requirements prevent the Director from reviewing final decisions rendered by the APJs."[89] By declining to enforce that provision, the Court allowed the Director to exercise the "powers and duties" vested in him by Congress and to accordingly "review[] PTAB decisions" and even "issue decisions himself on behalf of the Board."[90] In this case, by contrast, Congress bestowed no such power upon the HHS Secretary. There are no fallback provisions on which he can rely to exercise a supervisory power (or any

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[88] 80 Stat. 1610, § 1(b).

[89] *Arthrex*, 549 U.S. at 25.

[90] *Id.* at 24, 25; *see also* 35 U.S.C. § 3(a)(1) ("The powers and duties of the United States Patent and Trademark Office shall be vested in . . . [a] Director of the United States Patent and Trademark Office . . . , who shall be a citizen of the United States and who shall be appointed by the President, by and with the advice and consent of the Senate."); *id.* § 3(2)(A) ("The Director shall be responsible for providing policy direction and management supervision for the Office and for the issuance of patents and the registration of trademarks.").

other), and no injunction, declaration, or judgment of ours can change that statutory reality.[91]

"[W]e try," when we can, "to limit the solution to the problem."[92] But with or without § 299b-4(a)(6), the constitutional problem persists. We therefore decline the Government's invitation "to sever the limitations on secretarial oversight" over the Task Force.[93]

III

Because we agree with the plaintiffs on the merits of their Appointment Clause challenge against the Task Force, we must now determine whether they were given the appropriate relief.

The district court determined that the plaintiffs were entitled to not only party-specific injunctive relief but also vacatur under § 706(2) of the APA and a concomitant universal injunction. The district court specifically vacated "any and all agency actions taken to implement or enforce the preventive care coverage requirements in response to an 'A' or 'B' recommendation by the [Task Force] on or after March 23, 2010," and enjoined the Government "from implementing or enforcing 42 U.S.C. § 300gg-13(a)(1)'s compulsory coverage re-

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[91] *Cf. NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 448 (5th Cir. 2022) ("[T]he judicial power vested in us by Article III does not include the power to veto statutes.").

[92] *Ayotte*, 546 U.S. at 328.

[93] By extension, we also decline the Government's alternative invitation to sever § 299b-4(a)(6)'s application "to the Task Force's 'A' and 'B' recommendations to the extent those recommendations are given effect to require coverage under 42 U.S.C. § 300gg-13." If the Government's broader proposed solution cannot fix the constitutional problem, neither can its narrower one.

quirements in response to an 'A' or 'B' rating from [the Task Force] in the future."

The Government, along with the many amici in this case, vigorously object to these remedies. The Government, for its part, contends that the district court failed to consider the equities when it granted this broad relief—and if it had, the Government posits, the district court would have concluded that vacatur was unwarranted. The amici, for their part, echo the Government and vouch for the equities at stake. They generally attest to the importance of the various preventive-care services that are now covered by operation of § 300gg-13(a), and many of them express concern about the collateral effects the universal remedies would have if implemented.

Although we disagree with the Government's primary contention that the district court was required to consider the various equities at stake, we nevertheless agree with its secondary contention that there was no basis for the district court to grant relief under the APA. It follows, in our view, that there was also no basis for the universal injunction.

A

Our caselaw, notwithstanding notable skepticism,[94] has understood vacatur under § 706(2) to be a remedy

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[94] *E.g.*, *United States v. Texas*, 599 U.S. 670, 695 (2023) (Gorsuch, J., concurring) (doubting that the "power to 'vacate' agency action" means to render it "null and void"); John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 Yale J. on Reg. 119, 131 (2023) ("Vacatur of rules, under section 706(2) or as a generally applicable non-statutory remedy, was not familiar when the APA was adopted.").

that affects individuals beyond those who are parties to the immediate dispute. "Under prevailing precedent," we have observed, "§ 706 extends beyond the mere non-enforcement remedies available to courts that review the constitutionality of legislation, as it empowers courts to set aside—*i.e.*, formally nullify and revoke—an unlawful agency action."[95] As we put it in a couple of recent cases, setting aside agency action under § 706 has "nationwide effect,"[96] is "not party-restricted,"[97] and "affects persons in all judicial districts equally."[98] That is because, unlike an injunction, which operates *in personam*,[99] vacatur operates on the status of agency action in the abstract.[100]

In addition to its potency and peculiarly broad nature, vacatur under § 706 is, as we have repeatedly de-

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[95] *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 859 (5th Cir. 2022) (internal quotations marks omitted).

[96] *In re Clarke*, 94 F.4th 502, 512 (5th Cir. 2024).

[97] *Career Colls. and Schs. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024).

[98] *Clarke*, 94 F.4th at 512.

[99] *See* JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS § 72, at 74 (2d ed. 1840).

[100] *See Whole Woman's Health v. Jackson*, 595 U.S. 30, 44 (2021) ("Consistent with historical practice, a federal court exercising its equitable authority may enjoin named defendants from taking specified unlawful actions."); *see also Texas v. Biden*, 20 F.4th 928, 957 (2021) (*rev'd on other grounds*) ("That statutory empowerment [in § 706(2)] means that, unlike a court's decision to hold a statute unconstitutional, the district court's vacatur rendered the June 1 Termination Decision void."); Harrison, *supra* note 94, at 119 (2023) ("Vacatur of rules, as [some] courts understood it, is a universal remedy distinct from universal injunctions. Vacatur operates on the legal status of a rule, causing the rule to lose binding force.").

scribed it, the "default" remedy for unlawful agency action.[101] Thus, contrary to what the Government and the amici represent, we do not read our precedent to require consideration of the various equities at stake before determining whether a party is entitled to vacatur.[102] Section 706, after all, provides that a "reviewing court *shall*" set aside unlawful agency action,[103] and we do not understand vacatur to be a remedy familiar to courts sitting in equity, at least as this court currently conceptualizes it.[104]

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[101] *E.g.*, *Data Mktg.*, 45 F.4th at 859 ("The default rule is that vacatur is the appropriate remedy); *Texas v. Biden*, 20 F.4th at 993 ("[B]y default, remand *with* vacatur is the appropriate remedy."); *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374-75 (5th Cir. 2022) ("Vacatur is the only statutorily prescribed remedy for a successful APA challenge to a regulation.").

[102] The one decision the Government cites in support of its contention, *Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023), is not to the contrary. In *Cargill*, we confronted what we concluded to be an unlawful agency regulation, and a plurality of our en banc court opted to remand the vacatur issue to the district court so that it could consider whether "a more limited remedy [was] appropriate [under the] circumstances." *Id.* at 472. The plurality did so, it stated, because "the parties ha[d] not briefed the remedial-scope question." *Id.* That is obviously not the case here. What the Government's short parenthetical citation to *Cargill* fails to capture is that just before the plurality decided that remand was appropriate given the lack of briefing, it recited plainly the proposition that is at odds with its argument: "vacatur of an agency action is the default rule in this Circuit." *Id.*

[103] 5 U.S.C. § 706(2) (emphasis added).

[104] *See Feds for Med. Freedom v. Biden*, 63 F.4th 366, 387 (5th Cir. 2023) ("[T]he English system of equity did not authorize injunctions against the king. And as a general rule, American courts of equity did not provide relief to parties beyond the case." (internal quotations and citations omitted)). *But cf.* 2 THE REC-

We do read our precedent, however, to say that one of the minimal requirements to be entitled to this "default" APA remedy is, perhaps unsurprisingly, an APA claim. As the Government dutifully apprised us via a Rule 28(j) letter, a panel of this court recently said as much. In *Deanda v. Becerra*, a plaintiff belatedly requested vacatur of an allegedly unlawful regulation in a proposed final judgment following his successful constitutional challenge to the administration of a federal statute.[105] Over an objection by the Government that the plaintiff had failed to plead an APA claim, the district court adopted the proposed judgment and vacated the regulation.[106] We reversed, observing, "We know of no authority . . . authorizing a court to vacate a regulation under § 706(2) in the absence of an APA claim."[107]

We can say the same today. The plaintiffs' response to the Government's Rule 28(j) letter does not raise to our attention any newer, contrary authority. Nevertheless, they offer two counterpoints. Abiding by our rule of orderliness,[108] we must reject them both.

ORDS OF THE FEDERAL CONVENTION OF 1787, at 27 (Max Farrand ed., 1911) (Madison describing the judiciary's powers to "set aside" unconstitutional laws).

[105] 96 F.4th 750, 755 (5th Cir. 2024).

[106] *Id.*

[107] *Id.* at 767-68.

[108] *See Gahagan v. U.S. Citizenship & Immigr. Servs.*, 911 F.3d 298, 302 (5th Cir. 2018) ("Three-judge panels . . . abide by a prior Fifth Circuit decision until the decision is overruled, expressly or implicitly, by either the United States Supreme Court or by the Fifth Circuit sitting en banc." (quoting *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir. 2001))).

The plaintiffs first contend that Rule 54(c) of the Federal Rules of Civil Procedure does not confine the available remedies to what they requested in their complaint. Under Rule 54(c), "final judgment[s] should grant relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."[109] We agree that Rule 54(c) does indeed dispel the formalism that relief is limited to only what is specifically demanded, and we further agree that, unlike the defendant in *Deanda*, the Government in this case had comparatively more time to rebut the plaintiffs' claim of entitlement to vacatur. Even so, the plaintiffs' vacatur demand undeniably came "at a . . . later stage of the proceedings,"[110] and it was of "substantially different character from that requested" in their operative complaint.[111] Specifically, the demand came during the third round of summary-judgment briefing, just before the notice of appeal was filed, and the remedy had the effect of invalidating many agency actions, none of which the plaintiffs challenged in their live complaint. In fact, the one APA claim the plaintiffs asserted in their original complaint—which took aim at the many preventive-care recommendations that they now assert are unlawful—was abandoned in their amended complaint. We continue to adhere to the view that Rule 54(c) offers "remedial latitude,"[112] insofar as judgments need not be limited to the kind or

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[109] FED. R. CIV. P. 54(c).

[110] *Engel v. Teleprompter Corp.*, 732 F.2d 1238, 1242 (5th Cir. 1984).

[111] *Portillo v. Cunningham*, 872 F.3d 728, 735 (5th Cir. 2017).

[112] *Deanda*, 96 F.4th at 768.

amount of relief pleaded,[113] but we think it a step too far for the district court to award relief never pleaded (indeed, abandoned), and to do so at the last stage of proceedings and for particular agency actions never expressly challenged.

Apart from their procedural-flexibility argument, the plaintiffs also contend that even if they did not expressly challenge the agency actions encompassed by the district court's vacatur order, their constitutional challenge implicitly did. In the plaintiffs' view, vacatur under the APA is appropriate here because their successful constitutional challenge to the preventive-care coverage mandates under 42 U.S.C. § 300gg-13 necessarily implicates the lawfulness of the regulations and agency actions taken under them. This argument, we think, has sound logic,[114] but it is one that is also foreclosed by *Deanda*. As the panel in that case recognized, the "substantive rulings were incompatible with the regulation's lawfulness," but it was still "not the same as adjudicating an APA challenge to a regulation."[115] We must, therefore, also reject this theory of upholding the district court's vacatur remedy.

B

Because we do not find any support for the district court's decision to vacate all agency actions taken to enforce the Task Force's recommendations, we also cannot

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[113] CHARLES ALLEN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 631 (8th ed. 2017).

[114] *Cf. Franciscan All.*, 47 F.4th at 378 ("[A] challenge to an agency regulation is necessarily a challenge to the underlying statute as well.").

[115] *Deanda*, 96 F.4th at 768.

find any support for the district court's universal (or nationwide) injunction. The parties recognize that such injunctions are not "required or even the norm,"[116] and several justices on the Supreme Court have viewed them with conspicuous skepticism.[117] Scholars and judges from our sister circuits have done the same.[118]

Likely for those reasons, the plaintiffs do not defend the universal injunction on its own terms. They instead justify it on the ground that it is no broader, and thus no more harmful, than the vacatur remedy that the district court already awarded. "Because this injunction is concomitant to the APA remedy," the plaintiffs explain, "there is no cause for angst over the issuance of

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[116] *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021).

[117] *Compare Labrador v. Poe*, 144 S. Ct. 921, 928 (2024) (Gorsuch, J., concurring) ("Lower courts would be wise to take heed" that "any equitable remedy they issue must not be 'more burdensome to the defendant than necessary to redress' the plaintiff's injuries.") (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)), *with id.* at 938 (JACKSON, J., dissenting) ("I share the concern that courts heed the limits of their power."); *see also Trump v. Hawaii*, 585 U.S. 667, 713 (2018) (Thomas, J., concurring) ("I am skeptical that district courts have the authority to enter universal injunctions."); *Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1, 1 (Mem.) (statement of KAVANAUGH, J.) ("No federal statute expressly grants district courts the power to enter injunctions prohibiting Government enforcement against non-parties in the circumstances presented in this case.").

[118] *E.g.*, *Arizona v. Biden*, 40 F.4th 375, 394-98 (Sutton, C.J., concurring). The scholarship on nationwide injunctions is prolific, and we are generally familiar—and appreciative—of all the academics who have weighed in on this important issue. But for analysis from one leading commentator, see generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 421 (2017).

a universal injunction." We can agree with the sentiment[119] but not with the premise. As we have already explained, the district court erred in vacating all agency actions[120] taken to enforce the preventive-care mandates, so we have no reason to uphold relief broader than what is necessary to redress the plaintiffs' injuries.[121] Though this case concerns federal law and necessarily implicates concerns of nationwide uniformity, it does not fall into one of the narrow categories that we have previously identified as particularly appropriate

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[119] *Cf. Labrador*, 144 S. Ct. at 931-32 (KAVANAUGH, J., concurring) ("[A] rule prohibiting nationwide or statewide injunctions would not eliminate the need for this Court to assess the merits of some emergency applications involving new laws. For one, there is an ongoing debate about whether any such rule would apply to Administrative Procedure Act cases involving new regulations, given the text of the APA."); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2006) (upholding a nationwide injunction and concluding that it was "compelled by the text of [§ 706] of the Administrative Procedure Act"); Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 2027 (2023) ("The [Solicitor General's] solution of allowing a court to provide injunctive relief only to the individual litigant would seem to mean that a regulation could never be vacated or 'set aside' as a whole, no matter how many courts have spoken to its validity, until the Supreme Court has reviewed it.").

[120] We additionally note, and the plaintiffs agree, that the district court's vacatur remedy was overbroad insofar as it purported to vacate non-final agency actions. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to judicial review.").

[121] *See Califano*, 442 U.S. at 702 ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.").

for universal injunctive relief.[122] Nor would party-specific injunctive relief in this case prove "unwieldy" or "cause more confusion" for geographic reasons, for all the plaintiffs in this case reside in two neighboring Texas counties.[123]

Thus, without any basis to seek universal vacatur of final agency actions taken to enforce the preventive-care mandates, the plaintiffs lack any basis for an in-

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[122] *E.g.*, *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015) (upholding a universal injunction in an immigration case because of the interest in keeping immigration laws "uniform" and because "a geographically-limited injunction would be ineffective"); *Texas v. United States*, 50 F.4th 498, 531 (5th Cir. 2022) ("In the context of immigration law, broad relief is appropriate to ensure uniformity and consistency in enforcement.") (quoting *Texas v. United States*, 40 F.4th 205, 229 n.18 (5th Cir. 2022)); *see also Feds for Med. Freedom*, 63 F.4th at 388 (explaining that the Government's opposition toward the district court's universal injunction "s[at] awkwardly" with its position that it wanted "consistency across the Government in enforcement of this Government-wide vaccine policy"). It is worth noting that the fact we are reviewing the constitutionality of federal law can also cut *against* universal relief, because unlike a universal injunction against the enforcement of state law, one against the enforcement of federal law presents more practical percolation problems. *See Trump*, 585 U.S. at 713 (THOMAS, J., concurring) ("These [universal] injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts. . . . "). There is also, not to mention, the issue of nonmutual offensive collateral estoppel and the Supreme Court's holding in *United States v. Mendoza* that it does not apply to the federal government. 464 U.S. 154, 164 (1984).

[123] *Feds for Med. Freedom*, 63 F.4th at 388 (upholding a universal injunction because, among other reasons, the thousands of plaintiffs were "spread across every State in the Nation" and the district court "fear[ed] that limiting the relief to only those before it would prove unwieldy and would only cause more confusion").

junction of the same breadth.[124] The district court likewise did not explain why, apart from vacatur under the APA, the universal injunction was necessary. We must therefore conclude that it was an abuse of discretion to enter universal injunctive relief after already providing complete relief to the plaintiffs.

IV

We now address, lastly, the subject of the plaintiffs' cross-appeal. For reasons that echo their constitutional challenge against the Task Force, the plaintiffs maintain that the other two administrative bodies behind the preventive-care mandates, ACIP and HRSA, violate the Appointments Clause.

As far as the statutory scheme in § 300gg-13 is concerned, both ACIP and HRSA have roles similar to that of the Task Force. For example, like the Task Force, both ACIP and HRSA appear to have the unilateral authority to issue legally binding recommendations for preventive care under § 300gg-13(a), and their power to

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[124] We recognize, of course, that even ordinary, party-specific injunctions can incidentally benefit nonparties. *See, e.g.*, *Texas*, 599 U.S. at 693 (GORSUCH, J., concurring) ("Traditionally, when a federal court finds a remedy merited, it provides party-specific relief, directing the defendant to take or not take some action relative to the plaintiff. If the court's remedial order affects nonparties, it does so only incidentally."); *see also Feds for Med. Freedom*, 63 F.4th at 387 (noting that injunctions "*could* benefit nonparties as long as that benefit was merely incidental" (internal quotation omitted)). But we think it indicative of its overbreadth that the district court's universal injunction in this case would ultimately benefit some of the parties in this lawsuit whom it found lacked standing.

do so is subject only to the HHS Secretary's "interval" determination under subsection (b).[125]

The similarities, however, disappear once our review extends past that cabined preventive-care scheme. With respect to ACIP, its preventive-care recommendations must first be approved by the CDC Director before they can take effect.[126] The CDC Director, in turn, derives his authority from the HHS Secretary, who can countermand the CDC Director's decisions to approve ACIP's vaccine recommendations.[127] Similarly, with respect to HRSA, Secretary Becerra can exercise control over the guidelines it publishes by virtue of the transfer of power in HHS's Reorganization Plan No. 3 of 1966. There, Congress authorized the Secretary to perform "all functions of the Public Health Service . . . and all functions of all agencies of or in the Public Health Service."[128] Thus, unlike his power vis-à-vis the

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[125] *See* 42 U.S.C. § 300gg-13(b) ("The [HHS] Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) and (a)(2) or a guideline under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.").

[126] *See* 45 C.F.R. § 147.130(a)(1)(ii) ("[A] recommendation from [ACIP] is considered in effect after it has been adopted by the Director of the [CDC].").

[127] *See* 42 U.S.C. § 243; *see also id.* § 242c.

[128] 80 Stat. 1610 (1966). The plaintiffs contend that HRSA did not exist until 1982, so the Reorganization Plan No. 3 of 1966 could not have transferred its powers and functions to the HHS Secretary. The plaintiffs recognize, however, that this argument is all but foreclosed by *Willy v. Administrative Review Board*, 423 F.3d 483, 491-92 (5th Cir. 2005), in which we held that the Reorganization Plan No. 6 of 1950, which predated the creation of the Admin-

Task Force, Secretary Becerra has fallback powers on which he can exercise supervisory authority over ACIP and HRSA—authority, in our view, that encompasses the prerogative to ratify their preventive-care recommendations and guidelines made pursuant to § 300gg-13(a).[129]

According to the Government, the Secretary has exercised this statutory prerogative and has effectively cured whatever Appointments Clause issues afflict ACIP and HRSA. Like it did with the Task Force, the Government points to Secretary Becerra's memo of January 21, 2022, in which he purported to ratify all the recommendations and guidelines thus far issued by ACIP and HRSA.

Even if we were prepared to accept ratification as a valid means of curing Appointments Clause defects, however, we cannot accept the Secretary's attempt to do so here—at least at this juncture. That is because the plaintiffs put forward compelling and essentially unrebutted arguments that there are serious APA problems with the Secretary's ratification memo. They specifically contend that the Secretary's memo (1) failed to go through notice-and-comment rulemaking,[130] (2) is arbi-

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istrative Review Board within the Department of Labor, transferred to the Secretary of Labor the power to appoint members of the Administrative Review Board.

[129] *See Free Enter. Fund*, 561 U.S. at 510 ("Given that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, *and* given the Commission's oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a 'Hea[d] of Departmen[t].'" (emphasis added) (alterations in original)).

[130] *See* 5 U.S.C. § 553(b)-(c) (outlining notice-and-comment procedure).

trary and capricious because it does not explain its reasoning,[131] and (3) is improperly retroactive.[132] The district court, to be sure, determined that the Secretary had properly ratified ACIP's and HRSA's recommendations and guidelines, but it had no opportunity to consider the above three contentions that the plaintiffs now advance on appeal—likely because the Secretary issued his ratification memo on January 21, 2022, years after the plaintiffs filed their amended complaint and months after they filed their initial brief in support of summary judgment.

In our estimation, these arguments present pure questions of law and, if left unconsidered, could lead to an incorrect result with respect to the plaintiffs' constitutional challenges. For those reasons, we could exercise our discretion to consider them for the first time on appeal.[133] At the same time, however, we are disinclined to decide questions without sufficient briefing, particularly ones of high stakes and of constitutional import. We also generally prefer to adhere to our policy

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[131] *See id.* § 706(2)(A) (empowering reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[132] *See id.* § 551(4).

[133] *See Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127, 128 (1992) ("This court has recognized, however, that 'when a question is of pure law, and when refusal to consider it will lead to an incorrect result or a miscarriage of justice, appellate courts are inclined to consider questions first raised on appeal.'" (quoting *Nilsen v. City of Moss Point, Mississippi*, 674 F.2d 379, 387 n.13 (5th Cir. 1982), *rev'd en banc on other grounds*, 701 F.2d 556 (5th Cir. 1983))).

of being "a court of review, not first view."[134] So rather than decide these heady questions ourselves without the benefit of any considered judgment below or any meaningful response from the Government on appeal, we think it prudent for the district court to consider these arguments in the first instance. Once it does, we will be better positioned to weigh in on issues that affect not only the parties to this case, but evidently so many of the interested stakeholders in this circuit that the many amici represent.[135]

V

In sum, we:

- AFFIRM the district court's judgment insofar as it enjoined the defendants from enforcing the preventive-care mandates against the plaintiffs it found had standing;
- REVERSE its judgment insofar as it entered universal remedial relief; and

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[134] *Deanda*, 96 F.4th at 767 (quoting *Rest L. Ctr. v. U.S. Dep't of Lab.*, 66 F.4th 593, 597 (5th Cir. 2023)).

[135] *Cf. Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (GORSUCH, J., concurring in part and concurring in the judgment) ("[T]he crucible of adversarial testing on which we usually depend, along with the experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights."). Granted, the many amici in this case may have less interest in this litigation now that we have determined the district court erred in granting universal relief. But barring a contrary decision from our en banc court or the Supreme Court, our decision today will of course have stare decisis effect for the litigants in this circuit. *See Labrador*, 144 S. Ct. at 932 (KAVANAUGH, J., concurring).

- REMAND for further proceedings to consider those arguments we have identified as presented for the first time on appeal.

APPENDIX B

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

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

BRAIDWOOD MANAGEMENT, INC., ET AL., PLAINTIFFS

v.

XAVIER BECERRA, ET AL., DEFENDANTS

Filed: Mar. 30, 2023

SECOND MEMORANDUM OPINION & ORDER ON REMEDIES IN RELATION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Before the Court are Plaintiffs' Supplemental Brief in Support of Plaintiffs' Motion for Summary Judgment (ECF No. 98), filed October 24, 2022; Defendants' Response to Plaintiffs' Supplemental Motion for Summary Judgment and Supplemental Cross-Motion for Summary Judgment (ECF No. 99) and Supplemental Appendix in Support (ECF No. 100), filed November 23, 2022; Plaintiffs' Reply Brief in Support of Supplemental Motion for Summary Judgment and Response to Defendants' Supplemental Cross-Motion for Summary Judgment (ECF No. 111), filed January 6, 2023; and Defendants' Reply in Support of Supplemental Cross-Motion for Summary Judgment (ECF No. 112), filed Janu-

ary 27, 2023. Also before the Court are the *Amici Curiae* Brief for the American Cancer Society, et al. (ECF No. 107), filed December 1, 2022; and the Brief of *Amici Curiae* American Medical Association, et al. (ECF No. 108), filed December 1, 2022.

On September 7, 2022, this Court resolved the parties' cross-motions for summary judgment on the merits partly in favor of Plaintiffs and partly in favor of Defendants. Mem. Op. 41-42, ECF No. 92. The Court ordered supplemental briefing regarding standing for the non-Braidwood Plaintiffs, the non-Braidwood religious objector Plaintiffs' Religious Freedom Restoration Act claim with respect to the PrEP coverage mandate, and the appropriate scope of relief for the successful parties. *Id.* Having considered the parties' briefing and applicable law on those issues, and in light of its prior decision on the merits in favor of Defendants, the Court **DISMISSES with prejudice** the religious objector Plaintiffs', including Braidwood Management Inc.'s, contraceptive mandate claim. The non-religious objector Plaintiffs' contraceptive mandate claim is **DISMISSED without prejudice** for lack of subject matter jurisdiction. Because the Court concludes that the PrEP coverage mandate violates RFRA, the Court **GRANTS** the non-Braidwood religious objector Plaintiffs' summary judgment motion and **DENIES** Defendants' summary judgment motion on this claim.

Therefore, the Court **GRANTS** all religious objector Plaintiffs', including Braidwood Management Inc.'s, request for declaratory and injunctive relief as to this claim. Finally, in light of its prior ruling that 42 U.S.C. § 300gg-13(a)(1)'s compulsory preventive care coverage requirements in response to an "A" or "B" rating by the

U.S. Preventive Services Task Force made on or after March 23, 2010 violates the Appointments Clause, the Court **GRANTS** Plaintiffs' request for declaratory and injunctive relief with respect to this claim, **VACATES** any and all agency actions implementing or enforcing that provisions' mandatory coverage requirements, and **ENJOINS** Defendants and their officers, agents, servants, and employees from implementing or enforcing the compulsory preventive care coverage mandate in the future.

I. BACKROUND

A. Legal Background

On March 23, 2010, Congress enacted the Patient Protection and Affordable Care Act (ACA), which dictates four categories of preventive care services most private health insurance companies must cover. 42 U.S.C. § 300gg-13. The Act empowers three agencies —the U.S. Preventive Services Task Force (PSTF), the Health Resources and Services Administration (HRSA), and the Advisory Committee on Immunization Practices (ACIP)—to unilaterally determine what kinds of preventive care fall within each category of mandatory coverage by issuing guidelines or recommendations that, by operation of the statute, carry the force of law. *Id.* Specifically, PSTF recommends "A" or "B" ratings for specific evidence-based items and services for all patient demographics; HRSA issues "comprehensive guidance" regarding preventive care and screening for infants, children, adolescents, and women; and ACIP recommends certain immunizations. *Id.* § 300gg-13(a)(1)-(4). Private health insurers must cover and cannot impose cost sharing requirements for these recommended services. *Id.* § 300gg-13(a).

While all three agencies are affiliated with the U.S. Department of Health and Human Services (HHS), they are not all identically structured. ACIP and HRSA were created by the Secretary of HHS to provide vaccine recommendations and guidance on programs and activities within the agency.[1] *See* 42 U.S.C. § 217a(a) (authorizing HHS Secretary to create advisory councils or committees). Both ACIP and HRSA are ultimately subject to the "supervision and direction" of the HHS Secretary. 42 U.S.C. §§ 202, 243, 247b.[2] By contrast, PSTF is a volunteer body of non-federal experts that provides evidence-based recommendations related to preventive care services and health promotion.[3] And though the Task Force receives support from AHRQ, an agency within HHS, the Task Force is not itself a part of AHRQ or HHS.[4] 42 U.S.C. § 299b-4(a)(1). When it created PSTF, Congress specified that the Task Force's recommendations "shall be independent and, to the ex-

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[1] Mem. Op. 3, ECF No. 92.

[2] Mem. Op. 14-17, ECF No. 92 (recognizing HHS Secretary's authority to ratify actions taken by ACIP and HRSA).

[3] Defs.' App. in Supp. of Cross-Mot. for Summ. J. 66, ECF No. 65. Though PSTF is not housed within another federal agency, given its authority to compel insurers to cover recommended services through issuance of ratings in conjunction with the ACA's compulsory coverage requirements, the Task Force members function as "officers" of the United States that exercise significant legal authority and are therefore referred to as an "agency" for purposes of this Opinion. Mem. Op. 18-24, ECF No. 92; *see also* 5 U.S.C. § 701 (defining "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency").

[4] Defs.' Resp. to Pls.' Mot. for Summ. J. 40, ECF No. 64.

tent practicable, not subject to political pressure." *Id.* § 299b-4(a)(6).

Since the ACA's enactment, the agencies have issued several such pronouncements. Among those, and relevant to the case at hand, are HRSA's 2011 guidance compelling insurance companies to cover all FDA-approved contraceptive methods—including certain abortifacients ("contraceptive mandate")—and PSTF's 2019 issuance of an "A" rating for preexposure prophylaxis (PrEP) drugs that are used by persons at high risk of HIV acquisition ("PrEP mandate").[5] For purposes of this Opinion, the Court refers collectively to agency guidance or recommendations made compulsory through operation of § 300gg-13(a)(1) through (a)(4), and including the contraceptive and PrEP mandates, as the "preventive care mandates."

B. The Parties

Plaintiffs are six individuals and two businesses who challenge the legality of the preventive care mandates as violative of the Constitution and the Religious Freedom Restoration Act (RFRA). Each desires the option to purchase or provide insurance that excludes or limits coverage currently required by the preventive care mandates and argues that Defendants' implementation and enforcement of the preventive care mandates prevents them from doing so. Each Plaintiff objects to the preventive care mandates for religious or personal reasons, or both.[6]

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[5] Pls.' App. 21, 12, ECF No. 46.

[6] For purposes of this Opinion, the Court refers to Plaintiffs Miller, Scheideman, and Fort Worth Oral Surgery as the "non-religious objector Plaintiffs"; to Plaintiffs Kelley, Starnes, Maxwell,

Plaintiffs John Kelley, Joel Starnes, Zach Maxwell, and Ashley Maxwell provide health coverage for themselves and their families. They want the option to purchase health insurance that excludes or limits coverage of PrEP drugs, contraception, the HPV vaccine, and the screenings and behavioral counseling for STDs and drug use.[7] They say neither they nor their families require such preventive care.[8] They also claim that compulsory coverage for those services violates their religious beliefs by making them complicit in facilitating homosexual behavior, drug use, and sexual activity outside of marriage between one man and one woman.[9]

Plaintiff Joel Miller likewise provides health coverage for himself and his family. Like the other Plaintiffs, Miller wants the option to purchase health insurance that excludes or limits coverage of preventive care that "he does not want or need."[10] Miller's wife "is past her childbearing years," and neither he nor his family members "engage in the behaviors that makes [sic] this preventive treatment necessary."[11] Plaintiff Gregory Scheideman provides health coverage for himself, his family, and the employees of his company, Fort Worth Oral Surgery. Scheideman wants the option to purchase health insurance that excludes or limits coverage of services currently required by the preventive care

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Kelley Orthodontics, and Braidwood Management Inc. as the "religious objector Plaintiffs"; and to all Plaintiffs except for Braidwood Management Inc. as the "non-Braidwood Plaintiffs."

[7] *See* Pls.' App. 33-37, 39-43, 50-54, 56-60, ECF No. 46.

[8] *Id.*

[9] *Id.* at 36, 42, 53, 59.

[10] *Id.* at 62-65.

[11] *Id.* at 65.

mandates.[12] Scheideman says neither he nor his family members require such preventive care.[13] In addition, Scheideman and his business partners do not want to cover such care for their employees.[14]

Plaintiff Kelley Orthodontics provides health insurance for its employees. Kelley Orthodontics is a Christian professional association that wishes to provide health insurance for its employees that excludes coverage of preventive care such as contraceptives and PrEP drugs.[15] Plaintiff John Kelley, the owner of Kelley Orthodontics, says that providing such coverage violates his religious beliefs.[16]

Plaintiff Braidwood Management Inc. is a Christian for-profit corporation owned by Steven Hotze.[17] Braidwood provides health insurance to its approximately seventy employees through a self-insured plan, and Hotze wishes to provide health insurance for Braidwood's employees that excludes coverage of preventive care such as contraceptives and PrEP drugs.[18] Hotze, like Plaintiffs Kelley, Starnes, and the Maxwells, objects to coverage of those services on religious grounds.[19] Hotze also wants the option to impose copays or deduct-

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[12] *Id.* at 45-48

[13] *Id.*

[14] *Id.*

[15] *Id.* at 37.

[16] *Id.*

[17] *Id.* at 67.

[18] *Id.* at 67-71.

[19] *Id.* at 69-71.

ibles for preventive care in Braidwood's self-insured plan.[20]

Defendants are the Secretary of HHS, Xavier Becerra; the Secretary of the Treasury, Janet Yellen; the Secretary of Labor, Martin Walsh; and the United States. The three individual Defendants are sued in their official capacities for their roles in enforcing the preventive care mandates.

C. Procedural Background

Plaintiffs' First Amended Complaint alleged several claims: (1) that the preventive care mandates violate Article II's Appointments Clause; (2) the preventive care mandates violate the nondelegation doctrine; (3) that 42 U.S.C. § 300gg-13(a)(1) violates Article II's Vesting Clause; (4) the preventive care mandates, as a matter of statutory interpretation, apply only to ratings, recommendations, or guidelines in place at the time Congress passed the ACA; and (5) that the PrEP Mandate individually violates RFRA.[21] The Court dismissed Plaintiff's statutory interpretation claim for failure to state a claim and denied on the merits their Appointments Clause claim with respect to ACIP and HRSA and their nondelegation and Vesting Clause claims.[22] However, the Court granted summary judgment in favor of Plaintiffs' Appointment Clause claim

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[20] *Id.*

[21] First Am. Compl., ECF No. 14.

[22] Order, ECF No. 35 (denying statutory interpretation claim for failure to state a claim); Mem. Op., ECF No. 92 (denying Plaintiffs' motion for summary judgment on the merits as to their nondelegation claim, Vesting Clause claim, and Appointments Clause claim with respect to ACIP and HRSA).

with respect to PSTF and that the PrEP mandate violates Braidwood's rights under RFRA.[23] The issues left to resolve are whether the non-Braidwood Plaintiffs have standing, whether the PrEP Mandate violates RFRA as to the non-Braidwood Plaintiffs, and what is the appropriate remedy for the Plaintiffs who succeed on their claims. The parties have briefed the issues, which are ripe for the Court's review.

II. DISCUSSION

A. Whether the Non-Braidwood Plaintiffs Have Standing to Press their Claims

The Court turns first to the question of whether the non-Braidwood Plaintiffs have Article III standing such that they may be granted relief on their successful claims. *See Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017) (requiring each plaintiff to demonstrate its own Article III standing to seek and obtain each form of relief sought). To establish Article III standing, each plaintiff must set forth specific evidence showing (1) an injury-in-fact (2) that is fairly traceable to the defendants' conduct, and (3) is likely to be redressed by a favorable judicial decision. *Id.* An injury-in-fact must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical" in nature. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560-61 (1992). As the parties invoking federal jurisdiction, Plaintiffs bear the burden of proving each element of standing. *Id.* at 561.

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[23] Mem. Op. 41-42, ECF No. 92.

The purchaser standing doctrine, developed in the D.C. Circuit in cases challenging government conduct, recognizes Article III injury-in-fact when a plaintiff has been deprived of the opportunity to purchase a desired product due to government action. *See, e.g.*, *Weissman v. Nat'l R.R. Passenger Corp.*, 21 F.4th 854, 857-58 (D.C. Cir. 2021); *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1077-78 (D.C. Cir. 2017); *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113-14 (D.C. Cir. 1990). Under this theory, courts have recognized purchaser standing where the plaintiffs have "lost [the] opportunity to purchase a desired product . . . even if they could ameliorate the injury by purchasing some alternative product." *Orangeburg*, 862 F.3d at 1078 (cleaned up). However, such plaintiffs need not lose *all* opportunity to purchase a product to establish injury-in-fact. They must simply demonstrate that their choices have been "restrict[ed]" or that there is "*less* opportunity to purchase [the desired product] than would otherwise be available to them." *Competitive Enter. Inst.*, 901 F.2d at 112; *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1332 (D.C. Cir. 1986) (emphasis added). In making this determination, courts have focused on whether the challenged government action has rendered the consumer's desired product "unreasonably priced" or has made it "not readily available." *Weissman*, 21 F.4th at 858.

While lost or diminished opportunity to purchase a desired product has been the general rule for purchaser standing since its inception, the D.C. Circuit's recent decision in *Weissman v. National Railroad Passenger Corporation* adds nuance to the standard. 21 F.4th at 858-59. In *Wiessman*, now the leading decision on the

doctrine of purchaser standing, the D.C. Circuit distinguished "core features" versus "ancillary terms" of a particular product, holding that would-be plaintiffs have purchaser standing if they can show that their desired product, "defined at a reasonable level of generality" and "differentiated from available alternatives by its core features," is no longer available. *Id.* at 859. If the desired product is only distinguishable from the available alternative product "by an ancillary term," however, the plaintiff has not carried its burden as to injury-in-fact. *Id.*

Here, Plaintiffs rely exclusively on the doctrine of purchaser standing and argue that, because each of the non-Braidwood Plaintiffs has been denied the opportunity to purchase a desired product—namely, health insurance coverage that excludes services the would-be consumers find religiously objectionable, unnecessary, or otherwise undesirable—they have standing to press their associated claims for relief.[24] Defendants attack Plaintiffs' reliance on purchaser standing at a theoretical level, arguing first the doctrine is inapplicable to this case because "the Fifth Circuit has never adopted the purchaser standing doctrine;" that the doctrine is limited exclusively to the context of the Administrative Procedure Act (APA); and, those issues aside, Plaintiffs cannot satisfy the standard under *Weissman* anyway.[25]

As an initial matter, that the Fifth Circuit has not expressly adopted the purchaser standing doctrine does not bar its application here because neither has the Fifth Circuit *rejected* the theory. Nor is it uncommon or im-

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[24] Pls.' Supp. Br. 11-12, 14-15, ECF No. 98.

[25] Defs.' Resp. 5, ECF No. 99.

proper for a district court to look to outside Circuits for persuasive legal authority where there is no binding precedent on the issue at hand. And despite Defendants' contrary assertion, the purchaser standing doctrine need not confer standing only in cases alleging claims under the APA. Indeed, as Defendants concede, the *Weissman* decision does not expressly foreclose the doctrine's application beyond the APA context.[26] *See Weissman*, 21 F.4th at 859 (noting that the Circuit "has assumed" purchaser standing applies only in the APA context but theorizing that it "could apply beyond that context"). The Court knows of no compelling reason to impose more stringent rules of standing when a plaintiff brings an APA claim as opposed to any other sort of claim, and Defendants offer none. Therefore, provided they satisfy purchaser standing as the D.C. Circuit has articulated it, the Court finds no reason to deny the Plaintiffs standing on this basis.[27]

The religious objector Plaintiffs attest that they want the option to purchase health insurance—for themselves, their families, or their employees—that excludes coverage of preventive care such as PrEP drugs, the HPV vaccine, contraceptives, and screenings and behav-

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[26] *Id.*

[27] Plaintiffs suggest that the Court should decline to follow *Weissman* on grounds that the decision is an anomaly, departing from decades of D.C. Circuit and Supreme Court precedent with its core feature-versus-ancillary term distinction. Pls.' Reply 6-7, ECF No. 111. While it may be true that *Weissman* substantially amends the rule of purchaser standing, that case is the Circuit's leading decision on the doctrine. And given no controlling authority within the Fifth Circuit, the Court is unwilling to depart from that same Circuit's most recent precedential decision on the subject.

ioral counseling for STDs and drug use.[28] Each claims that the preventive care mandates requiring compulsory coverage for those services violates their religious beliefs by making them complicit in facilitating homosexual behavior, drug use, and sexual activity outside of marriage between one man and one woman as a condition of purchasing health insurance.[29]

By contrast, the non-religious objector Plaintiffs, as well as those who object to the preventive care mandates on religious grounds, claim injury based on their inability to purchase insurance that excludes or imposes copays or deductibles for preventive care services they do not want or need, resulting in higher monthly premiums.[30] Plaintiffs claim this denial of choice is a distinct injury from the inability to purchase insurance that is violative of one's sincerely held religious beliefs.[31]

Defendants do not contest that the religious objector Plaintiffs' Hobson's choice between purchasing health insurance that includes religiously objectionable services or forgoing conventional health insurance altogether is an injury-in-fact. And such an argument would be meritless. *See March for Life v. Burwell*, 128 F. Supp. 3d 116, 128-29 (D.D.C. 2015) ("The employee plaintiffs have demonstrated that the [Contraceptive] Mandate substantially burdens their sincere exercise of religion . . . [because] the Mandate, in its current form, makes it impossible for employee plaintiffs to pur-

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[28] See note 7 *supra*.

[29] *See* Pls.' App. at 36-37, 42, 53, 59, ECF No. 46; Pls.' Supp. Br. at 12, ECF No. 98.

[30] Pls.' App. 33, 39, 45, 50, 56, 62, ECF No. 46.

[31] *Id.*; Pls.' Supp. Br. 14-15, ECF No. 98.

chase a health insurance plan that does not include coverage of [services] to which they object [on religious grounds]."). Instead, Defendants argue that these plaintiffs suffer no real injury as a result of the preventive care mandates because they do not currently participate in the health care market and that they opted out of the insurance market for reasons other than the mandates, namely, the *cost* of coverage.[32] But each of these arguments fail.

First, the Plaintiffs need not *act* to violate their sincerely held religious convictions by purchasing a product they believe would make them complicit in objectionable conduct just to obtain standing. Defendants' contrary assertion is both illogical and legally incorrect. Rather, Plaintiffs need only show their *opportunity* to purchase their desired product, as defined by its core features, has been reduced or eliminated. *Weissman*, 21 F.4th at 859; *Competitive Enter. Inst.*, 901 F.2d at 112 (finding plaintiffs' "restricted opportunity to purchase" a desired product to be a "cognizable injury"); *Center for Auto Safety*, 793 F.2d at 1332 (finding standing where plaintiffs had "less opportunity to purchase [the desired product] than would otherwise be available to them"). It is undisputed that health insurance companies stopped selling insurance plans excluding the objectionable coverage in response to the preventive care mandates. As a result, these Plaintiffs lost access to health insurance plans they could purchase without religious objection. Thus, religious objector Plaintiffs have made the necessary showing here.[33]

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[32] Defs.' Resp. 3-5, ECF No. 99; Defs.' Reply 2-7, ECF No. 112.

[33] See notes 7 and 29 *supra*.

The fact that Plaintiffs Kelley and Starnes utilize Christian bill-sharing does not negate this cognizable injury. *See Orangeburg*, 862 F.3d at 1078 (cleaned up) (noting that "lost opportunity to purchase a desired product [is sufficient to demonstrate injury-in-fact] . . . even if [plaintiffs] could ameliorate the injury by purchasing some alternative product"). Nor does this standard require Plaintiffs to prove that they would, in fact, purchase conventional health insurance if the preventive care mandates were lifted.[34] As discussed, Plaintiffs are suffering a cognizable injury *now* through their current inability to purchase conventional health insurance that excludes the objectionable coverage.[35] And Defendants have not offered any decision indicating that purchaser standing plaintiffs must evince a *commitment*, rather than a desire, to purchase the product in question.[36]

Second, Defendants argue that several of the religious objector Plaintiffs cannot demonstrate standing because in their verified responses to requests for admissions, they indicated they stopped purchasing health insurance "because it was too expensive," not because of the preventive care mandates.[37] Defendants argue that under Federal Rule of Civil Procedure 36, the Court must accept these statements as "conclusively established."[38] FED. R. CIV. P. 36(b). While Defendants

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[34] Defs.' Resp. 4, ECF No. 99.

[35] For this reason, the Court need not address whether the Plaintiffs' late-coming declarations are permissible to support their assertions of standing.

[36] *See* Defs.' Reply 4-6, ECF No. 111.

[37] Defs.' Resp. 3, ECF No. 99; Defs.' Reply 2-3, ECF No. 111.

[38] Defs.' Reply 2-3, ECF No. 111.

are correct about the conclusive nature of the responses, they are wrong that the Court must accept them as the "*complete and sufficient* basis for [the plaintiffs'] decision to stop purchasing health insurance."[39] The language of Rule 36(b) does not compel this result and Defendants cite no authority to support the proposition that the responses must be read as the *exclusive* basis for Plaintiffs' decisions. Reading the statements in context supports this conclusion. Importantly, Defendants' requests for admission addressed solely whether Plaintiffs could *quantify* the impact of the mandates on their insurance premiums.[40] Plaintiffs responded that they could not quantify the increased costs, but that they knew their premiums had become too expensive to afford.[41] Their discussion of costs is a natural result of Defendants' targeted questions about premiums.[42] As such, the Court finds no reason to deny standing on this basis.

The only remaining issue related to this element of the standing inquiry is whether the preventive care mandates to which the non-Braidwood Plaintiffs object are "core features" or merely "ancillary terms." In *Weissman*, the D.C. Circuit applied its core features-versus-ancillary term distinction to hold that would-be

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[39] *Id.* at 3 (emphasis added).

[40] *See* Defs.' App. in Supp. of Cross-Mot. for Summ. J. 181-222, 277-96, ECF No. 65.

[41] See note 40 *supra*.

[42] Of course, had Plaintiffs offered this same response to a broad question about *why* they stopped purchasing insurance, and later tried to back away from that answer in their pleadings, Rule 36 would compel a different result. But the specific cost-based questions in Defendants' requests for admission are important context.

plaintiffs did not have purchaser standing because they had no cognizable interest in contracting to purchase train tickets without being subject to a binding arbitration provision. *Weissman*, 21 F.4th at 859. The court concluded that the purchasers had "adequately alleged a 'primary,' concrete consumer interest in traveling on Amtrak, but not in purchasing an Amtrak ticket without an arbitration provision." *Id.* at 860. In other words, the arbitration provision was merely ancillary to the desired product defined at a reasonable level of generality —namely, a train ticket.

Defendants argue that, here, the objectionable preventive care coverages are merely ancillary terms and that "whatever precise features of health insurance may be 'core' to Plaintiffs, they continue to have access to health insurance that includes those features, and thus do not have standing under the 'purchaser standing' theory."[43] The Court agrees in part. Defendants' argument is true as to the non-religious objector Plaintiffs, who would like to purchase health insurance without the unwanted an unnecessary preventive care services and associated copays or deductibles but otherwise retain access to conventional healthcare. Indeed, these Plaintiffs are current participants in the health insurance market and, by all appearances, are not prevented from retaining it for their personal or business needs on account of expense.[44] The *Weissman* court offered no guidance about where the line between "core features" and "ancillary terms" is to be drawn. But wherever that line may be, that the non-religious objector Plaintiffs may still—and indeed do—purchase conventional

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[43] Defs.' Reply 10, ECF No. 111.

[44] Pls.' App. 45-48, 62-65, ECF No. 46.

health insurance despite its inclusion of preventive care coverage suggests the features are merely ancillary.

The same argument cannot be made for the religious-objector Plaintiffs. These Plaintiffs, who do not currently and are unwilling to purchase health insurance that includes the preventive care coverage, find those services objectionable enough to forgo conventional health insurance altogether. Though the Court does not suggest that a decision not to purchase, without more, would be enough to determine whether a feature is "core," a decision not to purchase *based on one's religious convictions* certainly meets the criteria. In short, these Plaintiffs have a cognizable interest in being able to purchase a product that does not obligate them to violate their religious beliefs. Though the Government may disagree with those beliefs, it is no position to dictate whether the Plaintiffs' interests in adhering to their religious convictions is a core or merely ancillary component of their decision to abstain. Thus, the religious objector Plaintiffs have carried their burden to demonstrate injury-in-fact based on a theory of purchaser standing.

The remaining two elements for Article III standing —traceability and redressability—are relatively straightforward. Plaintiffs "must satisfy the 'causation' and 'redressability' prongs of the Art. III minima by showing that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). When a plaintiff suffers injury as the object of the challenged government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action

will redress it." *Lujan*, 504 U.S. at 561-62. And indeed, there is little doubt that Plaintiffs' injuries—incurred through PSTF's ratings operating in conjunction with 42 U.S.C. § 300gg-13—are fairly traceable to Defendants' enforcement of the preventive care mandates. Nor is it contested that the forms of relief sought would likely redress the Plaintiffs' injuries. Moreover, the proliferation of short-term, limited duration insurance (STLDI) plans in response to Congress's exempting them from the ACA requirements adds further support to these elements.[45] That insurance companies are offering STLDI plans without preventive care coverage when not legally required to do so indicates that the restricted options in the conventional market are at least partly attributable to the Government's enforcement of the mandates. Thus, it is reasonable to conclude that if Defendants are broadly enjoined from enforcing these mandates, the conventional health insurance market may respond similarly to the STLDI market, meaning Plaintiffs' injuries would *likely* be redressed by a favorable decision.

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In sum, the religious objector Plaintiffs have demonstrated standing and are entitled to press their claims for relief. Non-religious objector Plaintiffs Joel Miller and Gregory Scheideman have not made this showing. Given these conclusions, and the Court's prior determination that 42 U.S.C. § 300gg-13(a)(4) does not violate the Appointments Clause with respect to HRSA, the Court **DISMISSES with prejudice** the religious objector Plaintiffs' contraceptive mandate claims and shall enter

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[45] Pls.' App 176, ECF No. 46.

summary judgment in favor of Defendants as to this claim. The Court **DISMISSES without prejudice** non-religious objector Plaintiffs' contraceptive mandate claim for lack of subject matter jurisdiction.[46]

B. Whether the PrEP Coverage Mandate Violates the Religious Freedom Restoration Act as to the Non-Braidwood Religious Objector Plaintiffs

Having concluded that the non-Braidwood religious objector Plaintiffs have standing to press their claims for relief, the Court must now resolve on the merits their claim that the PrEP mandate violates RFRA. The Court previously decided the mandate violates RFRA as to Braidwood and incorporates much of its prior analysis here.[47]

RFRA generally prohibits the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). To demonstrate a vi-

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[46] Defendants suggest the Court should dismiss the non-religious objector Plaintiffs' contraceptive coverage claim with prejudice, citing two decisions that depart from the general rule that dismissals based on lack of subject matter are without prejudice. Defs.' Reply 11 n.4 (citing *Guajardo v. Air Exp. Int'l, USA, Inc.*, No. 3:12-CV-815-L, 2012 WL 2886672, at *3 n.* (N.D. Tex. July 16, 2012) and *Westfall v. Miller*, 77 F.3d 868 (5th Cir. 1996)). Because these Plaintiffs have had ample opportunity to demonstrate standing, Defendants argue, they need not be given another chance to replead their claims. *Id.* But the single authoritative decision Defendants cite also dismissed based on the plaintiffs' failure to state a claim. *Westfall*, 77 F.3d at 870. For this reason, and because Defendants have not offered any other reason to depart from the general rule of dismissal, the Court dismisses without prejudice.

[47] Mem. Op. 36-41, ECF No. 92.

olation of RFRA, the remaining religious objector Plaintiffs "must show that (1) the relevant religious exercise is grounded in a sincerely held religious belief and (2) the government's action or policy substantially burdens that exercise by, for example, forcing [the plaintiffs] to engage in conduct that seriously violates [their] religious beliefs." *Ali v. Stephens*, 822 F.3d 776, 782-83 (5th Cir. 2016) (cleaned up) (interpreting RLUIPA).[48] If Plaintiffs carry that burden, the government "*may* substantially burden a person's exercise of religion *only if* it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (emphases added).

As it does with Braidwood, the PrEP mandate substantially burdens the religious exercise of the remaining non-Braidwood Plaintiffs. And like the owner of Braidwood, these Plaintiffs object to purchasing or providing coverage for PrEP drugs because they believe that (1) the Bible is "the authoritative and inerrant word of God," (2) the "Bible condemns sexual activity outside marriage between one man and one woman, including homosexual conduct," (3) providing coverage of PrEP drugs "facilitates and encourages homosexual behavior, intravenous drug use, and sexual activity outside of marriage between one man and one woman," and (4) purchasing coverage of PrEP drugs by purchasing such

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[48] *Holt v. Hobbs*, 574 U.S. 352, 356-58 (2015) (noting that RFRA and its sister statute RLUIPA apply identical standards).

coverage for personal or business use makes them complicit in those behaviors.[49]

Yet, as previously discussed, the ACA forces these Plaintiffs to choose between purchasing health insurance that violates their religious beliefs and foregoing conventional health insurance altogether. 42 U.S.C. § 300gg-13(a)(1); 45 C.F.R. § 147.130(b)(1). It is undisputed that putting individuals to this choice imposes a substantial burden on religious exercise. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725-26 (2014). Thus, Plaintiffs have shown that the PrEP mandate substantially burdens their religious exercise. The burden thus shifts to Defendants to show that the PrEP mandate furthers a compelling governmental interest and is the least restrictive means of furthering that interest.

For the reasons set out in the Court's prior Opinion, however, the Court finds that Defendants have not carried their burden to demonstrate a compelling government interest or that the PrEP mandate is the least restrictive means of furthering that articulated interest.[50] *Braidwood Mgmt., Inc. v. Becerra*, --- F. Supp. 3d ---, 2022 WL 4091215, at *19-20 (N.D. Tex. Sept. 7, 2022). Defendants claim—and Plaintiffs do not dispute—a compelling government interest in inhibiting the spread of a potentially fatal infectious disease like HIV.[51] But as this Court previously held, properly framed in the context of this RFRA case, the question is whether the government has a compelling interest in requiring *all*

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[49] Pls.' App. 36-37, 42-43, 53-54, 59-60, ECF No. 46.

[50] Mem. Op. 38-41, ECF No. 92.

[51] Defs.' Mot. for Summ. J. 57, ECF No. 64; Pls.' Resp. to Mot. for Summ. J. 39, ECF No. 74.

private insurers to cover PrEP drugs in every one of their insurance policies.[52] But neither Congress nor PSTF expressed that compelling interest and the ACA's several exemptions for grandfathered plans and small businesses undermine Defendants' argument that all insurers must provide plans with PrEP drug coverage.[53] Nor have Defendants offered any meaningful argument as to how the PrEP mandate satisfies the "exceptionally demanding" least-restrictive-means test.[54] *Hobby Lobby Stores*, 573 U.S. at 728.

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Because Defendants have not carried their burden to show that the PrEP mandate merits the substantial burden on Plaintiffs' religious exercise, the Court **GRANTS** summary judgment in favor of the remaining non-Braidwood Plaintiffs as to Claim 5 of Plaintiffs' Amended Complaint and **DENIES** Defendants' corresponding motion for summary judgment as to this claim. Under 28 U.S.C. § 2201, the Court **HOLDS** that the PrEP mandate violates Plaintiffs Braidwood Management Inc., Kelley Orthodontics, John Kelley, Joel Starnes, Zach Maxwell, and Ashley Maxwell's rights under the Religious Freedom Restoration Act. Braidwood Management Inc. and Kelley Orthodontics, and to the extent applicable, individual Plaintiffs need not comply with the preventive care coverage recommendations of the U.S. Preventive Services Task Force issued on or after March 23, 2010, because the members of the Task Force have not been appointed in a manner consistent

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[52] Mem. Op. 39, ECF No. 92.

[53] *Id.* at 39-40.

[54] *Id.* at 40-41.

with Article II's Appointments Clause. Accordingly, the Court **ENJOINS** Defendants and their officers, agents, servants, and employees from implementing or enforcing the PrEP mandate as against these Plaintiffs.

C. Whether Plaintiffs are Entitled to a Universal Remedy or to Narrowly Tailored Relief

Having found in favor of the religious objector Plaintiffs on the merits of their Appointments Clause claim as it relates to PSTF and their claim that the PrEP mandate violates their rights under RFRA, the Court must determine the appropriate remedy. Though Defendants contest the parties' success on the merits, they do not dispute that successful Plaintiffs are entitled to party-specific declaratory and injunctive relief.[55] Thus, the final issue before the Court is what relief the Plaintiffs are entitled to for their success on the merits of their Appointments Clause claim as it pertains to PSTF.

Plaintiffs argue Braidwood, and the other religious objector Plaintiffs who have demonstrated Article III standing, is entitled to a universal remedy under the APA "set[ting] aside" every agency action taken to implement or enforce the preventive care recommendations (made compulsory through operation of 42 U.S.C. § 300gg-13(a)(1)) of the unconstitutionally appointed Task Force since March 23, 2010.[56] *See* 5 U.S.C. § 706(2)(A). Defendants object to this proposal and claim that, at most, Plaintiffs are entitled to targeted relief that permits the Court to sever the unconstitutional portions of

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[55] *See* Defs.' Resp. 15 n.5, 20, ECF No. 99.

[56] Pls.' Supp. Br. 8, ECF No. 98; Pls.' Reply 16, ECF No. 111.

the ACA, but not vacate the unlawful agency actions.[57] Alternatively, Defendants concede declaratory and injunctive relief that specifically addresses the prevailing parties' injuries is permissible.[58] Because the parties agree that the latter forms of relief are appropriate, here the Court will address only whether Plaintiffs are entitled to a universal remedy that prevents Defendants from enforcing the disputed coverage mandates against anyone, or only against the Plaintiffs to this dispute who have demonstrated Article III standing.

The first question is whether the APA permits vacatur of the unlawful agency actions taken to implement or enforce PSTF's constitutionally infirm preventive care mandates. It does. *Data Mktg. P'ship, LP v. U.S. Dep't of Labor*, 45 F.4th 846, 859 (5th Cir. 2022) (acknowledging the APA language authorizing courts to "hold unlawful and set aside agency actions" to permit vacatur) (cleaned up). The next question is whether vacatur is permissible here. It is. While Defendants raise a host of challenges to this conclusion, each is unavailing.

The Court begins with the text of the relevant statute, § 706(2) of the APA, which authorizes courts to "hold unlawful and set aside agency action" that the court finds to be "not in accordance with law" or "contrary to constitutional [] power." 5 U.S.C. § 706(2)(A)-(B). As an initial objection to Plaintiffs' proposed remedy, Defendants contend that even if the APA *permits* vacatur, it does not *require* it.[59] But the plain language

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[57] Defs.' Resp. 8-10, 20, ECF No. 99.

[58] *Id.* at 20-22.

[59] Defs.' Reply 16 n.6, ECF No. 112.

of § 706 contradicts that argument. 5 U.S.C. § 706 ("The reviewing court *shall* . . . "). And the authority Defendants cite to suggest that courts may *choose* whether to vacate agency action is inapplicable in this case because this Court has no option to remand the subject statute or contested implementation or enforcement action to a responsible agency. Defendants cite *Central and South West Services, Inc. v. U.S. EPA* to support the proposition that this Court may decline to vacate the unlawful agency action.[60] 220 F.3d 683, 692 (5th Cir. 2000). But the plaintiffs in that case challenged discrete segments of a Final Rule issued by the EPA, arguing that the agency failed to consider relevant factors and evidence in issuing its regulation. *Cent. & S. W. Servs.*, 220 F.3d at 686-87. The court agreed and, rather than vacate the Rule's contested provisions, remanded them to the agency for reconsideration, following the general rule that provides for remand instead of vacatur where an agency may be able to substantiate its regulatory decision. *Id.* at 690-92, 702. Because the Court has nothing to remand here, that decision is inapt.

That the Plaintiffs did not prevail on an APA claim is no bar to the remedy they seek. The Court's prior Opinion makes clear that this case involves government action the Court has found to be "not in accordance with law" or "contrary to constitutional [] power." 5 U.S.C. § 706(2)(A)-(B); *Braidwood Mgmt.*, 2022 WL 4091215, at *12-13, 20 (holding that the statutory scheme that gives PSTF's recommended ratings the force and effect of law violates Braidwood's rights under RFRA and Article II's Appointments Clause). Yet Defendants respond that the APA is inapplicable here because Plaintiffs have

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[60] Defs.' Reply 16 n.6, ECF No. 112.

only challenged the acts of *Congress*, and *not* the actions of the Task Force.[61] Because Plaintiffs did not specifically challenge PSTF's authority to issue recommendations under 42 U.S.C. § 299b(a)(1), Defendants claim they are not entitled to vacatur of those actions.[62] That may be true. But Plaintiffs *did* successfully challenge the constitutionality of the statute that gives PSTF's recommendations the force and effect of law.

As Plaintiffs assert, "a challenge to the constitutionality of a statute necessarily encompasses a challenge to every agency action taken to implement [or enforce] the unconstitutional command."[63] The Court agrees. And the Fifth Circuit recently affirmed a conceptually similar notion. *See Franciscan Alliance, Inc. v. Becerra*, 47 F.4th 368, 378 (5th Cir. 2022) ("HHS implicitly argues that a lawsuit challenging a regulation and a lawsuit challenging the underlying statute are different. But . . . a challenge to an agency regulation is *necessarily* a challenge to the underlying statute as well.") (emphasis added). An attack on the underlying statute would then logically present an attack on the executive actions taken pursuant to that statute. Thus, every executive action taken to implement or enforce PSTF's recommended ratings, by HHS or any other agency, are as constitutionally invalid as the authorizing statutory provision. Additionally, the only remedy that could relieve Plaintiffs' injury is one directed at the agencies tasked with implementing and enforcing the unconstitutional statute, since courts have no authority to order Congress to cure its statutory deficiency. *See gener-*

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[61] Defs.' Reply 15-16, ECF No. 112.

[62] Defs.' Reply 15, ECF No. 112.

[63] Pls.' Reply 20, ECF No. 111.

ally Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

Defendants also suggest that any party pursuing relief under the APA must follow the "comprehensive statutory scheme for litigating certain types of challenges to agency action."[64] They say this scheme "establishes certain claims (*see, e.g.*, 5 U.S.C. §§ 702, 706) and prerequisites to bringing them (*see, e.g.*, 5 U.S.C. § 704), and then authorizes the Court to take certain actions to remediate them (*see, e.g.*, 5 U.S.C. §§ 703, 705)."[65] Beyond this general assertion, however, Defendants provide no indication of what prerequisites or administrative remedies the Plaintiffs in this case might have been obligated to exhaust.[66] Nor do they identify any provision of the ACA that sets out an appropriate course for administrative review of the preventive care mandates they challenge.[67] And while they fault Plaintiffs for citing "no case" in support of their proposed remedial pos-

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[64] Defs.' Reply 17, ECF No. 111.

[65] *Id.*

[66] *See* Defs.' Reply 17-19, ECF No. 111.

[67] *Id.* Moreover, Defendants offer no explanation why the very provisions they cite as part of this statutory scheme are inapplicable to the instant case. Indeed, § 702 provides that a person "adversely affected or aggrieved by agency action *within the meaning of a relevant statute*, is entitled to judicial review thereof." *Id.* § 702 (emphasis added). Here, Plaintiffs have been adversely affected by the implementation and enforcement of 42 U.S.C. § 300gg-13(a)(1)'s compulsory effect on the PSTF's recommendations. And § 704 provides that courts may review agency action "for which there is no other adequate remedy in a court are subject to judicial review." *Id.* § 704. Again, other than Congress's revision of the statute in question—which the Court has no authority to dictate—the Court knows of no adequate remedy for curing the constitutional violation at bar. And Defendants suggest none.

ture, the criticism applies equally to Defendants.[68] Indeed, Defendants cite no authority—not one—dictating the opposite rule that they urge this Court to adopt: that APA remedies *are* reserved exclusively for successful APA claims.[69] So while the Court is without clear precedential guidance on this question, the plain language of the APA supports Plaintiffs' remedial position.

Additionally, Federal Rule of Civil Procedure 54 allows the Court to provide the relief to which Plaintiffs are entitled, despite their failure to request that form of relief at the outset of their case, and provided the request is not prejudicial to the opposing party. FED. R. CIV. P. 54(c); *Peterson v. Bell Helicopter Textron, Inc.*, 806 F.3d 335, 340 (5th Cir. 2015) ("there is no prejudice when 'all of the elements justifying relief were fully established before the district court'"); *see also Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 136 S. Ct. 2292, 2307 (2016) (applying Rule 54 and noting "in 'the exercise of its judicial responsibility' it may be 'necessary . . . for the Court to consider the facial validity' of a statute even though a facial challenge was not brought) (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 333 (2010)), overruled on other grounds in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

Here, the elements necessary to justify vacatur under the APA have been proven. This Court has already found that, by operation of 42 U.S.C. § 300gg-13(a)(1),

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[68] Defs.' Reply 18, ECF No. 112 ("But a court cannot award such relief if a plaintiff, like Plaintiffs here, does *not bring* any APA claim. *Plaintiffs cite no case to the contrary.*") (second emphasis added).

[69] *See* Defs.' Resp. 11-13, ECF No. 99; Defs.' Reply 17-19, ECF No. 112.

the PSTF members wield "significant authority pursuant to the laws of the United States" in violation of Article II. *Braidwood Mgmt.*, 2022 WL 4091215, at *10. This constitutionally infirm statutory creation is "not in accordance with law" and makes the issuance of their recommendations "contrary to constitutional [] power." 5 U.S.C. § 706(2)(A)-(B). And, as discussed, Plaintiffs' challenge to the § 300gg-13(a)(1) logically includes a challenge to the executive actions taken pursuant to that statute. Thus, any *agency actions* taken to implement and enforce the corresponding preventive care mandates are necessarily "not in accordance with law" and may be "set aside." *Id.* § 706.

Nor are Defendants prejudiced by Plaintiffs' requested relief. In passing, Defendants suggest that Plaintiffs' proposing vacatur as a remedy at this stage of litigation presents notice and due process concerns.[70] But Defendants have been on notice that Plaintiffs were seeking a universal remedy since they filed their Amended Complaint. Throughout, Plaintiffs repeatedly expressed their intent to obtain broad relief:

> The Court should therefore declare that any and all preventive-care mandates based on a rating, recommendation, or guideline issued by the U.S. Preventive Services Task Force, the Advisory Committee on Immunization Practices, or the Health Resources and Services Administration after March 23, 2010—the date on which the Affordable Care Act was signed into law—are unconstitutional and unenforceable,

[70] Defs.' Resp. 12, ECF No. 99.

> and it should permanently enjoin the defendants from enforcing them.[71]
>
> [T]he Court should enjoin the defendants from enforcing any preventive-care mandate derived from an agency rating, recommendation, or guideline that issued after March 23, 2010.[72]
>
> [The Court should] permanently enjoin the defendants from enforcing any coverage mandate based upon an agency rating, recommendation, or guideline that issued after March 23, 2010.[73]
>
> [And the Court should] award all other relief that the Court deems just, proper, or equitable.[74]

This was sufficient to provide Defendants fair notice of the type of relief Plaintiffs were seeking for their Appointments Clause claim. Moreover, Defendants have been given ample opportunity—a response and sur-reply—to fully brief the propriety of vacatur at the remedies stage.

Beyond the statutory scheme and Rule 54, there is some authority that suggests courts possess a degree of inherent authority to provide the remedies that Plaintiffs seek here. *See Collins v. Yellen*, 141 S. Ct. 1761, 1799 (2021) (Gorsuch, J., concurring) ("Whether unconstitutionally installed or improperly unsupervised, officials cannot wield executive power except as Article II provides. Attempts to do so are void. . . . [W]here individuals are burdened by unconstitutional executive

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[71] Am. Compl. ¶ 77, ECF No. 14.

[72] *Id.* ¶ 80.

[73] *Id.* at 26.

[74] *Id.*

action, they are entitled to relief.") (cleaned up); *see also Collins v. Mnuchin*, 938 F.3d 553, 609 (5th Cir. 2019) (severing the "for cause" provision that presented a Removal Clause violation), *aff'd in part, rev'd in part, vacated in part sub nom. Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (Oldham and Ho, JJ., concurring in part and dissenting in part) ("Our *Article III powers* permit us to [vacate unlawful agency action], as it would redress Plaintiffs' injury-in-fact. Such a remedy finds support in precedent.") (emphasis added) (internal citations omitted). Though these hints do not resolve every question presented here, they provide some support for the Court's conclusion that it may grant the relief the Plaintiffs have requested in this case.

Finally, a universal remedy is appropriate because Defendants' alternative remedial proposal—severing the statutory provision that purportedly gives rise to the appointment problem—will not cure Plaintiffs' injuries. Rather than vacating the agency actions implementing or enforcing PSTF's recommendations, Defendants urge the Court to sever 42 U.S.C. § 299b-4(a)(6).[75] This section provides that PSTF's rating recommendations "shall be independent and, to the extent practicable, not subject to political pressure." *Id.* § 299b-4(a)(6). "Severing" or singly making this provision unenforceable would permit the Secretary of HHS to review and approve the Task Force's recommendations, Defendants say, curing the Appointments Clause problem without unnecessarily disrupting the ACA's overarching

[75] Defs.' Resp. 8-10, ECF No. 99.

statutory scheme.[76] But Defendants' assertion is wrong for several reasons.

First, by Defendants own admission, PSTF is not part of HHS or any federal agency and is not, therefore, automatically subject to the Secretary's "supervision and direction" as are ACIP and HRSA. 42 U.S.C. §§ 202, 243, 247b.[77] For this reason, the Supreme Court's decision in *United States v. Arthrex, Inc.* is inapplicable. 141 S. Ct. 1970 (2021) (curing appointment problem by ordering every administrative patent judge's decision to be subject to the review of the PTO Director). Even if it is assumed for the sake of argument that PSTF were subject to the Secretary's oversight, severing § 299b-4(a)(6) might *permit* the Secretary to authorize or reject PSTF's recommendations *post hoc* but it would not *compel* him to take such action. Moreover, § 300gg-13(a)(1) would still operate to give PSTF's ratings the force and effect of law unless and *until* the Secretary decided to ratify or veto a particular recommendation.

Moreover, Fifth Circuit and Supreme Court precedent indicate that, given the particular constitutional violation at issue here, vacatur is the appropriate remedy for Plaintiffs' injury. In fact, the line of decisions from the Fifth Circuit and Supreme Court, which Defendants say *rejects* Plaintiffs' remedial position, is more properly read to support it.[78] *See generally Collins v. Mnuchin*,

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[76] *Id.* at 10.

[77] Defs.' Mot. for Summ. J. 40, ECF No. 64; Mem. Op. 25, ECF No. 92.

[78] Defs.' Reply 15 n.5, ECF No. 112 ("[T]he remedial position proffered in the partially dissenting opinion cited by Plaintiffs in *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019), was rejected first by

938 F.3d 553 (5th Cir. 2019) (severing the "for cause" provision that presented a Removal Clause violation), *aff'd in part, rev'd in part, vacated in part sub nom. Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (discussing the propriety of vacatur based on removal versus appointments problems). In *Mnuchin*, the *en banc* and closely divided Fifth Circuit considered the proper remedy for a restriction on removal that violated Article II. *Mnuchin*, 938 F.3d at 591. Ultimately the court concluded that the appropriate remedy was to sever the "for cause" provision, thus curing the unconstitutional removal restriction. *Id.* at 595. But that case is distinguishable from this one for an obvious reason: that decision involved a Removal Clause violation, *not* an Appointments Clause violation. And the *Mnuchin* court expressly noted the difference. *Id.* at 593 ("[T]he Court has invalidated [and vacated] actions taken by individuals who were not properly *appointed* under the Constitution. [In this scenario,] officers were vested with authority that was never properly theirs to exercise. Such separation-of-powers violations are, as the D.C. Circuit put it, 'void *ab initio*.' *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013) . . . Restrictions on *removal* are different.") (emphases added). For these reasons, the Court holds that vacatur—not severance—is the appropriate remedy for curing Plaintiffs' constitutional injuries.

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the *en banc* Fifth Circuit and subsequently by the Supreme Court as 'neither logical nor supported by precedent.' *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021).").

In sum, Plaintiffs have shown that they are entitled to vacatur as a *remedy* for their successful Appointments Clause claim. All agency action taken to implement or enforce the preventive care coverage requirements in response to an "A" or "B" recommendation by the U.S. Preventive Services Task Force on or after March 23, 2010 and made compulsory under 42 U.S.C. § 300gg-13(a)(1) are **HELD** unlawful as violative of the Appointments Clause. The Court **ORDERS** that such agency actions are **VACATED** and Defendants and their officers, agents, servants, and employees are **ENJOINED** from implementing or enforcing 42 U.S.C. § 300gg-13(a)(1)'s compulsory coverage requirements in response to an "A" or "B" rating from the Task Force in the future.

Further, under 28 U.S.C. § 2201, the Court **HOLDS** that agency action taken to implement or enforce the preventive care mandates in response to an "A" or "B" recommendation by the U.S. Preventive Services Task Force on or after March 23, 2010 and made compulsory under 42 U.S.C. § 300gg-13(a)(1) are unlawful as violative of the Appointments Clause. Braidwood Management Inc. and Kelley Orthodontics, and to the extent applicable, individual Plaintiffs need not comply with the preventive care coverage recommendations of the U.S. Preventive Services Task Force issued on or after March 23, 2010, because the members of the Task Force have not been appointed in a manner consistent with Article II's Appointments Clause. Accordingly, the Court **ENJOINS** Defendants and their officers, agents, servants, and employees from implementing or enforcing the same against these Plaintiffs.

III. CONCLUSION

Therefore, the Court **DISMISSES with prejudice** the religious objector Plaintiffs', including Braidwood Management Inc.'s, contraceptive mandate claims. The non-religious objector Plaintiffs' contraceptive mandate claims are **DISMISSED without prejudice** for lack of subject matter jurisdiction. The parties' cross-motions for summary judgment are **GRANTED in part** and **DENIED in part**. For the reasons discussed, the remaining Plaintiffs have shown they are entitled to declaratory and injunctive relief as to their RFRA claims and to declaratory and injunctive relief and to a universal remedy with respect to their Appointments Clause claim as it relates to PSTF. Separate final judgment shall issue.

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

/s/ REED O'CONNOR
REED O'CONNOR
UNITED STATES DISTRICT JUDGE

APPENDIX C

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

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

BRAIDWOOD MANAGEMENT, INC., ET AL., PLAINTIFFS

v.

XAVIER BECERRA, ET AL., DEFENDANTS

Filed: Sept. 7, 2022

MEMORANDUM OPINION & ORDER

Before the Court are Plaintiffs' Motion for Summary Judgment (ECF Nos. 44-46), filed November 15, 2021; Defendants' Combined Response and Cross-Motion for Summary Judgment (ECF Nos. 62-65), filed January 28, 2022; Plaintiffs' Combined Response and Reply (ECF No. 74), filed March 28, 2022; and Defendants' Reply (ECF No. 83), filed May 26, 2022. The Court held a hearing on the motions on July 26, 2022. Having considered the motions, arguments, and applicable law, the Court **ORDERS** that motions are **GRANTED in part** and **DENIED in part**.

I. BACKGROUND

A. The Law

The Patient Protection and Affordable Care Act ("ACA") requires most private health insurance to cover certain "preventive care." 42 U.S.C. § 300gg-13. Specifically, group health plans and health insurance issuers must "provide coverage for and shall not impose any cost sharing requirements for" four categories of preventive care. *Id.* The ACA empowers three agencies affiliated with the Department of Health and Human Services ("HHS") to determine what services fall within those four categories. *Id.*

First, the U.S. Preventive Services Task Force ("PSTF") recommends "evidence-based items or services that have in effect a rating of 'A' or 'B.'" *Id.* § 300gg-13(a)(1). Second, the Advisory Committee on Immunization Practices ("ACIP") recommends certain immunizations. *Id.* § 300gg-13(a)(2). Third, the Health Resources and Services Administration ("HRSA") issues "comprehensive guidelines" with respect to infants, children, and adolescents for "evidence-informed preventive care and screenings." *Id.* § 300gg-13(a)(3). And fourth, HRSA issues "comprehensive guidelines" with respect to women for "such additional preventive care and screenings" not covered under § 300gg-13(a)(1). *Id.* § 300gg-13(a)(4). Private health insurance must cover the services identified by the three agencies under these categories.[1] *Id.* § 300gg-13(a).

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[1] The Court refers to § 300gg-13(a)(1) through (a)(4) collectively as the "preventive-care mandates."

1. PSTF

PSTF is a body of volunteers "with appropriate expertise" to make healthcare recommendations. 42 U.S.C. § 299b-4(a)(1). The Director of the Agency for Healthcare Research and Quality ("AHRQ"), an agency within HHS, "convene[s]" PSTF. *Id.* The purpose of PSTF is to "review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community, and updating previous clinical preventive recommendations." *Id.* By statute, PSTF and its members "shall be independent and, to the extent practicable, not subject to political pressure." *Id.* § 299b-4(a)(6).

In 2019, PSTF recommended pre-exposure prophylaxis ("PrEP") drugs to prevent HIV infection. *See* Defs.' App. 385, ECF No. 65. PSTF issued an "A" recommendation for PrEP drugs for individuals who are at high risk of HIV acquisition, which meant that health insurance plans must cover PrEP drugs under 42 U.S.C. § 300gg-13(a)(1). *See* Pls.' App. 12, ECF No. 46. The regulations delayed implementation of the coverage until June 2020. *See* 45 C.F.R. § 147.130(b)(1).

2. ACIP

The HHS Secretary created ACIP as an advisory council under 42 U.S.C. § 217a(a) to provide guidance to HHS on vaccines. *See* Defs.' App. 152, ECF No. 65. ACIP reports to the Director of the Centers for Disease Control and Prevention ("CDC"), who exercises delegated authority from the HHS Secretary. *See id.* (first citing 42 U.S.C. § 243; and then citing *id.* § 247b). A vaccine recommendation from ACIP "is considered in

effect after it has been adopted by the Director of the [CDC]." 45 C.F.R. § 147.130(a)(1)(ii). Once the CDC Director adopts a vaccine recommendation, ACIP publishes the recommendation in a weekly report. *See* Defs.' App. 152, ECF No. 65.

ACIP recommends the HPV vaccine to prevent new HPV infections and HPV-associated diseases, including some cancers. In 2007, ACIP began recommending the HPV vaccine for females ages eleven to twelve. *See* CDC, *Quadrivalent Human Papillomavirus Vaccine: Recommendations of the Advisory Committee on Immunization Practices (ACIP)* (Mar. 23, 2007), https://www.cdc.gov/mmwr/PDF/rr/rr5602.pdf. ACIP currently recommends the HPV vaccine for all children ages eleven to twelve, plus various catch-up vaccination plans for older populations. *See* Elissa Meites et al., *Human Papillomavirus Vaccination for Adults: Updated Recommendations of the Advisory Committee on Immunization Practices* (Aug. 16, 2019), https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6832a3-H.pdf. Health insurance plans must cover the HPV vaccine under 42 U.S.C. § 300gg-13(a)(2).

3. HRSA

The HHS Secretary created HRSA to provide direction to programs and activities within HHS. *See* Health Resources and Services Administration; Statement of Organization, Functions, and Delegations of Authority, 47 Fed. Reg. 38,409 (Aug. 31, 1982). HRSA is directed by an Administrator who reports to the Assistant Secretary of HHS. *Id.* at 38,410. The HRSA Administrator, like the CDC Director, is a non-career political appointee whose employment may be terminated

by the agency at any time. *See* 5 C.F.R. § 317.605; Defs.' App. 42, ECF No. 65.

In 2010, HRSA promulgated a series of comprehensive guidelines for infants, children, and adolescents. The guidelines include counseling for alcohol abuse, screening and behavioral counseling for sexually transmitted infections, screening and behavior interventions for obesity, and counseling for tobacco use. *See Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 75 Fed. Reg. 41,726, 47,740-55 (July 19, 2010). "[A] recommendation or guideline in the comprehensive guidelines supported by HRSA is considered to be issued on the date on which it is accepted by the Administrator of HRSA or, if applicable, adopted by the Secretary of HHS." *Coverage of Certain Preventive Services Under the Affordable Care Act*, 80 Fed. Reg. 41,318, 41,322 (July 14, 2015).

In 2011, HRSA promulgated additional guidelines requiring nonexempt employers to cover "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." RIN 1545-BJ60, 77 Fed. Reg. 8,725, 8,725 & n.1 (Feb. 15, 2012) (citation and internal quotation marks omitted). Those guidelines became known as the contraceptive mandate. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Health insurance plans must cover the services recommended by HRSA under 42 U.S.C. § 300gg-13(a)(3) and (a)(4).

B. The Parties

Plaintiffs are six individuals and two businesses who challenge the legality of the preventive-care mandates under the Constitution and the Religious Freedom Restoration Act ("RFRA"). Each Plaintiff wishes to obtain or provide health insurance that excludes or limits coverage currently required by the preventive-care mandates. They object to the services required by the preventive-care mandates for a mixture of religious and economic reasons.

Plaintiffs John Kelley, Joel Starnes, Zach Maxwell, and Ashley Maxwell provide health coverage for themselves and their families. They want the option to purchase health insurance that excludes or limits coverage of PrEP drugs, contraception, the HPV vaccine, and the screenings and behavioral counseling for STDs and drug use. *See* Pls.' App. 35-37, 41-43, 52-54, 58-60, ECF No. 46. They say neither they nor their families require such preventive care. *Id.* They also claim that compulsory coverage for those services violates their religious beliefs by making them complicit in facilitating homosexual behavior, drug use, and sexual activity outside of marriage between one man and one woman. *Id.* at 38, 44, 53, 59.

Plaintiff Joel Miller likewise provides health coverage for himself and his family. Like the other Plaintiffs, Miller wants the option to purchase health insurance that excludes or limits coverage of preventive care that "he does not want or need." *Id.* at 66-67. Miller's wife "is past her childbearing years," and neither he nor his family members "engage in the behaviors that makes [sic] this preventive treatment necessary." *Id.* at 67.

Plaintiff Gregory Scheideman provides health coverage for himself, his family, and the employees of his company, Fort Worth Oral Surgery. Scheideman wants the option to purchase health insurance that excludes or limits coverage of services currently required by the preventive-care mandates. *Id.* at 47-49. Scheideman says neither he nor his family members require such preventive care. *Id.* at 48-50. In addition, Scheideman and his business partners do not want to cover such care for their employees. *Id.*

Plaintiff Kelley Orthodontics provides health insurance for its employees. Kelley Orthodontics is a Christian professional association that wishes to provide health insurance for its employees that excludes coverage of preventive care such as contraceptives and PrEP drugs. *Id.* at 39. Plaintiff John Kelley, the owner of Kelley Orthodontics, says that providing such coverage violates his religious beliefs. *Id.*

Plaintiff Braidwood Management Inc. is a Christian for-profit corporation owned by Steven Hotze. *Id.* at 69. Braidwood provides health insurance to its approximately seventy employees through a self-insured plan, and Hotze wishes to provide health insurance for Braidwood's employees that excludes coverage of preventive care such as contraceptives and PrEP drugs. *Id.* at 70-71. Hotze, like Plaintiffs Kelley, Starnes, and the Maxwells, objects to coverage of those services on religious grounds. *Id.* at 72-73. Hotze also wants the option to impose copays or deductibles for preventive care in Braidwood's self-insured plan. *Id.* at 70, 73. Plaintiffs argue that Defendants' enforcement of the preventive-care mandates limits their ability to obtain or provide insurance that excludes their unwanted coverage.

Defendants are the Secretary of HHS, Xavier Becerra; the Secretary of the Treasury, Janet Yellen; the Secretary of Labor, Martin Walsh; and the United States. The three individual Defendants are sued in their official capacities for their roles in enforcing the preventive-care mandates.

C. The Litigation

Plaintiffs' First Amended Complaint asserts five claims. Plaintiffs allege that (1) the preventive-care mandates violate the Appointments Clause; (2) the preventive-care mandates violate the nondelegation doctrine; (3) 42 U.S.C. § 300gg-13(a)(1) violates the Vesting Clause; (4) the preventive-care mandates, as a matter of statutory interpretation, apply only to ratings, recommendations, or guidelines in place at the time Congress passed the ACA; and (5) the PrEP mandate violates RFRA. *See* 1st Am. Compl., ECF No. 14. The Court dismissed Plaintiffs' statutory interpretation claim for failure to state a claim, and it dismissed Plaintiffs' religious objections to the contraceptive mandate as barred by res judicata.[2] *See* Order, ECF No. 35.

Plaintiffs moved for summary judgment on the remaining claims. *See* Pls.' Summ. J. Mot., ECF No. 44. Defendants responded and cross-moved for summary judgment. *See* ECF Nos. 62, 63. Defendants argue

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[2] Plaintiffs' lawsuit in *DeOtte v. Nevada*, No. 4:18-cv-00825, barred their claims against the contraceptive mandate in this case. *See* Order 12-16, ECF No. 35. On August 31, 2022, the Court dismissed *DeOtte* as moot in accordance with the Fifth Circuit's mandate issued that day. *See* Order, ECF No. 118, Case No. 4:18-cv-00825. In light of the judgment in *DeOtte*, Plaintiffs now wish to pursue their claims against the contraceptive mandate in this case. *See* Not. of Supp. Authority, ECF No. 91.

the Court should dismiss the amended complaint because Plaintiffs lack standing and, alternatively, because Defendants prevail on the merits. *See* Defs.' Summ. J. Br., ECF No. 64. The parties exchanged briefs, and the Court held a hearing on July 26, 2022. The motions are ripe for review.

In sum, the issues before the Court are (1) whether Plaintiffs have standing; (2) whether PSTF, ACIP, and HRSA violate the Appointments Clause; (3) whether PSTF members have removal protections that violate Article II's Vesting Clause; (4) whether PSTF, ACIP, and HRSA violate the nondelegation doctrine; and (5) whether the PrEP mandate violates RFRA.

II. LEGAL STANDARD

Summary judgment is appropriate only where the pleadings and evidence show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is not "a disfavored procedural shortcut, but rather . . . an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]he substantive law will identify which facts are material." *Id.* The movant must inform the court of the basis for its motion and identify the portions of the record that reveal there are no genuine disputes of material fact. *Celotex*, 477 U.S. at 323.

The court must view the evidence in the light most favorable to the nonmovant. *Ion v. Chevron USA, Inc.*, 731 F.3d 379, 389 (5th Cir. 2013). "Moreover, a court must draw all reasonable inferences in favor of the nonmoving party and may not make credibility determinations or weigh the evidence." *Id.* And if there appears to be some support for disputed allegations, such that "reasonable minds could differ as to the import of the evidence," the court must deny the motion for summary judgment. *Anderson*, 477 U.S. at 250.

The opposing party must "identify specific evidence in the record and . . . articulate the precise manner in which that evidence supports his or her claim." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). If a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," the court must grant summary judgment. *Celotex*, 477 U.S. at 322. In that situation, no genuine dispute of material fact can exist, as the failure to establish an essential element of the claim "necessarily renders all other facts immaterial." *Id.* at 323.

III. ANALYSIS

A. Standing

The U.S. Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const., art. III, § 2. The case-or-controversy limitation requires plaintiffs seeking relief in federal court to show they have constitutional standing to pursue their claims. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). "Constitutional standing has three elements: (1) an 'injury in fact' that is (a) concrete and particular-

ized and (b) actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that a favorable decision will redress the injury." *Croft v. Governor of Tex.*, 562 F.3d 735, 745 (5th Cir. 2009) (quoting *Lujan*, 504 U.S. at 560). At the summary judgment stage, a plaintiff "must 'set forth' by affidavit or other evidence 'specific facts,'" establishing the elements of standing. *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)).

As Plaintiffs point out, Braidwood presents the easiest case for standing. *See* Pls.' Resp. 10, ECF No. 74. Braidwood self-insures its seventy employees and must therefore provide ACA-compliant health insurance. *See* 26 U.S.C. § 4980H(c)(2). Through the preventive-care mandates, ACA insurance policies must cover, among other things, PrEP drugs, the HPV vaccine, and screenings and behavioral counseling for STDs and drug use. Hotze objects to those services on both religious and non-religious grounds, claiming they facilitate and encourage homosexual behavior, intravenous drug use, and sexual activity outside of marriage between one man and one woman. *See* Pls.' App. 72, ECF No. 46. Hotze says that providing this coverage in Braidwood's self-insured plan violates his religious beliefs by making him complicit in encouraging those behaviors. *Id.*

Braidwood has demonstrated several Article III injuries. First, the mandates deprive Braidwood of the ability to choose whether and to what extent its insurance plan covers preventive care. When a plaintiff is the object of the challenged government action, "there is ordinarily little question" that the action has caused injury. *Lujan*, 504 U.S. at 561-62. The ACA requires Braidwood to cover the preventive services mandated

under § 300gg-13. *See* 26 U.S.C. § 4980H(c)(2). Braidwood is also prohibited from imposing cost-sharing arrangements, such as deductibles or co-pays, for those services. *See* 42 U.S.C. § 300gg-13(a). Hotze wants Braidwood's plan to exclude or limit coverage for the preventive-care services mandated under § 300gg-13, but Braidwood cannot exclude coverage for those services without violating the law. *See* Pls.' App. 70-72, ECF No. 46.

Second, the mandates force Braidwood to underwrite coverage for services to which it holds sincere religious objections. This injury is distinct from the pocketbook injury Braidwood would incur in paying for the objectionable services. Because Braidwood self-insures, Hotze believes that offering coverage is itself a tacit endorsement of the behaviors that he believes the services encourage. *See* Pls.' App. 72, ECF No. 46. Many courts have already addressed this type of injury, recognizing that the contraceptive mandate caused an injury in fact because it rendered plaintiffs "complicit in a scheme aimed at providing coverage to which they have a religious objection." *Archdiocese of St. Louis v. Burwell*, 28 F. Supp. 3d 944, 951 (E.D. Mo. 2014) (citation and internal quotation marks omitted) (collecting cases). Indeed, "it is beyond question" that religious employers have Article III standing to challenge a government mandate that infringes on their religious liberties "by requiring them to lend what their religion teaches to be an impermissible degree of assistance to the commission of what their religion teaches to be a moral wrong." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1154 (10th Cir. 2013) (Gorsuch, J., concurring), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Hotze's declaration establishes that the pre-

ventive-care mandates compel behavior that violates his religious beliefs, which is sufficient evidence of an injury in fact. *See Lujan*, 504 U.S. at 561.

Third, Braidwood faces a penalty for failing to comply with the mandates. Because Braidwood has more than fifty employees, it faces a tax of $100 per day for each employee not covered in accordance with the ACA. *See* 26 U.S.C. §§ 4980D, 4980H. Requiring religious employers to choose between complying with a service coverage mandate and paying a penalty imposes a substantial burden on religious freedom, and an injury in fact. *See Hobby Lobby Stores*, 573 U.S. at 719-20.

Defendants' counterarguments are unpersuasive. Defendants claim that Plaintiffs limited their religious objections to the PrEP mandate. They argue that the Court should thus consider only alleged injuries pertaining to the PrEP mandate. *See* Defs.' Cross Summ. J. Br. 31-32, ECF No. 64. Plaintiffs concede that their RFRA claims are limited to the PrEP mandate.[3] But

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[3] Plaintiffs' initial complaint asserted RFRA claims against compulsory coverage of the various services Plaintiffs found objectionable, including PrEP drugs, contraception, the HPV vaccine, and screenings and behavioral counseling for STDs and drug use. *See* Compl. 27-31, ECF No. 1. Plaintiffs' amended complaint drops all but one of those RFRA claims, challenging only the PrEP mandate. *See* 1st Am. Compl., ECF No. 14. Plaintiffs nevertheless moved for summary judgment on their claims that compulsory coverage of PrEP drugs, the HPV vaccine, and the screenings and behavioral counseling for STDs and drug use violates RFRA. *See* Pls.' Summ. J. Br. 35-42, ECF No. 45. Defendants argue that Plaintiffs are bound by their amended complaint, and thus the Court may consider Plaintiffs' RFRA challenges only as to the PrEP mandate. *See* Defs.' Cross Summ. J. Br. 31-32, ECF No. 64. The parties disputed that point in the briefing, but at the hearing Plaintiffs con-

Plaintiffs still suffer *injury* based on their religious objections to the other mandates. Plaintiffs claim that the various preventive-care mandates violate the Appointments Clause, the Vesting Clause, and the nondelegation doctrine. Braidwood's standing to assert those claims is based on the injuries discussed: in sum, that § 300gg-13 requires Braidwood to cover services it does not wish to cover for both religious and non-religious reasons. That Braidwood limited its RFRA claim to the PrEP mandate does not mean that it waived all claims of injury based on its religious objections. Even as to its non-RFRA claims, Braidwood's religious objections are "legally protected interest[s]." *Lujan*, 504 U.S. at 560. Braidwood has established by competent evidence that § 300gg-13 invades those interests. Those invasions are "concrete and particularized" and "actual or imminent," which means that Braidwood has suffered an injury in fact. *Id.*

Defendants' remaining arguments against Braidwood's standing proceed on the incorrect premise that Braidwood's injuries must pertain to covering PrEP drugs. Even adopting that incorrect premise, however, Defendants' arguments are unpersuasive. Defendants point out that Braidwood has not provided evidence that it has paid for or will likely pay for PrEP drugs. In Defendants' view, that makes Braidwood's injury hypothetical. Until Braidwood is faced with paying for PrEP drugs, it "operates only under a legal obligation to cover PrEP if such a claim is submitted, and an abstract legal obligation is insufficient to establish standing." *See* Defs.' Cross Summ. J. Br. 34, ECF

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ceded that their RFRA challenges are limited to the PrEP mandate. *See* H. Trans. 24-25 (Rough Draft).

No. 64 (citing *Barber v. Bryant*, 860 F.3d 345, 357 (5th Cir. 2017)).

Defendants misunderstand Braidwood's injury. Braidwood is not merely alleging a traditional "pocketbook injury." *California v. Texas*, 141 S. Ct. 2104, 2114 (2021). Distinct from his risk of pecuniary harm, Hotze asserts an ongoing dignitary harm, claiming that merely "*providing this coverage* in Braidwood's self-insured plan would make [him] complicit" in behaviors that violate his religious beliefs. Pls.' App. 72, ECF No. 46. Therefore, Braidwood faces not only a potential future injury in the form of paying for preventive care, but also a current injury in the form of underwriting services that violate Hotze's religious beliefs. Braidwood's numerous injuries are of the kind that courts have consistently found appropriate for Article III adjudication.

The next two standing requirements—causation and redressability—are even more straightforward. Braidwood "must satisfy the 'causation' and 'redressability' prongs of the Art. III minima by showing that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Again, when a plaintiff suffers injury as the object of the challenged government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561-62. Section 300gg-13 prohibits Braidwood from excluding coverage and imposing cost-sharing arrangements for various services to which it objects. And Braidwood faces a significant tax for not complying with the law. *See* 26 U.S.C. §§ 4980D, 4980H. Braidwood seeks declaratory

and injunctive relief to prevent Defendants from enforcing the preventive-care mandates against it. There is no doubt that Braidwood's injuries are fairly traceable to Defendants' enforcement of the preventive-care mandates and that granting Braidwood's requested relief would likely redress its injuries. Indeed, Defendants conceded at oral argument that assuming Braidwood has suffered an injury (which Defendants contest), that injury is traceable and redressable. Braidwood has standing to pursue its claims.

Plaintiffs argue that because Braidwood has standing, the Court need not inquire into the standing of the other Plaintiffs. *See* Pls.' Resp. 10, ECF No. 74. For purposes of resolving these summary judgment motions, Plaintiffs are correct. As previously discussed, Braidwood has standing for all its claims. And because all Plaintiffs bring the same claims as Braidwood, the Court may address the merits of each claim. *See Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650-51 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint."). But when it comes to granting relief, each Plaintiff must show it has standing to obtain the relief sought. *See id.* at 1650; *Arizona v. Biden*, 31 F.4th 469, 483 (6th Cir. 2022) (Sutton, C.J., concurring) ("A valid Article III remedy operates with respect to specific parties, not with respect to law in the abstract," which "is why courts generally grant relief in a party-specific and injury-focused manner." (cleaned up)). For the remaining Plaintiffs to show standing, "much more is needed," because, unlike Braidwood, their asserted injuries "arise[] from the government's allegedly unlawful regulation (or lack of regulation) of someone else." *Lujan*, 504 U.S. at 562. The parties offered to file supplemental briefs

addressing the scope of relief and standing for the remaining Plaintiffs. For now, the Court proceeds to the merits.

B. Appointments Clause

The Appointments Clause lays out the permissible methods of appointing "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Principal officers must be nominated by the President and confirmed by the Senate. *Id.* But Congress can authorize the appointment of "inferior Officers" by the President alone, the courts, or "the Heads of Departments." *Id.*

Plaintiffs argue that the members of PSTF, ACIP, and HRSA are principal officers who must be appointed by the President and confirmed by the Senate. *See* Pls.' Summ. J. Br. 24-25, ECF No. 45. At the very least, Plaintiffs say, those agencies are comprised of inferior officers whose appointments may be vested in an agency head. *See id.* at 25-27. Regardless, Plaintiffs argue that the appointment process for members of all three agencies does not satisfy either constitutional method for appointing officers of the United States. *See id.* at 24-27. Defendants dispute all those claims. According to Defendants, the appointment processes for members of PSTF, ACIP, and HRSA are constitutionally permissible. *See* Defs.' Summ. J. Br., ECF No. 64. In any event, Defendants argue, the HHS Secretary's ratification of the challenged provisions nullifies Plaintiffs' Appointments Clause challenges. *Id.* at 38-45. The Court begins by addressing ratification, which narrows the issues.

1. The HHS Secretary ratified the directives of ACIP and HRSA, but not of PSTF.

Several circuits have held that a properly appointed official can ratify an improperly appointed official's action. The D.C. Circuit has "repeatedly held that a properly appointed official's ratification of an allegedly improper official's prior action, rather than mooting a claim, resolves the claim on the merits by 'remedying the defect' (if any) from the initial appointment." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019) (cleaned up). The Second, Third, and Ninth Circuits agree. *See NLRB v. Newark Elec. Corp.*, 14 F.4th 152, 160-63 (2d Cir. 2021); *Kajmowicz v. Whitaker*, 42 F.4th 138, 152 (3d Cir. 2022); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016).

Questions of ratification are "at least presumptively governed by principles of agency law." *FEC v. NRA Pol. Victory Fund*, 513 U.S. 88, 98 (1994). One basic principle is that "for a ratification to be effective, 'it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made*.'" *Gordon*, 819 F.3d at 1191 (quoting *NRA Pol. Victory Fund*, 513 U.S. at 98). At the very least, the party ratifying must have "the capacity to act at the time of ratification." *Id.* (citing Restatement on Agency (Third) § 4.04 cmt. b). Those principles resolve the ratification issues presented here.

First, the Secretary ratified the ACIP recommendations that Plaintiffs challenge. ACIP, as part of the Public Health Service, is "under the supervision and direction of the Secretary." 42 U.S.C. § 202. ACIP re-

ports to the CDC Director, who exercises delegated authority from the Secretary. *See* 42 U.S.C. §§ 243, 247b. "'The power to superintend,' [Alexander Hamilton] explained, 'must imply a right to judge and direct,' thereby ensuring that 'the responsibility for a wrong construction rests with the head of the department, when it proceeds from him.'" *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1983 (2021) (quoting 3 *The Works of Alexander Hamilton* 559 (J. Hamilton ed. 1850)). In recognition of that principle, Defendants claim that "the Secretary is empowered to direct ACIP's recommendation of specific vaccines." Defs.' Supp. Filing 2, ECF No. 86. And because a vaccine recommendation from ACIP "is considered in effect after it has been adopted by the Director of the [CDC]," the Secretary has authority over what vaccines are covered under § 300gg-13(a)(2). 45 C.F.R. § 147.130(a)(1)(ii). The Secretary ratified ACIP's recommendations that Plaintiffs challenge.[4] *See* Defs.' App. 6, ECF No. 65. Because he has authority to require, reject, or alter ACIP's recommendations, the Secretary's ratification of the challenged ACIP provisions remedies any appointment defects of ACIP regarding those recommendations. *See Guedes*, 920 F.3d at 13.

Likewise, the Secretary ratified the HRSA guidelines that Plaintiffs challenge. Like ACIP, HRSA is part of the Public Health Service and thus "under the supervision and direction of the Secretary." 42 U.S.C. § 202. HRSA is directed by an Administrator who, like the CDC Director, is answerable to the Secretary. *See* 47 Fed. Reg. at 38,410. The Secretary is thus "empow-

[4] The parties do not dispute that Secretary Xavier Becerra is a constitutionally appointed principal officer.

ered to direct HRSA to include particular care and screenings in the guidelines they support under 42 U.S.C. § 300gg-13(a)(3) and (a)(4)," as Defendants admit. Defs.' Supp. Filing 1, ECF No. 86. The Secretary ratified the HRSA guidelines that Plaintiffs challenge,[5] which remedies any appointment defects of HRSA regarding those guidelines. *See Guedes*, 920 F.3d at 13.

Plaintiffs raise several counterarguments. First, Plaintiffs argue that the Secretary has no authority to ratify the agencies' actions because § 300gg-13(a) "compels" the Secretary to implement the agencies' decisions. Pls.' Resp. Br. 19-21, ECF No. 74. Plaintiffs are correct that the Secretary "shall" enforce insurance coverage for the services identified by the three agencies. *See* 42 U.S.C. § 300gg-13. But § 300gg-13(a) contains no language removing or modifying the Secretary's background authority over ACIP and HRSA as to the services themselves. Indeed, Congress recognized that it was legislating against that background structure by referring to "recommendations" and "guidelines." ACIP has authority (given to it by the Secretary) to provide vaccine recommendations, which are subject to the absolute control of the Secretary. So, too, with HRSA. If Congress intends to alter the fundamental details of a regulatory scheme, courts "expect it to speak with the requisite clarity to place that intent beyond dispute." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849 (2020) (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626-27 (2018)). Section 300gg-

[5] Defs.' App. 6, ECF No. 65.

13(a) is devoid of any clear statement stripping the Secretary of his authority over ACIP and HRSA.

Second, Plaintiffs argue that even if the Secretary has ratified the challenged actions, § 300gg-13(a) would still violate the Appointments Clause because ACIP's and HRSA's actions are effective even before a constitutionally appointed officer ratifies them. Pls.' Summ. J. Br. 29, ECF No. 45. In other words, Plaintiffs say that ratification cannot cure the appointment problems because ACIP and HRSA are still exercising "significant authority pursuant to the laws of the United States" until their decisions are ratified. *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (holding that the SEC's administrative law judges are "officers of the United States," even though their decisions are subject to review by the SEC itself). But Article III standing principles do not permit Plaintiffs to challenge an unlawful appointment generally, or to challenge future exercises of unlawful authority. Plaintiffs' injuries must be traceable to government *action*. And the Secretary has ratified the particular actions of ACIP and HRSA that Plaintiffs complain of.

Plaintiffs' argument attacks the very principle of ratification. If Plaintiffs are correct, post hoc approval by an appropriate government actor cannot retroactively cure an earlier exercise of authority that was constitutionally defective. But the circuits have so far unanimously agreed that ratification may cure Appointment Clause problems, and Plaintiffs do not present a compelling reason to deviate from the consensus. The Secretary effectively ratified the ACIP and HRSA actions that Plaintiffs challenge, so the Court need not address the Appointments Clause issues regarding those two

agencies. The Court thus **GRANTS** partial summary judgment in favor of Defendants on Claim 1 of the Amended Complaint as to 42 U.S.C. § 300gg-13(a)(2), (a)(3), and (a)(4).

PSTF is different. According to Defendants, the Secretary may not direct PSTF to "give a specific preventive service an 'A' or 'B' rating, such that it would be covered pursuant to 42 U.S.C. § 300gg-13(a)(1)." Defs.' Suppl. Filing 3, ECF No. 86. That is because all PSTF members "and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure." 42 U.S.C. § 299b-4(a)(6). The Secretary, a political actor, thus does not have authority to direct what services are covered under § 300gg-13(a)(1). Arguably, the phrase "to the extent practicable" permits some level of direction by the Secretary. *Id.* But whatever that phrase means, it does not provide an exception for the Secretary to decree recommendations unilaterally. That exception would swallow the rule that "recommendations" must be "independent" and "not subject to political pressure." *Id.* Because the Secretary lacks authority to determine or direct what services receive an "A" or "B" rating, he cannot ratify PSTF's decisions on that subject. *See Gordon*, 819 F.3d at 1191. Defendants implicitly recognize as much by arguing that only the ACIP and HRSA ratifications were effective—not PSTF. *See* Defs.' Summ. J. Br. 39-43, ECF No. 64. The Court must therefore address the Appointments Clause challenge to PSTF.

2. The members of PSTF are officers of the United States.

A person is an officer of the United States if he (1) occupies a "'continuing' position established by law" and (2) exercises "significant authority pursuant to the laws of the United States." *Lucia*, 138 S. Ct. at 2051 (internal quotation marks and citations omitted). The members of PSTF satisfy both criteria.

First, PSTF members occupy a continuing position established by law. Congress requires the Director of AHRQ to "convene" PSTF by assembling a group of "individuals with appropriate expertise." 42 U.S.C. § 299b-4(a)(1). Congress described the purpose of PSTF, assigned its duties, authorized appropriations for its activities, and insulated it from political pressure. *See id.* § 299b-4. Regulations lay out extensive qualifications for the members, who serve four-year terms. *See Solicitation for Nominations for Members of the U.S. Preventive Services Task Force (USPSTF)*, 87 Fed. Reg. 2436, 2436-37 (Jan. 14, 2022). These positions will continue until Congress amends or repeals the statute creating them. They are "public station[s], or employment, conferred by the appointment of government." *United States v. Hartwell*, 73 U.S. 385, 393 (1867).

The PSTF positions are "continuing and permanent" rather than "occasional or temporary." *Lucia*, 138 S. Ct. at 2051. Among other things, PSTF must submit yearly reports to Congress and other agencies identifying gaps in research and recommending areas for further examination. 42 U.S.C. § 299b-4(a)(2)(F). At least once every five years, PSTF must review interventions and update recommendations. *Id.* These con-

gressionally created duties are regular, not occasional. *Cf. United States v. Germain*e, 99 U.S. 508, 511-12 (1878) (holding that a civil surgeon tasked with assisting the Commissioner of Pensions was not an officer in part because he was "only to act when called on by the Commissioner of Pensions in some special case"); *Auffmordt v. Hedden*, 137 U.S. 310, 326-27 (1890) (holding that a merchant appraiser valuing goods for the customs service was not an officer of the United States because he had "no general functions, nor any employment which ha[d] any duration as to time, or which extend[ed] over any case further than as he [was] selected to act in that particular case").

Defendants argue that PSTF members are not officers because their work is "part-time." Defs.' Summ. J. Br. 64, ECF No. 64. But the difference between a temporary position and a permanent position has more to do with "ideas of tenure and duration" than with the relative workload of the job. *Lucia*, 138 S. Ct. at 2051 (cleaned up). PSTF members serve four-year terms in a statutorily created position to carry out regular duties assigned by Congress. That role is nothing short of "a continuing and formalized relationship of employment with the United States Government." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757 (5th Cir. 2001) (en banc). Regardless, to the extent courts consider the relative workload a position requires, the duties of PSTF members cannot be brushed aside as minimal. PSTF applicants must have "adequate time to contribute substantively to the work products of [PSTF]." 87 Fed. Reg. at 2437. The members meet three times a year for two days in Washington, D.C. (paid for by the taxpayer). *Id.* But a "significant portion" of their work occurs between meetings. *Id.* Members must

expect frequent emails, "multiple conference calls each month," and interaction with stakeholders. *Id.* Indeed, "members devote approximately 200 hours a year outside of in-person meetings" to carrying out their duties. *Id.* The part-time nature of the PSTF positions, even if relevant, does not indicate that the positions are occasional or temporary.

Defendants also argue that PSTF members are not officers because they do not receive compensation for their service. *See* Defs.' Summ. J. Br. 53, ECF No. 64. In *Riley*, the Fifth Circuit observed that "Supreme Court precedent has established that the constitutional definition of an 'officer' encompasses, at a minimum, a continuing and formalized relationship of employment with the United States Government." *Riley*, 252 F.3d at 757 (first citing *Auffmordt*, 137 U.S. at 327; and then citing *Germain*e, 99 U.S. at 511-12). Defendants argue that by "employment," the

Fifth Circuit means *paid* employment. But neither the word "employment" nor the surrounding context in *Riley* implies that compensation is a necessary element of an office. The merchant in *Auffmordt* was not an officer *in part* because he was paid on a case-by-case basis and received no "continuing emolument." *Auffmordt*, 137 U.S. at 327. The surgeon in *Germain*e was not an officer *in part* because his payment was by commission prescribed by regulation, not "regular appropriation." *Germain*e, 99 U.S. at 511. And the qui tam plaintiffs in *Riley* were not officers because, "[f]or instance," they did "not draw a government salary." *Riley*, 252 F.3d at 757.

The cases demonstrate that monetary compensation is one aspect among many relevant to determining

whether a position is "continuing and formalized." *Id.* But employment positions take many forms, offering different terms, hours, compensation, and responsibilities. *See Germain*e, 99 U.S. at 511 ("[T]he term embraces the ideas of tenure, duration, emolument, and duties."). To be sure, the absence of a regular salary makes the PSTF positions appear less "continuing and formalized" than a salaried position, other things being equal. *Riley*, 252 F.3d at 757. But it is not dispositive, particularly when the members receive at least some compensation for travel to meetings and trainings. *See* 87 Fed. Reg. at 2437.

The Supreme Court and Fifth Circuit have not set a minimum-hours requirement for officers of the United States. Nor have they forbidden an officer from holding other employment. Nor have they required a particular form of compensation. Rather, courts consider various characteristics to determine whether the nature of the position is continuing and formalized. *See Lucia*, 138 S. Ct. at 2051; *Riley*, 252 F.3d at 757. Congress created PSTF, assigned it various duties, and requires its regular employment. The positions are fixed by statute and will continue indefinitely. Members must be specially qualified, and they are selected in a competitive process. They serve four-year terms that require meetings, research, drafting, and many other responsibilities. They receive compensation in support of their travel for in-person meetings, which they hold three times a year. These qualities indicate that PSTF members occupy a "'continuing' position established by law." *Lucia*, 138 S. Ct. at 2051.

Second, PSTF members exercise significant authority pursuant to the laws of the United States. This sec-

ond step "focuse[s] on the extent of power an individual wields in carrying out his assigned functions." *Lucia*, 138 S. Ct. at 2051. PSTF has authority to determine what preventive-care services receive an "A" or "B" rating. Private insurers must cover all services with an "A" or "B" rating. 42 U.S.C. § 300gg-13(a)(1). Therefore, PSTF has authority to determine what preventive-care services private insurers must cover. That includes the authority to determine the scope of any religious or nonreligious exemptions. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020) (holding that § 300gg-13(a)(4) gives HRSA the authority to determine "the ability to identify and create exemptions from its own Guidelines").

PSTF's authority over insurance policies is significant. Just as special trial judges of the U.S. Tax Court can issue the final decision in "comparatively narrow and minor matters" before them, PSTF exercises final authority over its narrow domain. *Lucia*, 138 S. Ct. at 2052 (internal quotation marks omitted) (quoting *Freytag v. Commissioner*, 501 U.S. 868, 873 (1991)). Whether insurance providers must cover PrEP drugs and countless other preventive services depends entirely on whether PSTF recommends them. PSTF wields a power to compel private action that resembles legislative authority. At the very least, it is on par with agency actions subject to approval by an agency head, which typically proceed through notice and comment procedures. But PSTF, unencumbered by the Administrative Procedure Act, "exercise[s] significant discretion" in determining what services insurance providers must cover. *Freytag*, 501 U.S. at 882. That degree of authority is "so 'significant' that it [is] inconsistent with

the classifications of 'lesser functionaries' or employees." *Id.* at 881 (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352 (1931)). PSTF thus exercises "significant authority pursuant to the laws of the United States." *Lucia*, 138 S. Ct. at 2051.

Defendants try to avoid that conclusion by insisting that PSTF makes "recommendations," not law. "PSTF's recommendations," Defendants argue, "are not exercises of the Executive or Legislative Power. They are 'evidence-based' scientific recommendations about the contemporary standard of care in preventive medicine." Defs.' Summ. J. Br. 56, ECF No. 64. But Defendants rely on a false dichotomy. That PSTF makes "scientific recommendations" says nothing about whether it exercises legislative power. Before Congress enacted the ACA, PSTF's recommendations were *merely* recommendations. Now, those recommendations have the force and effect of law. What PSTF "recommends" will bind insurance providers as forcefully as any law or regulation. And as the Supreme Court said of HRSA, PSTF "has virtually unbridled discretion to decide what counts as preventive care." *Little Sisters of the Poor*, 140 S. Ct. at 2380.

Defendants also point out that PSTF is tasked with determining the rating of individual preventive services, not decreeing what ratings are covered by insurance. Congress made the decision to give PSTF's recommendations the *effect* of required coverage. In other words, what matters are PSTF's "purposes," not the "incidental" effects of PSTF carrying out those purposes. Defs.' Summ. J. Br. 56, ECF No. 64. *Lucia* says otherwise. What matters is "the extent of *power* an individual *wields* in carrying out his assigned functions."

Lucia, 138 S. Ct. at 2051 (emphases added). Whatever PSTF's assigned functions are (or whatever PSTF *thinks* its assigned functions are) is secondary to the power it wields in carrying out those functions.[6] And that power is nothing short of dictating what preventive services insurance providers *must* cover. It is more troubling, not less, that Defendants insist the agency wielding that power is apparently not even cognizant of doing so.[7] An officer is no less an officer because he is oblivious to the power he wields.

Defendants also argue § 300gg-13(a) is no different than the numerous other times Congress has incorporated materials by reference into law. But the organizations involved in all Defendants' examples are private, state, or foreign entities.[8] None of the organizations

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[6] It is also "beside the point" that PSTF's decisions serve other non-significant functions. *Freytag v. Commissioner*, 501 U.S. 868, 882 (1991). "The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution." *Id.*

[7] *See* Defs.' Reply Br. 34, ECF No. 83 ("True, the PSTF's recommendations may be used for important purposes, including, as Congress has decided, being incorporated within certain insurance coverage. But PSTF members themselves are not tasked with considering what is appropriate about insurance at all, nor are they tasked with making discretionary decisions about insurance. . . . ").

[8] *See* 4 U.S.C. § 119(a)(2) (requiring electronic databases established by states to "be provided in a format approved by the American National Standards Institute's Accredited Standards Committee X12"); 16 U.S.C. § 3372(a)(2)(A) (rendering unlawful the importation "any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law"); 18 U.S.C. § 13(a) (criminalizing certain acts that

occupy a "'continuing' position established by law" in the federal government. *Lucia*, 138 S. Ct. at 2051. Defendants' examples do not present Appointments Clause problems, then, because none pass even the first part of the *Lucia* test. PSTF members, in contrast, serve in an agency created by federal law. And, perhaps more importantly, § 300gg-13(a) differs from Defendants' examples in its "capacious grant of authority" to the agencies "to make these determinations," while leaving their "discretion equally unchecked in other areas." *Little Sisters of the Poor*, 140 S. Ct. at 2380. In short, Defendants' argument "ignores the significance of the duties and discretion" of PSTF. *Freytag*, 501 U.S. at 881.

PSTF members occupy a continuing position established by law and exercise significant authority pursuant to the laws of the United States. *See Lucia*, 138 S. Ct. at 2051. They are therefore officers of the United States.

3. The members of PSTF are unconstitutionally appointed.

Because PSTF members are officers of the United States, their appointments must comply with Article II. Principal officers must be nominated by the President and confirmed by the Senate, while inferior officers may be appointed by the President alone, the courts, or the

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"although not made punishable by any enactment of Congress, would be punishable if committed . . . within the jurisdiction of the State . . . by the laws thereof in force at the time of such act"); 42 U.S.C. § 6293(b)(8) (requiring test procedures for water closets and urinals to comply with standards set by the American Society of Mechanical Engineers).

heads of departments, if Congress permits. U.S. Const. art. II, § 2, cl. 2.

"Whether one is an 'inferior' officer depends on whether he has a superior." *Edmond v. United States*, 520 U.S. 651, 662 (1997). In other words, the difference between principal and inferior officers is one of relationship, not of authority. *See id.* ("The exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather . . . the line between officer and nonofficer."). Inferior officers, then, are "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663.

PSTF members are principal officers. The AHRQ Director "convene[s]" PSTF, but he is not necessarily part of PSTF, whose members are otherwise "independent." 42 U.S.C. § 299b-4(a)(1), (a)(6). In that regard, PSTF is different from ACIP and HRSA, which are subject to the Secretary's control. *See supra* Section III.B.1. PSTF is not even part of HHS, or any other agency. *See* Defs.' Summ. J. Br. 51, ECF No. 64. AHRQ has no oversight or supervision role over PSTF, and AHRQ's function is merely to "provide ongoing administrative, research, and technical support." 42 U.S.C. § 299b-4(a)(3). The AHRQ Director is appointed by the Secretary, but he neither directs nor supervises PSTF or its members. *See id.* § 299(a). PSTF members are thus not inferior officers because they are not "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663.

PSTF members have no superior, so they are principal officers under Article II. *Id.* at 662.

Because PSTF members are principal officers, they must be appointed by the President and confirmed by the Senate. *See* U.S. Const. art. II, § 2, cl. 2. The PSTF members indisputably fail that constitutional requirement. The members are "convene[d]" by the AHRQ Director. 42 U.S.C. § 299b-4(a)(1). Defendants point to no other statute or regulation governing their selection. Presumably, the AHRQ Director selects new members or delegates the task to other AHRQ employees. *See* 87 Fed. Reg. at 2437 ("Nominated individuals will be selected for [PSTF] on the basis of how well they meet the required qualifications and the current expertise needs of [PSTF]."). Regardless, PSTF members are not presidentially appointed.

Even if PSTF members were inferior officers, their selection would still violate the Appointments Clause. Congress can vest the appointment of inferior officers by the President alone, the courts, or the heads of departments. U.S. Const. art. II, § 2, cl. 2. If the power to "convene" PSTF is commensurate with the power to appoint its members, then Congress arguably vested the appointment of PSTF members in the AHRQ Director. *See* 42 U.S.C. § 299b-4(a)(1). The AHRQ Director is not the President or an officer of the courts, so the only question is whether he is one of the "Heads of Departments" mentioned in Article II. He is not. "[T]he term 'Department' refers only to a part or division of the executive government, as the Department of State, or of the Treasury, expressly created and given the name of a department by Congress." *Freytag*, 501 U.S. at 886 (cleaned up). Defendants do not dispute that the AHRQ

Director is not a head of a department as understood in Article II.

Regardless of whether PSTF members are principal or inferior officers, they are unconstitutionally appointed. Defendants dispute that PSTF members are officers of the United States, but they do not resist the conclusion that the selection of PSTF members does not comply with the Appointments Clause procedures.

* * *

In dressing up legal directives as expert recommendations, Defendants overlook the constitutional importance of the power those recommendations wield. Congress may create agencies to recommend healthcare services to public and private entities. Doing so rarely poses constitutional problems because the recommendations do not bind American citizens. Under Defendants' theory, Congress may then backfill those recommendations with the force and effect of law, complete with hefty penalties for noncompliance. Not only that, but Congress can also mandate that all *future* recommendations have the force and effect of law, and it can make those recommendations unreviewable by anyone else. Perhaps Congress may do those things consistent with the Constitution. But when it does, Congress confers *power* on those who, before, were making mere recommendations. The Constitution says that individuals exercising that kind of power must be appointed by politically accountable officers. "[T]he Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659. PSTF's appointment process deviates from Article II's requirements, so the Court **GRANTS** partial

summary judgment in favor of Plaintiffs on Claim 1 of the Amended Complaint as to 42 U.S.C. § 300gg-13(a)(1).

The Court will take further briefing on the appropriate remedy, but one point is worth resolving here. Defendants say the proper remedy, if PSTF members are unconstitutionally appointed, is to allow the Secretary to ratify the actions of PSTF. *See* Defs.' Summ. J. Br. 57-58, ECF No. 64. But Defendants have disclaimed that the Secretary has any authority over PSTF. And without authority, there can be no ratification. *See Gordon*, 819 F.3d at 1191. Defendants' argument would make sense, for example, in the context of an ACIP recommendation that the Secretary *could* ratify but had *not yet* ratified. But as for PSTF, the Secretary's ratification is meaningless. *See supra* Section III.B.1. A second ratification would be equally meaningless.

C. Removal

Article II vests the "executive Power" in the President, who must "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. "The entire 'executive Power' belongs to the President alone." *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020). Because it would be impossible for the President to carry out the vast responsibility of the office by himself, Article II implies that the President may appoint lesser executive officers to assist him in his duties. *Id.* "That power, in turn, generally includes the ability to remove executive officials, for it is 'only the authority that can remove' such officials that they 'must fear and, in the performance of [their] functions, obey.'" *Id.* (alteration in original) (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)).

Congress may restrict the President's removal power over certain executive officers, to an extent. Inferior officers, for example, "may retain some amount of for-cause protection from firing." *Jarkesy v. SEC*, 34 F.4th 446, 463 (5th Cir. 2022) (citing *Morrison v. Olson*, 487 U.S. 654, 691-92 (1988)). "Likewise, even principal officers may retain for-cause protection when they act as part of an expert board." *Id.* (citing *Seila L.*, 140 S. Ct. at 2192).

Plaintiffs' removal claim fails because they do not identify any removal restrictions on PSTF members. Plaintiffs point to the provision requiring that all PSTF members "and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure." 42 U.S.C. § 299b-4(a)(6). But that language does not provide PSTF members tenure or insulate them from removal. Plaintiffs provide no persuasive argument as to why the provision should be construed in the direction of a constitutional violation. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (discussing the canon of constitutional avoidance). Quite simply, no statute forbids the President, Secretary, or AHRQ Director from firing any member of PSTF. And without any removal restrictions, there is no removal problem under Article II.

That conclusion might appear to be in tension with the Court's earlier conclusion that the Secretary lacks authority to ratify PSTF decisions. Recall that the Secretary does not have authority to direct what services are covered under § 300gg-13(a)(1), in part because of the political-insulation language in § 299b-4(a)(6). *See supra* III.B.1. The phrase "to the extent practicable" arguably permits the Secretary some amount of

control, but the Court did not construe the phrase to permit the Secretary to direct what services are covered. The political-insulation language thus prohibits the Secretary from directing what services are covered under § 300gg-13(a)(1), but it does not prohibit the Secretary or the President from removing PSTF members. Those interpretations are consistent for at least two reasons.

First, the statute grants PSTF unilateral authority, but not indefinite tenure. Congress granted PSTF complete discretion to make its decisions. AHRQ's role is merely to provide administrative, research, and technical support for PSTF. Even without the political-insulation language, it is not clear that the Secretary would have the authority to direct what services are covered under § 300gg-13(a)(1). In contrast, Article II vests the President with the background authority to remove executive officials. Unless Congress strips that authority for a particular officer (and does so in a constitutionally permissible manner), the President retains removal authority over that officer. The Court's interpretation of § 299b-4(a)(6) is thus consistent with the statutory context (which gives PSTF authority over covered services) and consistent with the constitutional background (which gives the President authority to remove executive officers).

Second, no party advanced a construction of the political-insulation language that would permit the Secretary to decree covered services under § 300gg-13(a)(1). Defendants concede that the "Secretary may not, consistent with § 299b-4(a)(6), direct that the PSTF give a specific preventive service an 'A' or 'B' rating, such that it would be covered pursuant to 42 U.S.C. § 300gg-

13(a)(1)." Defs.' Suppl. Filing 3, ECF No. 86. The canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 381. All parties' interpretations of the Secretary's authority over PSTF invite Appointments Clause problems. In contrast, the parties do offer competing interpretations of the political-insulation language as it relates to the removal issue.

The removal analysis is unnecessarily complicated by the fact that the members of the PSTF are unconstitutionally appointed. As a general rule, officers are subject to removal by the same actor who appointed them, subject to any other restrictions imposed by Congress. *See, e.g.*, *Seila L.*, 140 S. Ct. at 2197. If the PSTF members had been properly appointed by the President as principal officers, or properly appointed by the Secretary of Health and Human Services as inferior officers, then the Court's conclusion that they could be removed by those same appointing actors would be more readily apparent, even when factoring in the political-insulation language of § 299b-4(a)(6). It is unsurprising that Congress's novel regulatory scheme produces novel legal problems.

In sum, PSTF members do not have statutory tenure. They are removable at will. The Court thus **GRANTS** summary judgment in favor of Defendants as to Claim 3 of Plaintiffs' Amended Complaint.

D. Nondelegation

The Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States." U.S. Const. art. 1, § 1. The text "permits no delegation of those powers" to the other two branches of government. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Under the doctrine of nondelegation, "when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Id.* (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). A conferral of decisionmaking authority is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). "Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion). That process requires courts to evaluate the statute's text, context, purpose, and factual background. *Am. Power & Light*, 329 U.S. at 104.

Plaintiffs argue that the preventive-care mandates violate the nondelegation doctrine. Plaintiffs say that PSTF, ACIP, and HRSA are all exercising decisionmaking authority with no "intelligible principle" to guide them. Pls.' Summ. J. Br. 29-32, ECF No. 45. Section 300gg-13(a) compels coverage of certain "evidence-based items and services" identified by PSTF, "immunizations" recommended by ACIP, and "evidence-informed preventive care and screenings" designated by

HRSA. 42 U.S.C. § 300gg-13(a). Plaintiffs argue that the statute provides no standards guiding the agencies' decisions as to which items, services, immunizations, care, and screenings they can recommend. The statute confers authority on the agencies to decide what preventive services are covered, but it lacks, Plaintiffs say, any principle guiding their decisionmaking—let alone an intelligent one.

At least as to HRSA, the Supreme Court has hinted that it may agree with Plaintiffs. The Court recognized that § 300gg-13(a)(4) "grants sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover." *Little Sisters of the Poor*, 140 S. Ct. at 2380. "But the statute is completely silent as to what those 'comprehensive guidelines' must contain, or how HRSA must go about creating them. The statute does not, as Congress has done in other statutes, provide an exhaustive or illustrative list of the preventive care and screenings that must be included." *Id.* (quoting 42 U.S.C. § 300gg-13(a)(4)). Nor does the statute "set forth any criteria or standards to guide HRSA's selections." *Id.* The Court pointed out that even some of the other subsections of § 300gg-13(a) at least require "evidence-based" or "evidence informed" determinations. *Id.*; *see* 42 U.S.C. § 300gg-13(a)(1), (a)(3). Additionally, the ACA does not "require that HRSA consult with or refrain from consulting with any party in the formulation of the Guidelines." *Little Sisters of the Poor*, 140 S. Ct. at 2380. Taken together, "[t]his means that HRSA has virtually unbridled discretion to decide what counts as preventive care and screenings." *Id.* The Supreme Court thus concluded "that the ACA gives HRSA broad discretion to define preventive care and screenings and to create the reli-

gious and moral exemptions." *Id.* at 2381. The Supreme Court ultimately did not address whether HRSA violates the nondelegation doctrine, noting that no party raised the issue. *Id.* at 2382.

Plaintiffs rely on the Supreme Court's observations in *Little Sisters of the Poor*, but they overlook binding Fifth Circuit precedent. In *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436 (5th Cir. 2020), the Fifth Circuit addressed a nondelegation challenge to the Family Smoking and Tobacco Control Act. Congress delegated to the Secretary of the Food and Drug Administration the power to "deem" which tobacco products should be subject to the Act's mandates. 21 U.S.C. § 387a(b). The plaintiffs in *Big Time Vapes* argued that "Congress didn't provide 'any parameters or guidance whatsoever' to guide the Secretary's exercise of that discretion." *Big Time Vapes*, 963 F.3d at 443. The panel disagreed, holding that Congress had delineated (1) "its general policy" in the statute, (2) the public agency that is to apply that policy, and (3) the boundaries of the delegated authority. *Id.* at 444-45. The same is true here. Congress has delineated its general policy with respect to the preventive-care mandates, the public agencies applying the preventive-care mandates, and the boundaries of the delegated authority.

First, Congress has delineated a general policy to expand insurance coverage for various preventive services. The preventive-services provision outlines the "minimum" level of coverage that insurance plans must offer. 42 U.S.C. § 300gg-13(a). Congress then chose to incorporate the directives of existing agencies—PSTF, ACIP, and HRSA—to set the baseline services that insurance policies must cover. Because the agen-

cies preexisted the ACA, Congress had already outlined an express purpose for each agency. PSTF exists for "the purpose of developing recommendations for the health care community, and updating previous clinical preventive recommendations, to be published in the Guide to Clinical Preventive Services . . . , for individuals and organizations delivering clinical services." 42 U.S.C. § 299b-4(a)(1). ACIP exists "for the purpose of advising" the HHS Secretary on his role to "assist States and their political subdivisions in the prevention and suppression of communicable diseases." *Id.* §§ 217a(a), 243(a), 1396s(e). HRSA's history is more complicated, but it can be traced to Title V of the Social Security Act of 1935, passed for "the purpose of enabling each State to extend and improve, as far as practicable under the conditions in such State, services for promoting the health of mothers and children, especially in rural areas and in areas suffering from severe economic distress." 49 Stat. 620, 629 (1935).[9]

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[9] Over the years, Congress and the President organized and reorganized the agencies responsible for implementing various Congressional health programs. In 1973, exercising authority under those reorganization plans, the Secretary of Health, Education, and Welfare (later to become the HHS Secretary) created the Health Services Administration ("HSA") and the Health Resources Administration ("HRA"). *See* Public Health Service, 38 Fed. Reg. 18,261 (July 9, 1973). HSA's purpose was to "provide a national focus for programs and health services for all people of the United States with emphasis on achieving the integration of service delivery and public and private financing systems to assure their responsiveness to the needs of individuals and families in all levels of society." Health Services Administration, 39 Fed. Reg. 10,463 (Mar. 20, 1974). HRA's purpose was to "provide[] leadership with respect to the identification, deployment and utilization of personnel, educational, physical, financial and organizational resources in

The parties' briefs do not discuss Congress's policy in any notable detail. But the statute's text, context, and relevant factual background indicate a general policy to expand preventive-services coverage for a variety of medical services. Generally, "Congress's purpose in this section was to mandate coverage of certain health insurance items." *Leal v. Azar*, No. 2:20-cv-185, 2020 WL 7672177, at *16 (N.D. Tex. Dec. 23, 2020) (ruling that § 300gg-13(a)(4) does not violate the nondelegation doctrine), *vacated sub nom. on other grounds Leal v. Becerra*, No. 21-10302, 2022 WL 2981427 (5th Cir. July 27, 2022). The evidence shows that Congress delineated a general policy to guide the agency action.

Second, Congress has clearly delineated the public agencies to apply that policy. The statute explicitly names the agency responsible for each type of directive: PSTF recommends preventive services that have an "A" or "B" rating; ACIP recommends immunizations; HRSA recommends preventive care and screenings for infants, children, and adolescents; and HRSA also recommends additional preventive care and screenings for women. 42 U.S.C. § 300gg-13(a). No party disputes that Congress clearly identified the agency responsible for the decisionmaking.

Third, Congress limited the authority it delegated. Start with PSTF. Section 300gg-13(a)(1) requires that the "items or services" be "evidence-based" and "have

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the achievement of optimal health services for the people of the United States." Health Resources Administration, 39 Fed. Reg. 1,456 (Jan. 9, 1974). In 1982, the HHS Secretary consolidated HSA and HRA into the modern HRSA. *See* Health Resources and Services Administration; Statement of Organization, Functions, and Delegations of Authority, 47 Fed. Reg. 38,409 (Aug. 31, 1982).

in effect a rating of 'A' or 'B' in the current recommendations of [PSTF]." Congress provided further instructions on how PSTF is to develop its recommendations: the agency must "review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services." *Id.* § 299b-4(a)(1). Likewise, ACIP's authority is limited to "immunizations." *Id.* § 300gg-13(a)(2). HRSA's authority is split into two categories: First, "with respect to infants, children, and adolescents," HRSA's "preventive care and screenings" must be "evidence-informed" and provided for in their "comprehensive guidelines." *Id.* § 300gg-13(a)(3). Second, "with respect to women," HRSA's "preventive care and screenings" not covered by PSTF must also be provided for in their "comprehensive guidelines." *Id.* § 300gg-13(a)(4). Congress has demarcated the boundaries of agency decisionmaking in the statute.

Plaintiffs recognize that the agencies' discretion is bounded, but they argue that Congress did not provide an intelligible principle within those boundaries. "Limiting the scope of HRSA's powers to 'preventive care and screenings,' for example, does nothing to provide guidance when HRSA is deciding *which* 'preventive care' and *which* 'screenings' will be covered." Pls.' Summ. J. Br. 31, ECF No. 45. But the Fifth Circuit has all but foreclosed the distinction between boundaries and principles, upholding even a delegation of the power to "deem" which tobacco products should be subject to various mandates because Congress had cabined the delegation to narrow categories. *Big Time Vapes*, 963 F.3d at 443-45. Plaintiffs do not address *Big Time Vapes*.

A brief note is appropriate on *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), which the Fifth Circuit released during the parties' briefing. The panel in *Jarkesy* held that Congress violated the nondelegation doctrine when it gave the Securities and Exchange Commission unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency. *Id.* at 459. The panel held that the decision to bring an action in an agency tribunal instead of in an Article III court is legislative in nature. *Id.* at 461-62 (citing *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). The panel then held that Congress's delegation of that legislative authority lacked an intelligible principle because "Congress offered *no guidance* whatsoever." *Id.* at 462. Even the agency agreed that Congress had "given it exclusive authority and absolute discretion to decide whether to bring securities fraud enforcement actions within the agency instead of in an Article III court." *Id.* at 462. This case, however, is not one in which Congress has offered "no guidance." Congress's guidance may be minimal, and the power conferred may be significant. But the authority granted to the agencies falls within the constitutional parameters outlined by the Supreme Court and the Fifth Circuit.

Plaintiffs' nondelegation argument relies almost entirely on the majority's reflections on HRSA in *Little Sisters of the Poor*. "The Court might well decide—perhaps soon—to reexamine or revive the nondelegation doctrine. But we are not supposed to read tea leaves to predict where it might end up." *Big Time Vapes*, 963 F.3d at 447 (cleaned up). The Court thus **GRANTS** summary judgment in favor of Defendants as to Claim 2 of Plaintiffs' Amended Complaint.

E. Religious Freedom Restoration Act

Plaintiffs claim that the PrEP mandate violates RFRA.[10] This Section resolves only Braidwood's claim as to the PrEP mandate. The Court will take further briefing on the scope of the relief, standing of the other Plaintiffs, and the other Plaintiffs' RFRA claims.

RFRA generally prohibits the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). To claim protection under RFRA, Braidwood "must show that (1) the relevant religious exercise is grounded in a sincerely held religious belief and (2) the government's action or policy substantially burdens that exercise by, for example, forcing [Braidwood] to engage in conduct that seriously violates [its] religious beliefs." *Ali v. Stephens*, 822 F.3d 776, 782-83 (5th Cir. 2016) (cleaned up). If Braidwood carries that burden, the government "*may* substantially burden a person's exercise of religion *only if* it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (emphases added).

The PrEP mandate substantially burdens the religious exercise of Braidwood's owners. Braidwood is a for-profit corporation owned by Steven Hotze. Pls.' App. 69, ECF No. 46. Hotze objects to providing coverage for PrEP drugs because he believes that (1) the Bible is "the authoritative and inerrant word of God," (2)

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[10] Plaintiffs narrowed their RFRA claim to the PrEP mandate. *See supra* note 3.

the "Bible condemns sexual activity outside marriage between one man and one woman, including homosexual conduct," (3) providing coverage of PrEP drugs "facilitates and encourages homosexual behavior, intravenous drug use, and sexual activity outside of marriage between one man and one woman," and (4) providing coverage of PrEP drugs in Braidwood's self-insured plan would make him complicit in those behaviors. *Id.* at 72. Yet the ACA *requires* Braidwood to provide coverage for PrEP drugs. *See* 26 U.S.C. § 4980H(c)(2); 42 U.S.C. § 300gg-13(a)(1); 45 C.F.R. § 147.130(b)(1). If Braidwood does not provide coverage for PrEP drugs, it faces a substantial monetary penalty. *See* 26 U.S.C. §§ 4980D, 4980H. It is well established—and Defendants do not contest—that putting employers to this choice imposes a substantial burden on religious exercise. *See Hobby Lobby Stores*, 573 U.S. at 725-26.

Rather than disputing the law, Defendants dispute Hotze's beliefs. They argue that Hotze's claim that PrEP drugs facilitate various kinds of behavior is an empirical one that requires factual support. *See* Defs.' Summ. J. Br. 66-67, ECF No. 64. But Defendants inappropriately contest the *correctness* of Hotze's beliefs, when courts may test only the *sincerity* of those beliefs. The Supreme Court has "made it abundantly clear that, under RFRA, [HHS] must accept the sincerely held complicity-based objections of religious entities." *Little Sisters of the Poor*, 140 S. Ct. at 2383. Defendants may not "tell the plaintiffs that their beliefs are flawed" because the connection between the morally objectionable conduct and complicity in the conduct "is simply too attenuated." *Hobby Lobby Stores*, 573 U.S. at 723-24. In other words, "[i]f an employer has a religious objection to the use of a covered contraceptive, and if the em-

ployer has a sincere religious belief that compliance with the mandate makes it complicit in that conduct, then RFRA requires that the belief be honored." *Little Sisters of the Poor*, 140 S. Ct. at 2390 (Alito, J., concurring).

Braidwood has shown that the PrEP mandate substantially burdens its religious exercise. The burden thus shifts to Defendants to show that the PrEP mandate furthers a compelling governmental interest and is the least restrictive means of furthering that interest. Defendants have not carried that burden.

1. Defendants have not shown that the PrEP mandate furthers a compelling governmental interest.

Defendants claim a compelling interest in reducing the spread of HIV, a potentially fatal infectious disease. *See* Defs.' Summ. J. Br. 68, ECF No. 64. PrEP drugs reduce the risk of getting HIV from sex by about 99%, and from injection drug use by about 74%. Defs.' App. 385, ECF No. 65. And because HIV is a contagious disease, the benefits of PrEP use by a portion of the population extend to the broader public. *See id.* 385-86. PrEP prescriptions can be expensive, costing as much as $20,000 per year. *Id.* at 387. Defendants argue that the PrEP mandate is a cost-effective solution at inhibiting the spread of HIV. Braidwood does not dispute the government's compelling interest in preventing the spread of infectious disease, the severity of HIV, or the effectiveness of PrEP drugs. *See* Pls.' Resp. Br. 46, ECF No. 74.

But Defendants frame the interest too broadly. "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through applica-

tion of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). That requires courts "to look to the marginal interest" in enforcing the government mandate in similar cases. *Hobby Lobby Stores*, 573 U.S. at 727.

As an initial matter, Defendants' argument is at odds with their insistence that the PrEP mandate is merely a "recommendation." *See supra* Section III.B.2. Defendants claim a compelling interest in forcing employers to cover PrEP drugs in their insurance policies. But Congress did not reflect that interest in the ACA. Instead, Congress reflected an interest in compelling coverage for whatever PSTF happens to recommend as having an "A" or "B" rating. 42 U.S.C. § 300gg-13(a)(1). PSTF, meanwhile, "does not articulate the position of the United States government," and is entirely agnostic on what services insurance policies ought to cover. Defs.' Summ. J. Br. 15, ECF No. 64. In fact, PSTF recommends PrEP drugs only "to persons who are at high risk of HIV acquisition." Pls.' App. 12, ECF No. 46. Neither Congress nor PSTF expressed the compelling interest that Defendants now put forward. *See Little Sisters of the Poor*, 140 S. Ct. at 2392 (Alito, J., concurring) ("We can answer the compelling interest question simply by asking whether *Congress* has treated the provision of free contraceptives to all women as a compelling interest.").

More importantly, Defendants do not show a compelling interest in forcing private, religious corporations to cover PrEP drugs with no cost-sharing and no religious exemptions. Defendants provide no evidence of the

scope of religious exemptions, the effect such exemptions would have on the insurance market or PrEP coverage, the prevalence of HIV in those communities, or any other evidence relevant "to the marginal interest" in enforcing the PrEP mandate in these cases. *Hobby Lobby Stores*, 573 U.S. at 727. Moreover, the ACA's exemptions for grandfathered plans[11] and employers with fewer than fifty employees[12] undermines Defendants' claim of the "critical importance of reducing barrier to PrEP access." Defs.' Summ. J. Br. 70, ECF No. 64; *see Fulton v. City of Phila.*, 141 S. Ct. 1868, 1882 (2021). Defendants outline a generalized policy to combat the spread of HIV, but they provide no evidence connecting that policy to employers such as Braidwood, nor do they provide evidence distinguishing potential religious exemptions from existing secular exemptions. Thus, Defendants have not carried their burden to show that the PrEP mandate furthers a compelling governmental interest.

2. Defendants have not shown that the PrEP mandate is the least restrictive means of furthering their stated interest.

Even if Defendants had satisfied the compelling-interest prong, they have not shown that the PrEP mandate is the least restrictive means of furthering that interest. "The least-restrictive-means standard is exceptionally demanding. . . . " *Hobby Lobby Stores*, 573 U.S. at 728. Regarding the contraceptive mandate, the Supreme Court held that the "most straightforward way" of ensuring access to contracep-

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[11] 42 U.S.C. § 18011(a).

[12] 26 U.S.C. § 4980H.

tives "would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Id.* Likewise, Defendants have not shown that the government would be unable to assume the cost of providing PrEP drugs to those who are unable to obtain them due to their employers' religious objections.

Defendants' only response is that Braidwood waived this argument by not providing evidence of this proposed alternative in discovery. *See* Defs.' Summ. J. Br. 70, ECF No. 64. But Defendants, not Plaintiffs, bear the burden of demonstrating that applying the PrEP mandate to Braidwood "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Holt v. Hobbs*, 574 U.S. 352, 365 (2015) (citation and internal quotation marks omitted) (interpreting the Religious Land Use and Institutionalized Persons Act). Defendants have not demonstrated that the PrEP mandate is the least restrictive means of furthering their articulated interest. The Court thus **GRANTS** summary judgment in favor of Braidwood as to Claim 5 of Plaintiffs' Amended Complaint. The Court reserves ruling on Claim 5 as to the remaining Plaintiffs.

IV. CONCLUSION

Braidwood has standing to pursue its claims, so the Court is able to resolve most of the issues in this case. Accordingly, the Court rules as follows:

1) PSTF violates the Appointments Clause. The Court **GRANTS** Plaintiffs' summary judgment motion and **DENIES** Defendants' summary judgment motion on Claim 1 as to 42 U.S.C. § 300gg-13(a)(1). The Court reserves ruling on the appropriate remedy.

2) HRSA and ACIP do not, on this record, violate the Appointments Clause. The Court **DENIES** Plaintiffs' summary judgment motion and **GRANTS** Defendants' summary judgment motion on Claim 1 as to 42 U.S.C. § 300gg-13(a)(2) through (a)(4). The Court thus **DISMISSES** Claim 1 as to 42 U.S.C. § 300gg-13(a)(2) through (a)(4).

3) PSTF does not violate Article II's Vesting Clause. The Court **DENIES** Plaintiffs' summary judgment motion and **GRANTS** Defendants' summary judgment motion on Claim 3. The Court thus **DISMISSES** Claim 3.

4) The preventive services provisions do not violate the nondelegation doctrine. The Court **DENIES** Plaintiffs' summary judgment motion and **GRANTS** Defendants' summary judgment motion on Claim 2. The Court thus **DISMISSES** Claim 2.

5) The PrEP mandate violates Braidwood's rights under RFRA. The Court **GRANTS** Plaintiffs' summary judgment motion and **DENIES** Defendants' summary judgment motion on Claim 5 as to Braidwood. The Court reserves ruling on Claim 5 as to the remaining Plaintiffs and reserves ruling on the appropriate remedy.

6) The parties indicated they would file supplemental briefing on the scope of relief, standing for the re-

maining Plaintiffs as it relates to the scope of relief, and the claims relating to the contraceptive mandate. The parties shall file a joint status report by **September 9, 2022**, outlining the remaining issues to be decided and proposing a schedule for the remaining briefing.

SO ORDERED this **7th day** of **September, 2022**.

/s/ REED O'CONNOR
REED O'CONNOR
UNITED STATES DISTRICT JUDGE

APPENDIX D

1. U.S. Const. Art. II, § 2 provides:

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

2. 42 U.S.C. 299b-4 provides:

Research supporting primary care and access in underserved areas

(a) Preventive Services Task Force

(1) Establishment and purpose

The Director shall convene an independent Preventive Services Task Force (referred to in this subsection as the "Task Force") to be composed of individuals with appropriate expertise. Such Task Force shall review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community, and updating previous clinical preventive recommendations, to be published in the Guide to Clinical Preventive Services (referred to in this section as the "Guide"), for individuals and organizations delivering clinical services, including primary care professionals, health care systems, professional societies, employers, community organizations, non-profit organizations, Congress and other policy-makers, governmental public health agencies, health care quality organizations, and organizations developing national health objectives. Such recommendations shall consider clinical preventive best practice recommendations from the Agency for Healthcare Research and Quality, the National Institutes of Health, the Centers for Disease Control and Prevention, the Institute of Medicine, specialty medical associations, patient groups, and scientific societies.

(2) Duties

The duties of the Task Force shall include—

(A) the development of additional topic areas for new recommendations and interventions related to those topic areas, including those related to specific sub-populations and age groups;

(B) at least once during every 5-year period, review[1] interventions and update[2] recommendations related to existing topic areas, including new or improved techniques to assess the health effects of interventions;

(C) improved integration with Federal Government health objectives and related target setting for health improvement;

(D) the enhanced dissemination of recommendations;

(E) the provision of technical assistance to those health care professionals, agencies and organizations that request help in implementing the Guide[3] recommendations; and

(F) the submission of yearly reports to Congress and related agencies identifying gaps in research, such as preventive services that receive an insufficient evidence statement, and recommending priority areas that deserve further examination, including areas related to populations and

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[1] So in original. Probably should be "review of".

[2] So in original. Probably should be "updating of".

[3] So in original. Probably should be "Guide's".

age groups not adequately addressed by current recommendations.

(3) Role of Agency

The Agency shall provide ongoing administrative, research, and technical support for the operations of the Task Force, including coordinating and supporting the dissemination of the recommendations of the Task Force, ensuring adequate staff resources, and assistance to those organizations requesting it for implementation of the Guide's recommendations.

(4) Coordination with Community Preventive Services Task Force

The Task Force shall take appropriate steps to coordinate its work with the Community Preventive Services Task Force and the Advisory Committee on Immunization Practices, including the examination of how each task force's recommendations interact at the nexus of clinic and community.

(5) Operation

Operation.[4] In carrying out the duties under paragraph (2), the Task Force is not subject to the provisions of chapter 10 of title 5.

(6) Independence

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

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[4] So in original.

(7) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary for each fiscal year to carry out the activities of the Task Force.

(b) Primary care research

(1) In general

There is established within the Agency a Center for Primary Care Research (referred to in this subsection as the "Center") that shall serve as the principal source of funding for primary care practice research in the Department of Health and Human Services. For purposes of this paragraph, primary care research focuses on the first contact when illness or health concerns arise, the diagnosis, treatment or referral to specialty care, preventive care, and the relationship between the clinician and the patient in the context of the family and community.

(2) Research

In carrying out this section, the Center shall conduct and support research concerning—

(A) the nature and characteristics of primary care practice;

(B) the management of commonly occurring clinical problems;

(C) the management of undifferentiated clinical problems; and

(D) the continuity and coordination of health services.

3. 42 U.S.C. 300gg-13 provides:

Coverage of preventive health services

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

(1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;

(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and 1

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[1]

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[2]

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current

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[1] So in original. The word "and" probably should not appear.

[2] So in original. The period probably should be a semicolon.

recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009.

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

(b) Interval

(1) In general

The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) or (a)(2) or a guideline under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.

(2) Minimum

The interval described in paragraph (1) shall not be less than 1 year.

(c) Value-based insurance design

The Secretary may develop guidelines to permit a group health plan and a health insurance issuer offering group or individual health insurance coverage to utilize value-based insurance designs.