No. 24-475

In the Supreme Court of the United States

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

v.

XAVIER BECERRA, ET AL.

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

REPLY BRIEF FOR CONDITIONAL CROSS-PETITIONERS

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In *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657 (2020), a majority of this Court criticized 42 U.S.C. § 300gg-13(a)(4) for conferring "virtually unbridled discretion" upon the Health Resources and Services Administration. *Little Sisters*, 591 U.S. at 676. Yet the Court declined to rule on the constitutionality of the statute because "no party ha[d] pressed a constitutional challenge to the breadth of the delegation involved." *Id.* at 679.

The conditional cross-petition squarely presents the nondelegation claim that the parties in *Little Sisters* failed to raise, and the Solicitor General does not deny that the nondelegation claim is cleanly presented and

does not identify any vehicle problems or other issues that might prevent the Court from reaching the constitutional issues that it identified in *Little Sisters*. Instead, the Solicitor General's arguments against certiorari rely on the absence of a circuit split as well as this Court's longstanding reluctance to enforce the nondelegation doctrine. But none of that warrants denial of the conditional cross-petition when the Solicitor General is asking this Court to review the constitutionality of 42 U.S.C. § 300gg-13(a)(1)–(4)—and when this Court has previously expressed concerns that 42 U.S.C. § 300gg-13(a)(4) might transgress constitutional boundaries on Congress's ability to delegate lawmaking powers to administrative agencies. If the Court grants the Solicitor General's petition on the Appointments Clause issues, then it should grant the conditional cross-petition and allow the parties to argue the full panoply of constitutional issues raised by 42 U.S.C. § 300gg-13(a)(1)–(4).

REPLY TO THE SOLICITOR GENERAL'S STATEMENT

The Solicitor General's description of the history of the U.S. Preventive Services Task Force, the Advisory Committee on Immunization Practices (ACIP), and the Health Resources and Services Administration (HRSA) is mostly accurate. *See* Opp. at 3–6. But it neglects to mention that these agencies exercised an advisory role before the enactment of the Affordable Care Act, so none of their pre-ACA practices implicate the nondelegation

doctrine or the Appointments Clause[1]—and none of the agencies' pre-ACA activities can validate the powers that 42 U.S.C. § 300gg-13(a)(1)–(4) confers upon them. Before the ACA, their "recommendations" and "guidelines" really were recommendations and guidelines, as they did not bind private insurers or compel anyone to cover any of the agency-endorsed preventive care. Agencies do not wield lawmaking powers when issuing non-binding advice, and the constitutional issues arose only because the ACA gave binding legal force to the agencies' "recommendations" and "guidelines." No one is challenging the agencies' prerogatives to *recommend* coverage of preventive care, as they did before the enactment of the ACA. And neither the Appointments Clause nor the nondelegation claims will undo or threaten the progress that the agencies' non-binding recommendations and guidelines produced before the ACA, which the Solicitor General describes and lauds throughout her brief. *See* Opp. at 3–6; *id.* at 12–15.

The Solicitor General is not challenging the plaintiffs' standing to assert the nondelegation claims, yet she makes insinuations that call the plaintiffs' Article III standing into question. The Solicitor General notes, for example, that five of the six cross-petitioners "do not

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1. *See* Walter Dellinger, *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 U.S. Op. Off. Legal Counsel 208, 216 (1995) ("[M]embers of a commission that has purely advisory functions need not be officers of the United States because they possess no enforcement authority or power to bind the Government." (citation and internal quotation marks omitted)).

currently participate in the health care market,"[2] and that Braidwood "is the only cross-petitioner that currently participates in the health insurance market."[3] But only one plaintiff needs Article III standing, so the remaining cross-petitioners' non-participation in the health-insurance market does nothing to affect the certworthiness of the nondelegation claim. *See Biden v. Nebraska*, 600 U.S. 477, 489 (2023) ("If at least one plaintiff has standing, the suit may proceed."); *Little Sisters*, 591 U.S. at 674 n.6.

The Solicitor General also notes that Braidwood "does not allege . . . that any of its employees have ever sought coverage for PrEP medications." Opp. at 7. But Braidwood is suffering Article III injury from the mere requirement to provide objectionable coverage in its self-insured plan, regardless of whether its employees have sought this coverage. Hobby Lobby was not required to allege or prove that its employees would use abortifacient contraception and bill its self-insured plan for these drugs. The mere requirement to provide the coverage is what burdened the company's religious beliefs and inflicted injury in fact. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014) ("By requiring the Hahns and Greens and their companies to *arrange for such coverage*, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs." (emphasis added)); *see also Wheaton College v. Burwell*, 573 U.S. 958 (2014) (granting relief to employer that had

2. Opp. at 6 (citation and internal quotation marks omitted).
3. Opp. at 7.

"religious objections to providing *coverage* for contraceptive services," without requiring proof that its employees would use the objectionable contraception (emphasis added)). The requirement to underwrite coverage inflicts injury because Braidwood's owner wants his self-insured plan to exclude coverage that he finds objectionable, and section 300gg-13(a) deprives him of that option.[4] That alone confers standing because it limits Braidwood's authority to decide the contents of its self-insured plan and the coverage that it will offer.

Finally, the Solicitor General is wrong to say that "[a]ll three entities are supervised and directed by the HHS Secretary." Opp. at 3. Federal law shields the Task Force members and their recommendations from supervision and direction by others. *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."); Pet. App. 23a ("[T]he statutory scheme . . . 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."). The United States also conceded in the district court that 42 U.S.C. § 299b-4(a)(6) prohibits the Secretary from directing the Task Force to confer "A" or "B" ratings on particular preventive services:

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

> [T]he Secretary may not, consistent with [42 U.S.C.] § 299b-4(a)(6), direct that the [U.S. Preventive Services Task Force] 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).

App. 3a (internal quotation marks omitted). The Solicitor General cannot turn around and tell this Court that the Task Force is "supervised and directed by the HHS Secretary" when the government has acknowledged that 42 U.S.C. § 299b-4(a)(6) *prohibits* the Secretary from directing the Task Force and its "recommendations."

ARGUMENT

If the Court grants certiorari to review the plaintiffs' Appointments Clause challenge to the Task Force and its preventive-care coverage edicts, then it should grant certiorari on the nondelegation issue as well. The Appointments Clause and the nondelegation doctrine serve similar aims by ensuring that laws and policies are made by politically accountable actors. *See* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 Stan. L. Rev. 1557, 1560–63 (2003) (explaining how the Appointments Clause and the nondelegation doctrine "limit delegations of authority"); John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. Pa. L. Rev. 1673, 1716 (2000) ("[T]he nondelegation doctrine reinforces the limitations imposed by the Appointments Clause"). And the nondelegation issue is equally certworthy—if not more so—because this Court has already questioned the constitutionality of 42

U.S.C. § 300gg-13(a)(4) and practically invited a nondelegation challenge to the statute. *See Little Sisters*, 591 U.S. at 676–79. Several members of this Court have also expressed interest in revisiting the exceedingly deferential approach that this Court has taken toward congressional delegations of lawmaking authority. *See Gundy v. United States*, 588 U.S. 128, 149 (2019) (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); *id.* at 149–79 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) (criticizing the Court's use of "the intelligible principle 'test'" and proposing three factors to distinguish constitutionally permissible delegations from impermissible ones). Given that members of this Court have not only expressed interest in revisiting the nondelegation doctrine but specifically called out 42 U.S.C. § 300gg-13(a)(4) for its standardless delegation of authority, it would be incongruous for the Court to shut out all consideration of the nondelegation issues if it decides to grant certiorari on the Appointments Clause claim.

The Solicitor General nonetheless recommends that the Court deny the cross-petition because she claims that 42 U.S.C. § 300gg-13(a) "is fully consistent with this Court's nondelegation decisions." Opp. at 12. And the Solicitor General is certainly correct to observe that the past decisions of this Court have shown extraordinary deference to congressional statutes that confer lawmaking powers on agencies and other regulatory bodies. Opp. at 11–12. The Court has, for example, approved statutes that authorize agencies to regulate "in the pub-

lic interest,"[5] declaring that (and similar phrases) sufficient to provide the "intelligible principle" needed to ward off a nondelegation challenge. And only twice has this Court declared an act of Congress unconstitutional under the nondelegation doctrine—and both decisions occurred in the same year. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). In the words of Professor Sunstein, the nondelegation doctrine "has had one good year, and [235] bad ones." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000).

But none of these observations should defeat certiorari because at least four members of the Court have shown interest in revisiting this approach and subjecting congressional delegations of lawmaking power to more searching judicial scrutiny. *See Gundy*, 588 U.S. at 148–49 (Alito, J., concurring in the judgment); *id.* at 149–79 (Gorsuch, J., dissenting); *Little Sisters*, 591 U.S. at 676–79. Our argument for certiorari is based on the professed willingness of this Court's members to reinvigorate the nondelegation doctrine, and the Solicitor General does not defeat this argument by claiming that the lower court's disposition comports with the status quo regime. Many times this Court grants certiorari when it wants to reconsider or modify existing doctrine, and it does so even when the lower court's ruling is consistent with or dictated by the then-existing precedent of this Court.

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5. *National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943).

See, e.g., *Loper Bright v. Raimondo*, 143 S. Ct. 2429 (2023); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 142 S. Ct. 895 (2022); *Dobbs v. Jackson Women's Health Organization*, 141 S. Ct. 2619 (2021); *Obergefell v. Hodges*, 574 U.S. 1118 (2015); *Shelby County v. Holder*, 568 U.S. 1006 (2012); *Lawrence v. Texas*, 537 U.S. 1044 (2002).

It is also far from clear that the statutory delegations in 42 U.S.C. § 300gg-13(a)(1)–(4) contain the "intelligible principle" required by existing doctrine. The Solicitor General insists that "Congress provided intelligible principles to guide the relevant entities' exercise of discretion in recommending preventive services." Opp. at 12. But there is nothing *in the statute* that instructs or guides the agencies' discretion in this regard. The Solicitor General notes, for example, that 42 U.S.C. § 300gg-13(a)(1) "requires coverage for 'evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the' Task Force." Opp. at 12. Yet there is nothing in 42 U.S.C. § 300gg-13(a)(1) (or any other statute) that provides *any* guidance to the Task Force on whether a preventive service should receive an "A" or "B" designation. The Task Force has carte blanche in terms of the letter ratings that it assigns, and nothing in federal law provides *any* criteria for distinguishing an A- or B-rated service from other types of preventive care.

The Solicitor General tries to get around this problem by touting 42 U.S.C. § 299b-4, which provides (in relevant part):

> [T]he 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.

42 U.S.C. § 299b-4(a)(1); Opp. at 12 (quoting this language). But this statute says nothing about which preventive services should receive "A" or "B" ratings from the Task Force, nor does it supply a principle for the Task Force to use when distinguishing A- or B-rated services from everything else. The idea that the Task Force would even issue letter ratings is unmentioned in the U.S. Code, and the letter-grading system was created entirely by the Task Force without congressional direction or instruction. There cannot be an "intelligible principle" for assigning "A" and "B" ratings when the relevant statutes do not even mention or acknowledge the existence of a letter-grading system.

The Solicitor General claims that the Task Force has supplied an "intelligible principle" for its assignments of letter grades, and that the Task Force has used its self-imposed principles to guide its discretion when deciding whether to tag a preventive service with an "A" or "B" rating.[6] On its website, the Task Force explains the crite-

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6. *See* Opp. at 12–13 ("The Task Force issues 'A' recommendations for services that have a high certainty of a substantial net benefit, and 'B' recommendations for services that have at least a moderate certainty of a moderate net benefit.").

ria that it has established for each of the five letter grades that it issues:

What the Grades Mean and Suggestions for Practice

Grade	Definition
A	The USPSTF recommends the service. There is high certainty that the net benefit is substantial.
B	The USPSTF recommends the service. There is high certainty that the net benefit is moderate or there is moderate certainty that the net benefit is moderate to substantial.
C	**Note: The following statement is undergoing revision.** Clinicians may provide this service to selected patients depending on individual circumstances. However, for most individuals without signs or symptoms there is likely to be only a small benefit from this service.
D	The USPSTF recommends against the service. There is moderate or high certainty that the service has no net benefit or that the harms outweigh the benefits.
I	The USPSTF concludes that the current evidence is insufficient to assess the balance of benefits and harms of the service. Evidence is lacking, of poor quality, or conflicting, and the balance of benefits and harms cannot be determined.

See http://bit.ly/3Zu8eUX [[https://perma.cc/3J8B-P23Z]] (last visited Dec. 7, 2024). But the "intelligible principle"

must appear in the *statute* that delegates lawmaking authority, and an agency cannot "cure" a standardless delegation of power by creating its own "intelligible principle" or announcing self-imposed constraints on its delegated authority. *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001).

The Solicitor General also suggests that 42 U.S.C. § 300gg-13(a)(1) somehow "incorporates" the "standards" that the Task Force has been using when deciding whether to issue letter ratings, thereby codifying the "extant standards" that appear on the Task Force's website. *See* Opp. at 12–13. That is simply false; there is nothing in the statute that prevents the Task Force from changing its criteria for issuing an "A" or "B" rating, or from inverting its letter-rating system and using "A" and "B" to describe preventive services that *lack* rather than offer net benefits. The statute is entirely silent on how the letter ratings should be assigned, and it gives the Task Force total discretion to choose the criteria for distinguishing an A- or B-rated service from the remaining categories of preventive care. Finally, 42 U.S.C. § 300gg-13(a)(1)'s reference to "evidence-based" items and services does nothing to define the "A" and "B" categories or provide an "intelligible principle" for deciding what should be included or excluded from these groupings.

The Solicitor General is equally wrong to claim that 42 U.S.C.§ 300gg-13(a)(2)–(4) "incorporates" and codifies the preexisting "process" and practices at ACIP and HRSA. *See* Opp. at 13–14. ACIP and HRSA can change their processes and practices without violating 42 U.S.C.§ 300gg-13(a) or any other federal statute. And

nothing in 42 U.S.C. § 300gg-13(a) supplies any principle (let alone an "intelligible" principle) for deciding *which* immunizations and preventive care or screenings should appear in the "recommendations" and "guidelines" issued by ACIP and HRSA.

The Solicitor General's remaining arguments against certiorari fare no better. She criticizes our cross-petition for containing "hardly any argument as to why Sections 300gg-13(a)(1), (a)(2), and (a)(3) are unconstitutional." Opp. at 10. But a certiorari petition needs only to show that an issue is worthy of the Court's consideration; a litigant is not required or expected to argue the merits at the petition stage. And the absence of a circuit split should not defeat certiorari when *Little Sisters* invites a nondelegation challenge to 42 U.S.C. § 300gg-13(a)(4) and when numerous justices have expressed interest in revisiting the Court's approach to nondelegation.

Finally, the recent grant of certiorari in *FCC v. Consumers' Research*, No. 24-354, supports certiorari on the cross-petition, as the resolution of *Consumers' Research* will likely have implications for the nondelegation claims in this case, and it would be awkward (if not untenable) to hold the cross-petition for *Consumers' Research* if the Court grants the Solicitor General's petition on the Appointments Clause claims.

CONCLUSION

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

Respectfully submitted.

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December 9, 2024

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APPENDIX

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

JOHN KELLEY, *et al.*, Plaintiffs, v. XAVIER BECERRA, *et al.*, Defendants.	Civil Action No. 4:20-cv-00283-O

DEFENDANTS' SUPPLEMENTAL FILING REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT

At the July 26, 2022 hearing on the parties' cross-motions for summary judgment, the Court asked the undersigned whether the Secretary of Health and Human Services (the "Secretary") can "override a nonrecommendation" of or, in other words, impose a coverage requirement under 42 U.S.C. § 300gg-13 absent a prior recommendation of, any of the three entities referenced in subsection (a) of that statute.[1] The undersigned

1. The three entities are the United States Preventive Services Task Force ("PSTF"), the Advisory Committee on Immuniza-
(continued…)

agreed to respond in writing after confirming with Defendant agencies. Defendants hereby respond as follows:

1. **HRSA:** Yes, the Secretary is empowered 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), pursuant to his authority over the Public Health Service of the United States, see, for example, 42 U.S.C. § 202 and Reorganization Plan No. 3 of 1966, 31 Fed. Reg. 8855 (June 25, 1966), 5 U.S.C. app. 1. See also Defs.' Br. in Supp. of Resp. ("Cross-Mot.") at 5–6, 29, ECF No. 64; Defs.' Reply at 23–25, ECF No. 83.

2. **ACIP:** Yes, the Secretary is empowered to direct ACIP's recommendation of specific vaccines such that those recommendations directed by the Secretary take "effect" pursuant to 42 U.S.C. § 300gg-13(a)(2). Moreover, unlike with respect to the preventive services considered by the PSTF and HRSA, federal law does not permit ACIP to decline to issue a recommendation regarding any licensed vaccine or indication for a vaccine. ACIP is required by law to consider the use of any vaccine at ACIP's next scheduled meeting after "the licensure of [that] vaccine or any new indication for [that] vaccine [if the vaccine was previously licensed for a different indication]," and at a minimum provide a report on the status of its review if there is not sufficient time to make a recommendation between licensure and that meeting. 21st Century Cures Act, Pub. L. No. 114-255, § 3091, 130 Stat. 1033, 1149-50 (Dec. 13, 2016) (attached as Exhibit A hereto). Accordingly, there should be no licensed vaccines or vaccine uses as to which ACIP de-

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tion Practices ("ACIP"), and the Health Resources and Services Administration ("HRSA").

clines to issue a recommendation. However, if for some reason ACIP were to decline to issue a recommendation for a particular licensed vaccine or use of a vaccine, ACIP's Designated Federal Officer, a federal employee selected by the CDC, could add consideration of that vaccine to the agency's next meeting agenda. *See* App'x to Defs' Br. ("App'x"), ECF No. 65 at APP 150.

At the conclusion of the meeting, the CDC Director (who acts under the Secretary's supervision and direction pursuant to his authority over the Public Health Service) is empowered to adopt or otherwise amend any recommendation or "nonrecommendation" made at ACIP's meeting. (Defendants provided an example of the CDC Director making a broader recommendation than ACIP's initial recommendation at footnote 26 on page 38 of their cross-motion.) It is this final "recommendation" adopted by the CDC Director that takes "effect" for purposes of 42 U.S.C. § 300gg-13(a)(2)'s coverage requirement. *See* App'x at APP 149 ("[U]nder provisions of the Affordable Care Act . . . immunization recommendations of [ACIP] that have been adopted by the [CDC Director] must be covered by applicable health plans."); *see also* 45 C.F.R. § 147.130(a)(1)(ii). The Secretary or CDC Director could also exercise their removal authority over recalcitrant ACIP members. *See* Cross-Mot. at 5 (noting that ACIP "[m]embers are selected by the Secretary . . . and . . . are removable at will").

3. **PSTF:** The Secretary may not, consistent with 42 U.S.C. § 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). *See* 42 U.S.C. § 299b-4(a)(6) ("All members of the [PSTF], and any recommendations made by such mem-

bers, shall be independent and, to the extent practicable, not subject to political pressure."). The Secretary could, however, remove members of the PSTF who were unwilling to provide an "A" or "B" rating to a particular service pursuant to his authority over the Public Health Service, in general, and the Agency for Healthcare Research and Quality ("AHRQ"), in particular. *See* 42 U.S.C. § 299(a) ("There is established within the Public Health Service an agency to be known as the Agency for Healthcare Research and Quality, which shall be headed by a director appointed by the Secretary. The Secretary shall carry out this subchapter acting through the Director."); 42 U.S.C. § 299b-4(a)(1) ("The [AHRQ] Director shall convene an independent Preventive Services Task Force . . . to be composed of individuals with appropriate expertise."); *see also* App'x at APP 067, § 1.5.1. As Defendants argued in their briefing, to the extent that the Court concludes that this restriction creates a problem under the Appointments Clause or Vesting Clause, the appropriate remedy is to hold 42 U.S.C. § 299b-4(a)(6)'s restriction on the Secretary's control over the PSTF unconstitutional in the context of the Preventive Services Provision, but otherwise uphold the Preventive Services Provision and the PSTF's recommendations. *See* Cross-Mot. at 47; Defs.' Reply at 27.

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