No. 24-316

In the Supreme Court of the United States

ROBERT F. KENNEDY, JR., SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

BRAIDWOOD MANAGEMENT, INC., ET AL.

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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The United States 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-coverage 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 Robert F. Kennedy, Jr., in his official capacity as Secretary of Health and Human Services; Scott Bessent, in his official capacity as Secretary of the Treasury; Vincent Micone, in his 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.

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* Secretary Kennedy, Secretary Bessent, and Acting Secretary Micone were substituted as parties for their predecessors in office pursuant to Rule 35.3 of the Rules of this Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 104 F.4th 930. The memoranda opinions and orders of the district court (Pet. App. 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 petition for a writ of certiorari was filed on September 19, 2024, and granted on January 10, 2025. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at App., *infra*, 1a-7a.

INTRODUCTION

The Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, ensures democratic accountability. A government official who exercises continuing, "significant authority pursuant to the laws of the United States" is an officer of the United States. *Lucia* v. *SEC*, 585 U.S. 237, 245 (2018) (citation omitted). And all officers who wield executive power on the President's behalf must operate within "a clear and effective chain of command" leading up to the President. *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 11 (2021) (quoting *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010)). The President must be able to hold all his subordinates fully accountable, and the President, in turn, is fully accountable to the People.

Officers who have the "power to render a final decision on behalf of the United States" and answer only to the President are principal officers. *Edmond* v. *United States*, 520 U.S. 651, 665 (1997). As such, they must be appointed by the President with the Senate's advice and consent—a method that holds both actors politically accountable for principal officers' ensuing decisions. *Id.* at 659-660. By contrast, inferior officers can also be appointed by "the President alone, * * * the Courts of Law, or * * * the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. The Framers afforded that more streamlined method of appointment to assuage concerns that such "offices" would "bec[o]me numerous, and sudden removals necessary." *Arthrex*, 594 U.S. at 12 (quoting *United States* v. *Germaine*, 99 U.S. 508, 510 (1879)).

But that method imposes adequate accountability only if principal officers continue to supervise inferior officers and retain ultimate responsibility for legally binding decisions.

This case turns on how to classify members of the United States Preventive Services Task Force (Task Force). The Task Force sits within the Public Health Service, which is itself a component of the Department of Health and Human Services (HHS). All agree that Task Force members are officers of some kind, because they exercise significant, continuing governmental authority. Specifically, they can make recommendations concerning preventive services that, by operation of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), health-insurance issuers and group health plans must cover without requiring cost sharing by patients. 42 U.S.C. 300gg-13(a)(1).

The question is whether Task Force members are validly appointed inferior officers, or instead principal officers whose appointments are unconstitutional because they are not presidentially appointed and Senate confirmed. The answer is straightforward: Task Force members are inferior officers, because the Secretary of HHS—a quintessential principal officer—remains responsible for final decisions about whether Task Force recommendations will be legally binding on insurance issuers and group health plans. The Secretary can remove Task Force members at will, for any reason—perhaps the most "powerful tool for control" of their conduct. *Edmond*, 520 U.S. at 664. And the Secretary can review the Task Force's preventive-services recommendations and decide to deny them legal force under the ACA *before* those recommendations have binding effect. Taken together, those controls give the

Secretary, not the Task Force, ultimate responsibility for whether Task Force recommendations become final, binding decisions. The Fifth Circuit's contrary ruling declaring the Task Force's structure unconstitutional erroneously dismissed both of those means of secretarial control, which create a chain of supervisory accountability through the Secretary to the President.

Even if the statutory framework meant that Task Force members were principal officers, the Appointments Clause violation would be cured by severing the provision that the court of appeals regarded as precluding principal-officer review of the Task Force's decisions. That is the cure that this Court chose in *Arthrex*. See 594 U.S. at 26. Yet the Fifth Circuit declined to follow that path, instead viewing the Task Force as unlawfully exercising governmental authority for nearly 15 years and barring the Task Force from continuing to exercise such authority absent new legislation. This Court should at a minimum reverse the severability holding and allow the Task Force to make recommendations that will have legal effect only under appropriate supervision by the Secretary.

STATEMENT

A. Legal Background

1. Since 1984, the Public Health Service within HHS has relied on the Task Force—a group composed of "nationally recognized non-Federal experts in prevention and evidence-based medicine"—to develop recommendations about preventive health services. J.A. 37. Preventive health 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.

In 1999, Congress codified the Task Force's role by expressly 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). Congress also 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).

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). As a threshold step, the Task Force "selects and prioritizes topics for review." D. Ct. Doc. 65, at 77 (Jan. 28, 2022). "Anyone," including "individuals" and "organizations," "can nominate a new topic for Task Force consideration." *Ibid.*

After the Task Force chooses a topic, creates a research plan, and reviews the evidence, the Task Force may formulate a "draft recommendation statement" for a particular preventive service. D. Ct. Doc. 65, at 81. The Task Force then posts the "draft recommendation statement," along with the relevant "evidence," on its website "for public comment." *Ibid.* "During the comment period, any member of the public may submit comments." *Ibid.* Based on those comments, the Task Force may "propose revisions to the recommendation." *Ibid.*

All Task Force members then vote on the final recommendation. See J.A. 50-51. If adopted, the Task Force posts the recommendation on its website. D. Ct. Doc. 65, at 81. The Task Force also publishes its recommendations "in the Guide to Clinical Preventive Services," a resource for medical professionals, Congress, and other policymakers. 42 U.S.C. 299b-4(a)(1).

With the 2010 enactment of the ACA, Congress for the first time provided that some of the Task Force's recommendations could have binding legal effects. Specifically, the ACA requires health-insurance issuers and group health plans to cover certain preventive services without imposing copayments, deductibles, or other cost-sharing charges on patients. 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 without cost sharing 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]

2. The applicable statutes enable secretarial control over the Task Force and the process by which its recommendations may become legally binding. The Secretary can appoint Task Force members and has appointed the 16 members currently serving on the Task Force.

[1] The Task Force issues "A" recommendations for services that it deems to 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. J.A. 45-46.

Secretary of HHS, *Ratification of Prior Appointment and Prospective Appointment: Appointment Affidavit* (June 28, 2023) (*Appointment Ratification*), https://perma.cc/8TAA-7AMN. Task Force members serve four-year terms. See J.A. 39. Significantly, the Secretary can remove them at will before the end of their term, because there are no statutory restrictions on a member's removal. See 42 U.S.C. 299b-4(a) (2018 & Supp. IV 2022).

The ACA also gives the Secretary other powers to supervise Task Force recommendations. The statute provides 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)(1). The minimum interval established by the Secretary "shall not be less than 1 year." 42 U.S.C. 300gg-13(b)(2). Under current regulations, the interval for most recommendations is one year. See 45 C.F.R. 147.130(b)(1).

In addition, Congress has vested the Secretary with significant supervisory authority over the Public Health Service, which includes AHRQ and the Task Force. In Reorganization Plan No. 3 of 1966, 80 Stat. 1610 (Reorganization Plan), "all functions of the Public Health Service" and of its "officers," "employees," and "agencies" were transferred to the Secretary, § 1(a), 80 Stat. 1610; see Act of Oct. 19, 1984, Pub. L. No. 98-532, 98 Stat. 2705 (ratifying the Reorganization Plan as law). Congress has also empowered the Secretary 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. Reorganization Plan § 2, 80 Stat. 1610. The Secretary is further 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).

B. The Present Controversy

1. The Task Force's current "A" and "B" recommendations—which the Secretary has allowed to take effect and has since expressly ratified—cover more than 50 preventive services. U.S. Preventive Servs. Task Force, *A & B Recommendations*, https://perma.cc/8398-UNHV. 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 stroke; physical therapy to prevent falls by older adults; and eye ointment to prevent blindness-causing infections in newborns. *Ibid.* Since 2010, millions of Americans have received coverage for such preventive services without cost sharing. See J.A. 62.

Respondents are four individuals and two small businesses that object to the requirement that health-insurance issuers and group health plans cover certain preventive services. Pet. App. 7a. Five of the six respondents "do not currently participate in the health care market." *Id.* at 62a; see D. Ct. Docs. 111-1, ¶ 5, 111-2, ¶¶ 5-6, 111-3, ¶ 5 (Jan. 6, 2023). They object on religious grounds to the ACA's requirement that issuers and plans cover certain HIV-prevention medications for which the Task Force has issued an "A" recommendation that has taken effect. Pet. App. 7a-8a. And they wish to purchase or provide health insurance that excludes coverage for such medications consistent with their faiths. *Ibid.*

Braidwood Management is the only respondent that currently participates in the health-insurance market. Pet. App. 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 certain HIV-prevention medications and to "impose copays or deductibles for preventive care." *Id.* at 55a-56a.

2. Respondents filed this suit in the United States District Court for the Northern District of Texas. Respondents prevailed on a claim under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, securing a party-specific injunction against enforcement of the requirement to cover without cost sharing certain HIV-prevention medications. See Pet. App. 50a, 68a-72a, 84a, 129a-134a. The government did not appeal that RFRA decision.

As relevant here, respondents also challenged the Task Force's structure as violating 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. Pet. App. 8a. Respondents' operative complaint seeks injunctive and declaratory relief but does not seek vacatur under the Administrative Procedure Act (APA), 5 U.S.C. 706(2). J.A. 31-32.[2]

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[2] Respondents asserted 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 Pet. App. 5a-6a, 8a; 42 U.S.C. 300gg-13(a)(2)-(4). The district court rejected those Appointments Clause challenges, Pet. App. 102a-106a, but the court of appeals reversed and remanded for consideration of respondents' argument that the

The district court held that Task Force members are improperly appointed principal officers and granted summary judgment to respondents. Pet. App. 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 reasoned that Task Force members "have no superior," because the Secretary "neither directs nor supervises [the Task Force] or its members." *Id.* at 115a-116a.

The district court declined to construe or sever the relevant statutory provision to avoid the identified Appointments Clause problem. Pet. App. 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), should be construed to allow the Secretary to review the Task Force's "A" and "B" recommendations before they bind insurance issuers and group health plans. Pet. App. 81a. The district court recognized that this Court in *United States* v. *Arthrex, Inc.*, 594 U.S. 1 (2021), had "cur[ed]" an Appointments Clause violation by severing a statutory provision to ensure that decisions of administrative patent judges (APJs) would "be subject to the review of the [Patent and Trademark Office] Director." Pet. App. 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).

APA required public notice and comment for the Secretary's ratification of ACIP and HRSA recommendations and guidelines, *id.* at 43a-47a. Those separate claims are not before the Court.

As a remedy, the district court not only granted party-specific relief, but also ordered "[u]niversal" relief based on its reading of 5 U.S.C. 706(2), even though respondents had not raised an APA claim in their operative complaint. Pet. App. 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. 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 entered a corresponding stay. C.A. Doc. 153-2 (June 13, 2023).

In addition, 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 *Appointment Ratification*, *supra*. In January 2022, the Secretary had separately ratified all Task Force "A" and "B" recommendations then currently in effect. J.A. 34-35.

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. Pet. App. 1a-48a.

a. The court of appeals held that Task Force members are principal officers who had not been properly appointed. Pet. App. 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 noted that "another important consideration * * * is the extent to which the Task Force's work can be supervised by a higher-ranking executive official, like [the HHS] Secretary." *Id.* at 20a.

"On that front," the court of appeals could not "say that any such supervision exists—as a matter of law or reality." Pet. App. 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'" in Section 299b-4(a)(6) to mean "free from any supervision," as opposed to simply "'unbiased.'" *Id.* at 20a, 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 Pet. App. 21a-23a.

The court of appeals "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." Pet. App. 24a. The court considered it all but "dispositive" that, "[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.* The court considered inadequate the Secretary's "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. Pet. App. 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 thus considered itself "unable to track the Supreme Court's severability analysis in *Arthrex*," and held 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." Pet. App. 34a. The court recognized "notable skepticism" about the availability of universal vacatur under the APA, but explained that its precedent "has understood vacatur under § 706(2) to be a remedy that affects individuals beyond those who are parties to the immediate dispute" and "the 'default' remedy for unlawful agency action." *Id.* at 34a-36a.

The court of appeals observed, however, that "one of the minimal requirements to be entitled to th[e] 'default' APA remedy is, perhaps unsurprisingly, an APA claim." Pet. App. 37a. Because respondents had failed to plead an APA claim, 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 thus limited the injunction to bar the

government from enforcing the preventive-services-coverage requirements only against respondents. *Id.* at 43a.[3]

SUMMARY OF ARGUMENT

Inferior officers are those "whose work is directed and supervised at some level by" a principal officer. *Edmond* v. *United States*, 520 U.S. 651, 663 (1997). When classifying an officer as inferior or principal, this Court "apprais[es] * * * how much power [that] officer exercises free from control by a superior." *United States* v. *Arthrex*, 594 U.S. 1, 17 (2021). In general, an officer will be inferior if he may be removed at will by, and have his decisions reviewed by, a principal officer.

Members of the Task Force fit that bill because they cannot make any legally binding final decisions on behalf of the United States without the Secretary's permission. The Secretary can remove them at will, and the threat of removal is the ultimate tool for control over final decisions on recommendations. Moreover, the Secretary has separate statutory authorities that allow him to determine whether Task Force recommendations should become binding on health-insurance issuers and group health plans and allow him to impose other controls. Task Force members are therefore inferior officers. In holding otherwise, the court of appeals overlooked the extent of the Secretary's control. At a minimum, the cure for any Appointments Clause violation would be to sever the statutory provision that

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[3] The separate party-specific injunction arising from respondents' RFRA claims—which bars the government from enforcing against respondents the requirement to cover without cost sharing certain HIV-prevention medications—remains in force and will not be affected by this Court's resolution of the Appointments Clause issue here. See p. 9, *supra*.

the court (incorrectly) saw as unduly insulating the Task Force from secretarial supervision, not to bar the Task Force prospectively from exercising significant government authority absent new legislation.

I. Task Force members are inferior officers, not principal officers.

A. Only an officer properly appointed to a principal office may have "power to render a final decision on behalf of the United States" without possible supervision by a superior officer. *Edmond*, 520 U.S. at 665. A key question, then, is "how much power" an officer "exercises free from control by a superior." *Arthrex*, 594 U.S. at 17.

While various tools may allow a principal officer to control an inferior officer's decisions so that any final, binding decision is the principal's own, two are particularly significant. First and foremost, the authority to remove an officer at will "carries with it the inherent power to direct and supervise." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 707 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), aff'd in part, rev'd in part, and remanded, 561 U.S. 477 (2010). Second, the authority to "review" an officer's decisions before they bind private parties ensures that the superior officer is "responsib[le]" for the decisions "rendered by" the officers "purportedly under his charge." *Arthrex*, 594 U.S. at 14-15.

B. Here, the Secretary possesses both of those means of control over Task Force members. They are accordingly inferior officers.

As both lower courts recognized, the Secretary "may remove members of the Task Force at will." Pet. App. 18a; see *id.* at 119a. That at-will removal authority carries with it the "power to direct and supervise." *Free Enter. Fund*, 537 F.3d at 707 (Kavanaugh, J., dissent-

ing). For instance, if the Task Force were to reject the Secretary's request to withdraw a particular recommendation, the Secretary could remove and replace the Task Force members. Through his unfettered removal power, the Secretary can effectively ensure that no preventive-services recommendations contrary to the Secretary's judgment will take binding effect.

In addition, the Secretary may directly review—and deny legal force to—Task Force "A" and "B" recommendations. He may invoke his authority to "establish a minimum interval" before "A" and "B" recommendations bind insurance issuers and group health plans, to allow time for him to conduct further review or request that the Task Force reconsider or modify its recommendations. 42 U.S.C. 300gg-13(b)(1). That power alone precludes Task Force recommendations from having binding effect without the Secretary's approval. And the Secretary may use his general rulemaking authority to further enhance his supervisory role over recommendations —for instance, by prescribing procedures by which Task Force recommendations shall be reviewed. The combination of the Secretary's authorities ensures more than adequate supervision over the Task Force.

C. The contrary arguments offered by the Fifth Circuit and respondents lack merit. The court of appeals misinterpreted Section 299b-4(a)(6) as precluding the Secretary from reviewing, and denying binding effect to, Task Force "A" and "B" recommendations. 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 language requires that Task Force members make recommendations based on their impartial medical and public-health judgments. It does not mean that the Secretary is barred from then

determining whether Task Force recommendations will be given legal effect. That understanding follows naturally from the rest of the statutory framework, which provides the Secretary substantial authority to oversee the Public Health Service, including the Task Force. And it tracks Congress's longstanding practice of authorizing inferior-officer adjudicators (such as administrative law judges) to make threshold decisions, while subjecting those decisions to review by superior officers.

Respondents contend that to be constitutional, Section 299b-4(a)(6) must allow the Secretary not only to review Task Force recommendations, but also to *direct* the substance of those recommendations in the first instance. This Court's precedent does not support that contention. In *Edmond*, for instance, the Court held that judges of the Coast Guard Court of Criminal Appeals were inferior officers where a principal officer could "review[]" their decisions only *ex post* and could "not attempt to influence * * * the outcome of [their] individual" decisions *ex ante*. 520 U.S. at 664. What matters is that the Secretary, not the Task Force, is ultimately responsible for deciding what recommendations will have final, binding legal effect. Regardless, respondents do not explain why the Secretary's plenary removal authority would not confer additional control over recommendations, were such control constitutionally required.

II. If the Court nevertheless holds that Task Force members are unconstitutionally insulated from secretarial supervision, Section 299b-4(a)(6) should be severed to cure that defect.

A. This Court's ordinary practice "'when confronting a constitutional flaw in a statute'" is to "sever[] any 'problematic portions while leaving the remainder in-

tact.'" *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (citation omitted). In *Arthrex*, for instance, the Court severed the statutory provision that precluded principal-officer review of APJs' decisions, without disrupting the rest of the statutory framework. See 594 U.S. at 24-25.

Here, the court of appeals cited only one provision, Section 299b-4(a)(6), as unduly insulating Task Force recommendations from secretarial review. Under this Court's precedent, the Fifth Circuit should have declared Section 299b-4(a)(6) unenforceable as applied to Task Force "A" and "B" recommendations. And it should have left the statutory framework otherwise "operative." *Arthrex*, 594 U.S. at 25.

B. The court of appeals declined to sever Section 299b-4(a)(6) because it believed that doing so would not "also thereby *empower* the Secretary to begin reviewing, and possibly rejecting, the Task Force's recommendations." Pet. App. 31a (footnote omitted). But that view ignores the Secretary's broad supervisory powers over the Task Force, which would allow the Secretary to review Task Force recommendations—and deny them binding effect—following the severance of Section 299b-4(a)(6). See *Arthrex*, 594 U.S. at 24-25.

Respondents contend that severing Section 299b-4(a)(6) would not cure the constitutional defect because the Secretary would still lack power to review Task Force decisions *not* to adopt an "A" or "B" recommendation. But they cite no authority holding that the Appointments Clause requires principal-officer review of a subordinate officer's *inaction*—and this Court's decision in *Free Enterprise Fund* indicates the opposite. In any event, the Secretary here has multiple ways to ensure that the Task Force will consider particular proposed recommendations.

ARGUMENT

The Task Force's structure comports with the Appointments Clause because Task Force members are validly appointed inferior officers. Task Force members cannot unilaterally render final decisions that have legally binding effect. Rather, Task Force recommendations have legal effect only if the Secretary allows them to become final and binding. Most pointedly, the Secretary can control whether Task Force recommendations take effect by removing Task Force members at will. The relevant statutory provisions separately enable the Secretary to review Task Force recommendations and determine whether they will become legally binding on insurance issuers and group health plans. At a minimum, if any Appointments Clause problem exists, the court of appeals adopted the wrong solution. The court should have severed the lone provision that it (incorrectly) perceived as unduly insulating the Task Force from secretarial control. This Court should reverse.

I. TASK FORCE MEMBERS ARE INFERIOR OFFICERS

Under this Court's precedent, Task Force members are the Secretary's subordinates, not principal officers in their own right. The Secretary may remove Task Force members at will. And he may deny binding effect to their preventive-services recommendations. Task Force members are thus inferior officers who were validly appointed by the Secretary, and there is no Appointments Clause violation.

A. A Principal Officer's Power To Remove A Subordinate At Will And To Review The Subordinate's Decisions Provides Constitutionally Adequate Supervision

1. "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." *Edmond* v. *United States*, 520 U.S. 651, 662 (1997). Thus, inferior officers are ordinarily those "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.

To determine whether a particular officer qualifies as inferior, this Court "apprais[es] * * * how much power [that] officer exercises free from control by a superior." *United States* v. *Arthrex*, 594 U.S. 1, 17 (2021). Specifically, the Court asks whether the relevant officer has the statutory "power to render a final decision on behalf of the United States" without review "by other Executive officers." *Edmond*, 520 U.S. at 665. If so, then the officer's "unreviewable executive power" would be "incompatible with the[] status [of] inferior officer[]." *Arthrex*, 594 U.S. at 18. "Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch" without possible supervision by a superior officer. *Id.* at 23.

The most potent tool by which principal officers can exert adequate "control" over inferior officers is "[t]he power to remove [an] officer[]" at will. *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). The

officer's "presumed desire to avoid removal" therefore "creates [a] here-and-now subservience." *Id.* at 727 n.5 (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) (quoting *Edmond*, 520 U.S. at 662-664), cert. denied, 569 U.S. 1004 (2013).[4]

Another critical tool of control is the ability of a principal officer to "review" inferior officers' decisions before they become final. *Arthrex*, 594 U.S. at 14. Ordinarily, "adequate supervision" by a principal officer "entails review of decisions issued by inferior officers." *Id.* at 19. That ensures that the principal officer is not "relieve[d] * * * of responsibility for the final decisions rendered by" the officers "purportedly under his charge." *Id.* at 15.

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[4] See also *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 707 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), aff'd in part, rev'd in part, and remanded, 561 U.S. 477 (2010) ("*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"); Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1771 (2023) (citing Founding-era evidence "signal[ing] that tenure 'at pleasure' rendered the agent a 'mere creature' of a principal"); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1222 (2014) ("While in the abstract it may be true that an officer can be removable at will and yet also exercise independent judgment on specific issues, in reality officers removable at will generally understand that they answer to the [principal's] direction.").

2. This Court's recent Appointments Clause cases have repeatedly rested their analysis on those two forms of principal-officer supervision: at-will removal, and review of inferior-officer decisions. In *Edmond*, the Court held that judges of the Coast Guard Court of Criminal Appeals properly serve as inferior officers. 520 U.S. at 666. In so holding, the Court emphasized that the Judge Advocate General may remove those judges "from [their] judicial assignment without cause," and that their decisions could be "reverse[d]" by "another Executive Branch entity, the Court of Appeals for the Armed Forces." *Id.* at 664.

Similarly, in *Free Enterprise Fund* v. *Public Co. Accounting Board*, 561 U.S. 477 (2010), this 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 from the statute. *Id.* at 510. In addition to the Commission's at-will removal power, the Court stressed the "Commission's other oversight" mechanisms, including its abilities to "relieve the Board of authority" and to "amend Board sanctions." *Id.* at 504, 510.

Most recently, in *Arthrex*, the Court concluded that APJs could not be deemed inferior officers because they "have the 'power to render a final decision on behalf of the United States' without * * * review by their nominal superior or any other principal officer in the Executive Branch." 594 U.S. at 14 (citation omitted). The Court distinguished *Edmond* on the ground that "[w]hat was 'significant' to the outcome there—review by a superior executive officer—[was] absent" in the statutory framework governing APJs. *Ibid.*

3. The Fifth Circuit and respondents give insufficient weight to at-will removal authority. The court acknowledged that "an officer's removability" is "the most important" "hallmark[] of inferiority." Pet. App. 17a. Respondents have likewise conceded that "[a]t-will removal is the *sine qua non* of a dependent relationship." Resp. C.A. Br. 9. And the court further "agree[d] with the Government that the HHS Secretary may remove members of the Task Force at will." Pet. App. 18a. Yet despite the "here-and-now subservience" created by at-will removability, *Bowsher*, 478 U.S. at 727 n.5 (citation omitted), the court determined that Task Force members are principal officers by reasoning that at-will removability by a superior cannot alone suffice to make someone an inferior officer. Pet. App. 19a.

This Court need not resolve that question, because the Secretary has other means of control besides at-will removal. Regardless, the court of appeals did not identify any instance in which at-will removability was held to be constitutionally insufficient to render an officer inferior. And neither the court nor respondents have identified any examples, either in statute or judicial precedent, of officials who were removable at will by someone other than the President and yet were themselves principal officers required to be appointed by the President with the Senate's advice and consent.

By contrast, there are countless examples "where Congress historically has provided for appointment of an executive officer by the Head of a Department" and made "clear that the officer was inferior to that principal officer—because Congress did not prevent the principal officer from removing that inferior officer at will." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 705 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), aff'd in part, rev'd in part, and remanded,

561 U.S. 477 (2010). For instance, in 1789, the First Congress expressly designated "the Secretary for the Department of Foreign Affairs" as "a principal officer," while deeming his subordinate, the "chief Clerk," "an inferior officer" who was "to be appointed by the said principal officer" and "to be employed * * * as [the Secretary] shall deem proper." Act of July 27, 1789, ch. 4, §§ 1-2, 1 Stat. 28-29; see Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 50 (same for the Chief Clerk of the Department of War).[5] This Court later held that in those "departments" in which "power is given to the secretary[] to appoint all necessary clerks," "there can be no doubt[] that these clerks hold their office at the will and discretion of the head of the department." *In re Hennen*, 38 U.S. (13 Pet.) 230, 259-260 (1839). That history shows that at-will removal was a key hallmark of inferior-officer status, in keeping with the background constitutional requirement that those who exercise executive power on the President's behalf must be fully accountable to the President.

More recently, too, Congress has established important federal offices with substantial discretion and authority that have been understood to be inferior offices in significant part because their occupants may be removed at will by a principal officer. For example, the Federal Open Market Committee within the Federal Reserve System has final authority over the System's "[o]pen market operations"—that is, "the purchase and

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[5] See also Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65 (Assistant to the Secretary of the Treasury appointed by and removable at will by Secretary of the Treasury); Act of Feb. 20, 1792, ch. 7, § 3, 1 Stat. 234 (Deputy Postmasters appointed by and removable at will by Postmaster General); Act of Apr. 30, 1798, ch. 35, §§ 1-2, 1 Stat. 553-554 (Principal Clerk of Navy appointed by and removable at will by Secretary of Navy).

sale of Government securities in the domestic securities market," through which the System expands or contracts the supply of money in the United States. *Federal Open Mkt. Comm. of the Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 343 (1979); see 12 U.S.C. 263. Nonetheless, certain members of the committee are merely inferior officers because they sit alongside members of the Federal Reserve Board of Governors, who lack the power to countermand individual committee decisions, see 12 U.S.C. 263(b), but have "the authority to remove [the other committee members] at will." *Appointment and Removal of Federal Reserve Bank Members of the Federal Open Market Committee*, 43 Op. O.L.C. 263, 273 (2019).[6]

Thus, "a continuing tradition" of "[t]he way our Government has actually worked, over our entire experience" suggests that at-will removability is a critical indicator of inferior-officer status. *CFPB* v. *Community Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 445 (2024) (Kagan, J., concurring).

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[6] See also *Silver* v. *United States Postal Serv.*, 951 F.2d 1033, 1040 (9th Cir. 1991) (per curiam) (concluding that the Postmaster General, "[t]he chief executive officer of the Postal Service," 39 U.S.C. 203, is an inferior officer under the Appointments Clause because he "serv[es] at the pleasure of the" Postal Service's Board of Governors); *Kalaris* v. *Donovan*, 697 F.2d 376, 397 (D.C. Cir.) (holding that members of the Benefits Review Board in the Department of Labor, who issue final benefits-related orders that are not subject to superior-officer review, are "inferior officers" who serve "at the discretion of their appointing officer"), cert. denied, 462 U.S. 1119 (1983).

B. The Secretary's Power To Remove Task Force Members At Will And To Review Their Recommendations Ensures That They Are Inferior Officers

The statutory framework here gives the Secretary constitutionally adequate "control" over the Task Force. *Arthrex*, 594 U.S. at 17. Not only may the Secretary supervise Task Force members through his power to remove them at will, but he may also directly review—and deny binding effect to—their preventive-services recommendations.

1. The Secretary may supervise Task Force members through his at-will removal authority

As both the court of appeals and district court recognized, "the HHS Secretary may remove members of the Task Force at will." Pet. App. 18a; see *id.* at 119a. That conclusion follows from the Secretary's authority to 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 Reorganization Plan §§ 1(a), 2, 80 Stat. 1610; see also pp. 6-7, *supra* (noting the Secretary's ratification of the Director's earlier appointments). In turn, "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.

The Secretary's authority to remove Task Force members is unfettered. "When a statute does not limit the President's power to remove an agency head, [the Court] generally presume[s] that the officer serves at the President's pleasure." *Collins* v. *Yellen*, 594 U.S. 220, 248 (2021). Similarly, when a statute empowers an agency head to appoint an inferior officer and imposes no limitations on removal, "there can be no doubt" that the inferior officer "hold[s] [his] office at the will and

discretion of the head of the department," even if "no power to remove is expressly given." *Hennen*, 38 U.S. (13 Pet.) at 259-260; see, *e.g.*, *Reagan* v. *United States*, 182 U.S. 419, 424, 426-427 (1901).

Here, no statutory text protects Task Force members from at-will removal by the Secretary. That statutory silence establishes that Task Force members serve at the Secretary's pleasure. The structure of the Task Force is consistent with the "historical[]" model for inferior officers. *Free Enter. Fund*, 537 F.3d at 705 (Kavanaugh, J., dissenting). Congress has allowed a means for appointment of Task Force members by a Senate-confirmed "Head of a Department"—here, the Secretary—and "did not prevent" the Secretary "from removing" Task Force members "at will." *Ibid.* As a result, it should be "clear" that Task Force members are subordinate to the Secretary. *Ibid.*

The Secretary's ability to remove Task Force members at will ensures that they cannot exercise significant power "free from control by a superior," let alone issue binding recommendations or make other decisions without the Secretary's review. *Arthrex*, 594 U.S. at 17. For instance, the Secretary could suggest that the Task Force consider a particular topic for a preventive-services recommendation and remove Task Force members if they declined to take up his proposal. See D. Ct. Doc. 65, at 77 (explaining that "anyone can nominate * * * new topics for the Task Force to consider"). The Secretary could request or direct the Task Force not to publish an "A" or "B" recommendation that he does not support. And the Secretary could request the Task Force to reconsider a recommendation he believed to be unsound. Ultimately, if he found it appropriate, he could remove and replace Task Force members and request that the reconstituted Task Force modify or rescind a

recommendation before he sets an effective date for that recommendation.

2. The Secretary may also deny binding effect to the Task Force's "A" and "B" recommendations

In addition to removing Task Force members at will, the Secretary may supervise and review their recommendations directly.

As an initial matter, the Secretary can exercise control over Task Force recommendations through his authority to "establish a minimum interval" before "A" and "B" recommendations become "effective." 42 U.S.C. 300gg-13(b)(1). In other words, the Secretary controls whether and when recommendations have binding legal effect. Even if the Secretary has established a general minimum interval, he could set a longer interval for a recommendation about which he has concerns and request that the Task Force study that recommendation further (perhaps through additional public and professional input), consider modifying it, or direct others in the Public Health Service to evaluate it. In the meantime, insurance issuers and group health plans would have no binding obligation to cover the recommended service without cost sharing.

Beyond the Secretary's authority to establish when recommendations become binding, Congress has broadly empowered the Secretary to "supervis[e] and direct[]" the Public Health Service, 42 U.S.C. 202, which includes the Task Force. The Secretary also may perform "all functions of the Public Health Service" and its "officers," "employees," and "agencies," and "make such provisions as he shall deem appropriate authorizing the performance of any of the functions * * * of the Public Health Service." Reorganization Plan §§ 1(a), 2, 80 Stat. 1610.

Those authorities would furnish the Secretary with additional means to review the Task Force's "A" and "B" recommendations and determine whether they should become legally binding on issuers and plans. If the Secretary "direct[s]" that a recommendation should not be given binding effect, 42 U.S.C. 202, then issuers and plans would not be required to cover it without cost sharing. See 42 U.S.C. 300gg-13(a)(1) (requiring coverage only of "items or services that have *in effect* a rating of 'A' or 'B' in the current recommendations of the" Task Force) (emphasis added).

Finally, the Secretary may use his general regulatory authority to ensure additional supervision over Task Force recommendations. See 42 U.S.C. 202; 42 U.S.C. 300gg-92; Reorganization Plan §§ 1(a), 2, 80 Stat. 1610. He could, for example, prescribe procedures for the Task Force's consideration of recommendations about certain services, or provide that the Task Force be required to consider proposals that he submits himself or through the components in the Public Health Service. And he could provide for a preclearance regime under which the Task Force must notify the Secretary before it votes on a final "A" and "B" recommendation, and no such recommendations would take binding effect absent his affirmative approval, had other measures not proved sufficient to accomplish that.

3. The Secretary's combined authorities provide more than enough supervision over the Task Force

As just explained, the Secretary possesses both forms of supervisory authority that this Court has deemed critical: the power to remove Task Force members at will and the power to review their recommendations before they bind private parties. This case thus falls neatly within *Edmond*. There, as here, judges on

the Coast Guard Court of Criminal Appeals could be removed by a principal officer from assignments "without cause," and a higher appellate court could "reverse" their "decisions." *Edmond*, 520 U.S. at 664. Just as those judges were inferior officers, so are Task Force members.

Arthrex confirms that conclusion. There, after finding the statutory framework unconstitutional, the Court cured the violation by severing only the provision that "prevent[ed] the [principal officer] from reviewing final decisions" of APJs. *Arthrex*, 594 U.S. at 25. The Court left intact the provision that insulated APJs from removal 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)); see *ibid.* (declining to adopt the court of appeals' approach of severing "the for-cause provision"). Here, the statute allows *both* principal-officer review and at-will removability, so Task Force members are plainly inferior officers.

C. The Contrary Arguments Advanced By The Court Of Appeals And Respondents Lack Merit

The court of appeals nonetheless held that "Task Force members are principal officers." Pet. App. 24a. In so holding, the court misconstrued Section 299b-4(a)(6) as precluding secretarial review of Task Force recommendations. And respondents err in contending that the Appointments Clause requires that the Secretary have power not only to review Task Force recommendations, but also to direct those recommendations in the first instance.

1. The court of appeals erroneously concluded that Section 299b-4(a)(6) precludes the Secretary from reviewing Task Force recommendations

The court of appeals concluded that, even though "Task Force members are subject to at-will removal by the HHS Secretary," they are "principal officers" because (in the court's view) their "'recommendations' on legally mandated coverage of preventive care go unreviewed—and are unreviewable—by a higher-ranking officer." Pet. App. 24a. As explained above, see pp. 28-29, *supra*, that conclusion misinterprets the relevant statutory provisions as precluding secretarial review of Task Force "A" and "B" recommendations. While the court briefly acknowledged the Secretary's background powers over the Public Health Service, it believed they could not "override" Section 299b-4(a)(6), Pet. App. 30a, which 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). The court read the term "independent" in Section 299b-4(a)(6) to mean "decisionmaking without supervision" and "complete autonomy." Pet. App. 20a, 21a n.59.

a. That reading is incorrect. Nothing in Section 299b-4(a)(6) bars the Secretary from reviewing, and deciding whether to deny binding effect to, Task Force "A" and "B" recommendations—and a contrary reading would raise unnecessary constitutional concerns. Most naturally understood, Section 299b-4(a)(6) does not address the relationship of the Task Force to HHS at all. Rather, by requiring that Task Force members and their recommendations be "independent and, to the extent practicable, not subject to political pressure," 42 U.S.C. 299b-4(a)(6), Section 299b-4(a)(6) clarifies that

the members must exercise their own best medical and public-health judgments, must not regard themselves as mere representatives of the organizations or professions in which they serve, and must not be influenced by outside pressures. See also 42 U.S.C. 299b-4(a)(1) (requiring that recommendations be based on relevant "scientific evidence").

But even if Section 299b-4(a)(6) is also understood as addressing the relationship of the Task Force to HHS, it still does not support the court of appeals' holding here. The statutory requirements of "independen[ce]" and freedom from "political pressure" do not preclude the Secretary from denying binding effect to Task Force "A" and "B" recommendations. 42 U.S.C. 299b-4(a)(6). Contrary to the court of appeals' reasoning, the more natural reading of "independent" is "being or acting free of the *influence* of something else," "not looking to others for one's opinions," and "acting or thinking freely." *Webster's Third New International Dictionary of the English Language* 1148 (1993) (emphasis added); see *The American Heritage Dictionary of the English Language* 917 (3d ed. 1996) ("Free from the influence" or "guidance" of others).

Thus, although the statutory requirement of independence might be read as suggesting that Task Force members' recommendations must be unreviewable, it is better read as meaning only that Task Force members' consideration of proposed recommendations must be guided by the members' expert and impartial judgment. After all, the text first provides that the *members* shall be independent, which focuses on the individual members' participation on the Task Force. And the Task Force then produces *recommendations*, which will by definition have operative effect only if they are adopted by someone else. Under the latter of the two meanings

identified above, then, the Secretary may still review Task Force recommendations, even though the Task Force members initially formed them impartially.

b. Statutory context further supports the government's reading. See *Turkiye Halk Bankasi A.S.* v. *United States*, 598 U.S. 264, 275 (2023) ("[T]he Court must read the words Congress enacted 'in their context and with a view to their place in the overall statutory scheme.'") (citation omitted). The relevant statutory provisions afford the Secretary broad supervisory powers over the Task Force and allow him to remove Task Force members for any reason—including because they refused to consider a recommendation the Secretary proposed or issued one that the Secretary found unsound. Given those means of secretarial control, it would be incongruous to interpret Section 299b-4(a)(6)'s reference to independence as "a clear and express directive from Congress that the Task Force be free from *any* supervision." Pet. App. 20a (emphasis added).

Congress's longstanding practice of vesting independent decision-making authority in inferior-officer adjudicators further confirms that independence in forming initial decisions can be compatible with inferior-officer status. As the Court observed in *Arthrex*, while "inferior adjudicative officers" are expected to issue independent decisions, "it 'certainly is the norm' for principal officers to have the capacity to review [those] decisions." 594 U.S. at 20 (citation omitted); see *id.* at 25 (referring to that approach as "the almost-universal model of adjudication in the Executive Branch"); *Lucia* v. *SEC*, 585 U.S. 237, 242 (2018) (explaining that the Securities and Exchange Commission may "review the [Administrative Law Judge's] decision"). Administrative law judges are therefore properly regarded as inferior officers, because principal officers retain other

controls—including the power to determine what decisions become final and binding. *Bandimere* v. *SEC*, 844 F.3d 1168, 1179 (10th Cir. 2016), cert. denied, 585 U.S. 1035 (2018); see also 8 C.F.R. 1003.1(d)(7)(i) and (h) (allowing the Attorney General to review decisions of the Board of Immigration Appeals).

Likewise, the "special trial judges" of the Tax Court at issue in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), "exercise significant discretion" and "independent authority" when adjudicating certain proceedings, *id.* at 882. But they do so only "subject to such conditions and review as the [Tax Court] may provide." 26 U.S.C. 7443A(c); see *Arthrex*, 594 U.S. at 20. Accordingly, this Court held that the special trial judges are inferior officers. *Freytag*, 501 U.S. at 882.

Thus, under the Appointments Clause, Congress may permissibly provide for an initial "impartial decision by a panel of experts," followed by a final "transparent decision for which a politically accountable officer must take responsibility." *Arthrex*, 594 U.S. at 16. And, again, at-will removal provides yet further control over the Task Force.

c. The court of appeals emphasized Congress's instruction that Task Force members and their recommendations not be "subject to political pressure," "to the extent practicable." 42 U.S.C. 299b-4(a)(6); see Pet. App. 20a. According to the court, if the Secretary may deny binding effect to Task Force members' recommendations, "then the Task Force would have no political independence at all, contrary to the terms of the provision." Pet. App. 22a. But the court of appeals acknowledged that the Secretary has unfettered, at-will removal authority over the Task Force. Such authority includes the power to remove Task Force members if they refuse to withdraw proposed recommendations—

thus preventing recommendations from taking effect—and it is difficult to see why Section 299b-4(a)(6) would cabin other secretarial powers but not the most potent power of removal. Moreover, as just explained, Congress has directed several categories of inferior officers to make decisions using independent judgment, while at the same time subjecting those decisions to review by presidentially appointed principal officers.

In any event, Section 299b-4(a)(6) explicitly qualifies the requirement of freedom from "political pressure" 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, then the phrase "to the extent practicable" can be readily interpreted to allow it. This Court will construe a statute to "avoid" a substantial question whether the statute is "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" when determining which Task Force "recommendations" would be subject to secretarial review. Pet. App. 22a. But there is no mystery about where to draw the line. Any additional constitutionally necessary review will apply only to the "A" and "B" recommendations because they are the only ones that can 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. *Ar-*

threx, 594 U.S. at 13 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam)). The Task Force's *nonbinding* recommendations (such as its "C" recommendations) would require no additional secretarial supervision, because they involve no significant exercise of federal power. See *id.* at 14 (evaluating supervision only of the powers "that make[] the APJs 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," Pet. App. 23a, with Section 300gg-13(b)(1)'s requirement that the Secretary "establish a minimum interval between the date on which" the Task Force assigns an "A" or "B" rating to a preventive service and the date on which issuers and plans must cover that service without cost sharing, 42 U.S.C. 300gg-13(b)(1). That provision serves in part to give issuers and plans time to incorporate preventive services for the next policy or plan year. But the Secretary's authority to establish such an interval for that purpose does not deny the Secretary the ability to invoke that authority for the additional purpose of allowing him time to review—and then deny binding effect to—recommendations, or to remove and replace the Task Force members who issued them.

2. Respondents erroneously contend that the Appointments Clause requires that the Secretary have power to direct recommendations

Respondents contend (Br. in Support of Cert. 30-31) that to be constitutional, Section 299b-4(a)(6) must allow the Secretary not only to review Task Force recommendations, but also to *direct* the substance of those recommendations in the first instance. Notably, the Fifth Circuit did not endorse that argument. Instead,

it suggested that if the Task Force's "A" and "B" recommendations were "[]reviewable" by the Secretary, then Task Force members would be inferior officers. Pet. App. 24a. The court simply believed—incorrectly—that Section 299b-4(a)(6) precludes such review.

Respondents err in contending that secretarial power to direct recommendations is also constitutionally required. So long as the Secretary may determine whether recommendations bind private parties, he bears "responsibility for the final decisions rendered" by the Task Force members "under his charge." *Arthrex*, 594 U.S. at 15. In turn, the President can "attribute" the Task Force's decisions to a principal officer "whom he can oversee." *Free Enter. Fund*, 561 U.S. at 496 (emphasis omitted). And the public is not left to "wonder 'on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Arthrex*, 594 U.S. at 16 (quoting *The Federalist No. 70*, at 476 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). The Secretary can control Task Force recommendations by removing or threatening to remove Task Force members at will, by preventing recommendations from having final, binding effect, and by prescribing procedures to govern the recommendations process, among other means. The Appointments Clause does not require more.

In *Edmond*, for example, this Court held that judges of the Coast Guard Court of Criminal Appeals were inferior officers even though no superior could "attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings." 520 U.S. at 664. The Court explained that "[w]hat [wa]s significant" was that the judges had "no power to render a *final* decision on behalf of the United States unless permitted to do so by" a superior officer. *Id.* at 665 (emphasis added). And

the Court emphasized that even though a principal officer could not direct the judges' decisions *ex ante*, an "Executive Branch entity" could "reverse [those] decisions" after the fact. *Id.* at 664. Under *Edmond*, it is significant that a principal officer may *review*—and then decide to deny binding effect to—an inferior officer's decision. The principal officer need not also have the power to direct the inferior officer's decision in the first place.

That principle traces back to this Court's decision in *Myers*. There, in discussing the President's removal power, the Court explained that "there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals * * * the discharge of which the President can not in a particular case properly influence or control." *Myers*, 272 U.S. at 135. But the Court saw no constitutional problem with that structure because the President "may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." *Ibid.* The same logic applies here: Even if the Secretary could not "influence or control" Task Force recommendations *ex ante*, but see p. 27, *supra*, he may review those decisions after they are issued, deny them binding effect, and consider them "as a reason for removing" Task Force members, *Myers*, 272 U.S. at 135.

II. ANY APPOINTMENTS CLAUSE VIOLATION MAY BE CURED BY SEVERING SECTION 299b-4(a)(6)

Even if this Court were to conclude that the Task Force is unduly insulated from secretarial supervision, the proper course would be to sever the provision creating such insulation. The court of appeals erred in de-

clining to do so and instead prospectively barred the Task Force from issuing "A" and "B" recommendations that may create binding coverage obligations—at least absent new legislation.

A. Severing Section 299b-4(a)(6) Would Eliminate The Only Constitutional Flaw The Fifth Circuit Identified

"'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). That approach stems from the Judiciary's "negative power to disregard an unconstitutional enactment" in resolving a legal dispute. *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923). And "[b]ecause 'the 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.'" *Free Enter. Fund*, 561 U.S. at 508 (citations and brackets omitted). Indeed, it has been "firmly established since *Marbury* v. *Madison*" that "even in the absence of a severability clause" courts should opt "for surgical severance rather than wholesale destruction" when they find constitutional flaws in Congress's work. *Barr* v. *American Ass'n of Political Consultants, Inc.*, 591 U.S. 610, 626 (2020) (opinion of Kavanaugh, J.).

Thus, in *Arthrex*, this Court deemed the constitutional problem to be that the "unreviewable authority" of APJs was "incompatible with their appointment by the Secretary [of Commerce] to an inferior office." 594 U.S. at 23. The Court fixed that problem by determining 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 APJs." *Id.* at 25.[7] The Court therefore "sever[ed]" the provision "shielding" the APJs' decisions "from review" by the Director. *Id.* at 24. Without that provision, the Court reasoned, "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 the [Patent and Trademark Office]." *Id.* at 25 (citation omitted). Accordingly, the Court held that, following severance, the Director "may review" APJs' decisions and that the statute "otherwise remains operative." *Ibid.*

The same logic applies here. The court of appeals identified the constitutional defect as the absence of a "supervisory role for the Secretary" over "the Task Force's recommendations." Pet. App. 23a. And the court pinpointed Section 299b-4(a)(6)'s requirement that recommendations "be 'independent' and free from 'political pressure'" as the source of that defect. *Id.* at 20a; see *id.* at 23a. The fix therefore should have been to sever 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 statutory scheme otherwise "operative," *ibid.*—particularly because it is not "'evident'" that if Congress had been "faced with the limitations imposed by the Constitution," it "would have preferred"

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[7] 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 an opinion concurring in part and dissenting in part, joined by Justices Sotomayor and Kagan, which "agree[d] with [the] remedial holding" of the Chief Justice's opinion. *Id.* at 44. Thus, seven Members of the Court concurred in the severability analysis.

a Task Force without any authority to issue preventive-services recommendations that may bind issuers and plans over a Task Force whose recommendations are reviewed by the Secretary before they become binding, *Free Enter. Fund*, 561 U.S. at 509 (citation omitted).

B. The Severability Analysis Offered By The Court Of Appeals And Respondents Is Flawed

1. The court of appeals "agree[d] with the Government" that severing Section 299b-4(a)(6) would ensure secretarial supervision of the Task Force. Pet. App. 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*. As noted, the Court there held that after severing the offending provision, the Patent and Trademark Office Director "ha[d] the authority to provide for a means of reviewing" the relevant APJ decisions. *Arthrex*, 594 U.S. at 25. In so holding, the Court relied on a general provision "vest[ing] the Director with the 'powers 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," Reorganization Plan § 1(a), 80 Stat. 1610. And the Secretary has superintended the Public Health Service's activities

since the Reorganization Plan was promulgated in 1966. See 80 Stat. 1610. Under *Arthrex*, the Secretary's longstanding background authority to supervise and perform the Public Health Service's functions would comfortably provide for secretarial review of Task Force "A" and "B" recommendations following the severance of Section 299b-4(a)(6).

The court of appeals reasoned that it could not "track" the "severability analysis in *Arthrex*" because, in the court's view, "[t]here are no fallback provisions on which [the Secretary] can rely to exercise a supervisory power." Pet. App. 32a. But Section 202 expressly empowers the Secretary to "supervis[e] and direct[]" the Public Health Service. 42 U.S.C. 202. It is therefore precisely the type of "fallback provision[]" that the court of appeals recognized *would* be sufficient to permit principal-officer review. Pet. App. 32a.

The court of appeals focused instead on the Reorganization Plan—but it misunderstood that plan's operation. See Pet. App. 31a-32a. The Reorganization Plan allows the Secretary to exercise power over "all functions of the Public Health Service," though 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. Pet. App. 31a-32a.

But that exception does not apply to the Task Force. Instead, it 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 Pub. Health Serv., U.S. Dep't of Health, Educ., &

Welfare, *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* (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 Reorganization Plan, uses similar terminology, referring to "committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch" and whose function is "advisory only." §§ 2(a) and (b)(6), 86 Stat. 770; see 5 U.S.C. 1002(a) and (b)(6) (Supp. IV 2022).

The Task Force is not an advisory body covered by the Reorganization Plan's exception. Congress has expressly provided that "the Task Force is not subject to [FACA]." 42 U.S.C. 299b-4(a)(5) (Supp. IV 2022). And the Task Force's "A" and "B" recommendations are not advisory, since the ACA made them binding on 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 that HHS—through AHRQ—convenes, provide for its decisions to bind the public, and yet choose *not* to allow the Secretary to oversee that body despite vesting the Secretary 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 all the components of the Public Health Service that perform significant federal functions.

2. Respondents do not defend the court of appeals' reliance on the Reorganization Plan's exception. Instead, they contend (Br. in Support of Cert. 33) that severing Section 299b-4(a)(6) would not cure the constitutional defect because the Secretary would still lack the "ability to review or countermand [the Task Force's] decisions *not* to adopt an 'A' or 'B' recommendation." But

respondents offer no authority for the proposition that principal-officer review over a subordinate's *inaction* is necessary to satisfy the Appointments Clause. In *Free Enterprise Fund*, for instance, it was enough that the Securities and Exchange Commission could remove members of the Public Company Accounting Oversight Board "at will" and exercise "other oversight authority." 561 U.S. at 510. The Court did not suggest that the Commission must also have power to review Board decisions *not* to conduct investigations or bring enforcement actions; in fact, the Court acknowledged that the relevant statute "nowhere g[ave] the Commission effective power to start, stop, or alter individual Board investigations." *Id.* at 504.

Regardless, the Secretary has authority to ensure that the Task Force considers issuing particular recommendations. The Secretary may propose a recommendation topic and remove Task Force members if they refuse to consider it. And the Secretary may issue regulations mandating certain recommendation priorities.

Taking a different tack, respondents object (Br. in Support of Cert. 33-34) to the entire enterprise of severability. But "apart from some isolated detours," this "Court's power and preference" to "invalidate a statute" only "partially" has remained constant "[f]rom *Marbury* v. *Madison* to the present." *American Ass'n of Political Consultants*, 591 U.S. at 626 (opinion of Kavanaugh, J.). As Chief Justice Marshall explained long ago, if any part of an act is "unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States." *Bank of Hamilton* v. *Lessee of Ambrose Dudley*, 27 U.S. (2 Pet.) 492, 526 (1829); see also *Loeb* v. *Columbia Township Trustees*, 179 U.S. 472, 490 (1900) ("[O]ne section of a statute may be repugnant to

the Constitution without rendering the whole act void."). The Court has consistently applied that approach in every recent separation-of-powers decision that identified constitutional defects. *Arthrex*, 594 U.S. at 23-27; *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 234-238 (2020) (opinion of Roberts, C.J.); *Free Enter. Fund*, 561 U.S. at 508-510. If the Court believes that the Task Force's current structure is unconstitutional, the Court should apply its traditional severability principles.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Art. II, § 2, Cl. 2 provides:

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.

2. 42 U.S.C. 299b-4 (2018 & Supp. IV 2022) 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;

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

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

(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 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

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

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.

(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.

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[4] So in original.

(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.[2]

(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 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.

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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.

(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.