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.,
Respondents.

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

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

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.

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INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. The Buckeye Institute files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

Often government overreach comes in the form of agency rules and regulations imposed by unelected bureaucrats. The result is not just government overreach, but the insulation of important public policy decisions from any political or judicial accountability. This is incompatible with the representative democracy guaranteed by the Constitution.

The Buckeye Institute has advocated for government accountability in rulemaking. Independent entities like the U.S. Preventative Services Task Force—and the arguments made by the

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief.

government in this case—highlight the danger of unelected and unaccountable bodies making policy while hiding behind the skirts of the regulatory state.

SUMMARY OF THE ARGUMENT

In enacting the Affordable Care Act ("ACA"), Congress left many—if not most—of the Act's details to administrative agencies. This practice of making grand pronouncements and leaving executive agencies to work out the fine print is—unfortunately—far from unusual, particularly in legislation that regulates complex systems like insurance markets.

Proponents of this style of governance by delegation and deference to regulatory bodies often point to the twin rationales of access to technical expertise and independence from politics. They claim that allowing apolitical experts guided by data to create those policies will benefit society—whether the public likes it or not.

In this case, however, Congress took the delegation to administrative agencies even further, ostensibly in the hope of giving difficult decision-making about required insurance coverage to independent "experts," protected—"to the extent practicable"—from "political pressure." Congress created the Preventative Services Task Force ("the Task Force") in 1984 as an advisory body with no authority to mandate its recommendations. 42 U.S.C. § 299b–4(a). Section 2713 of the Affordable Care Act, however, expanded that authority to require private insurers to cover preventive services recommended by the Task Force with a grade of A or B. And the ACA requires insurers to cover these services at no cost to the end-

user. Thus, the Task Force went from a governmental advisor, issuing recommendations, to a governmental agency issuing enforceable edicts.

Regardless of whether one views this congressional delegation regarding insurance coverage law-making to an outside group as wise policy, the elevation of an independent *advisory* body to an independent agency with law-making power requires Congress to make a choice of what kind of agency the Task Force is. If the Task Force is truly independent, then its members are subject to the requirement of the Appointments Clause. If the Task Force members are instead merely inferior officers that give non-binding recommendations, controlled by the Secretary of Health and Human Services, then constitutional appointment is not necessary. But the government cannot have it both ways.

The expansion of the regulatory state necessarily raises questions of accountability. The government's attempt to create an independent agency without complying with the Appointments Clause strikes directly at the constitutional principle that liberty requires accountability.

Further, in trying to justify the Task Force's alleged exemption from accountability that flows from the Appointments Clause, the government urges a tortured reading of the statute that would in essence ignore the statute's mandatory language. The Fifth Circuit, along with the district court below, correctly interpreted the statute to hold that the Task Force cannot be simultaneously independent yet also subject to political control by the Secretary. This brief urges that—in light of the damage that the government's

interpretation could do to the cause of constitutional accountability—this Court affirm the Fifth Circuit's reading of the statute.

ARGUMENT

I. The Expanding Regulatory State and the Threat of Unaccountable Agencies

The Constitution makes no mention of administrative agencies. Yet, as Justice Jackson lamented over half a century ago, "[t]hey have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking." *Fed. Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). Simply put, the executive agency paradigm is always—to some extent—at odds with the Constitution's directive that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. Const. art. I, § 1, cl. 1. The practice of delegating legislative powers to executive agencies and more recently—independent agencies insulated from political pressure from the executive branch—thus implicates the U.S. Constitution's fundamental promise of self-governance. Madison described the challenge aptly in Federalist 51: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." The Federalist No. 51, at 294 (James Madison) (Fall River Press ed. 2021). Judging by the system of checks and balances he championed in the Constitution, Madison appreciated that the second

task was more difficult than the first. But for a republican form of government to survive, it was also the more important one.

The government's need for self-control is even more apparent now. In 1802, the United States government had 3,905 employees. Peter Kastor, *The Early Federal Workforce* 2 (2018), https://tinyurl.com/3rpv55s2. Roughly 700 of those employees were clerks in the federal government; the rest were postal workers. By contrast, today, the federal government employs 2.3 million civilians. Peter Onuf, *Thomas Jefferson: Domestic Affairs,* U. Va. Miller Ctr., (Mar. 25, 2021), https://tinyurl.com/6jmm4nze. More significant than the number of employees, however, is the influence that this unelected branch of government has over national policy. "For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process." *Immigr. & Naturalization Serv.* v. *Chadha*, 462 U.S. 919, 985 (1983) (White, J., dissenting). "The number of formal rules these agencies have issued thanks to their delegated legislative authority has grown so exuberantly it's hard to keep up." *Caring Hearts Pers. Home Servs., Inc.* v. *Burwell*, 824 F.3d 968, 969 (10th Cir. 2016) (Gorsuch, J.). The New Deal, with its faith that the "dispassionate professional judgment that only a cadre of experts could supply" was better suited to address the nation's problems than the political process, ushered the heyday of independent agencies. See Lisa Schultz Bressman & Robert B. Thompson,

The Future of Agency Independence, 63 Vand. L. Rev. 599, 612, 616 (2010).

By the 1970s, however, critics had raised concerns of congressional "delegation as abdication," arguing that "an unaccountable and headless fourth branch of government—the bureaucrats—had come to run American politics." Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 Annu. Rev. Political Sci. 37, 39 (2019) (citations omitted). In the mid-1980s, commentators observed that "[a]dministrative agencies today have enormous power to make fundamental policy decisions that the Constitution assigns to Congress as the branch of government most representative of the majority's views." *Id.* Indeed, "[m]ore and more legislation has been originating with the executive branch of government." *Id.* And today commentators have noted that "[e]very year, the growth of Statutes at Large is dwarfed by the expansion of the Federal Register." David Casazza, *Liberty Requires Accountability: Checking Delegations to Indep. Agencies*, 38 Harv. J.L. & Pub. Pol'y 729, 731 (2015).

Yet, despite these concerns, legislative delegation of regulatory authority to agencies continues unabated, with the result that modern governance relies heavily on the public policy decisions of the unelected. The result is "a nation governed largely by the duly appointed administrators of the people rather than the duly elected representatives of the people." *Id.*

Administrative law "constrain[s] Americans in all aspects of their lives, political, economic, social, and personal," having become "the government's primary

mode of controlling Americans." Philip Hamburger, *Is Administrative Law Unlawful?* 1 (2014). Administrative processes intrude upon many facets of American life that may well have been thought the proper province of private life and business, including brushing one's teeth, 606 Mass. Code Regs. § 7.11(11)(d); selling fresh milk, Stephen Dinan, *Feds Shut Down Amish Farm for Selling Fresh Milk*, Wash. Times (Feb. 13, 2012), https://tinyurl.com/53ths43p; or filling holes on one's land, see *Sackett* v. *EPA*, 566 U.S. 120, 124–25 (2012). Add to that "independent agencies" like the Task Force that "hold enormous power over the economic and social life of the United States." See *PHH Corp.* v. *CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). With literally "hundreds of federal agencies poking into every nook and cranny of daily life," "the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington, Tex.* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

Even if government by unelected experts proved more efficient, more rational, or even more just, this Court has time and again held that those purported benefits must yield to the "vital constitutional principle" that "[l]iberty requires accountability." *Dept. of Transp.* v. *Assn. of Am. Railroads*, 575 U.S. 43, 57 (2015) (Alito, J., concurring). "The Framers created a structure in which 'a dependence on the people' would be the 'primary control on the government.'" *In re Aiken Cnty.*, 645 F.3d 428, 440 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (quoting *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.,* 561 U.S. 477, 501 (2010)). Indeed, "[p]romoting political accountability is a central feature of American

political thought dating back to the Founding period, finding expression in the Declaration of Independence, *The Federalist Papers*, and the works that influenced the Founders." Casazza, *supra*, at 729–30.

Not surprisingly, the increase in government by administrative fiat has coincided with a decrease in trust in the federal government. "As of April 2024, 22% of Americans say they trust the government in Washington to do what is right 'just about always' (2%) or 'most of the time' (21%)." *Public Trust in Government: 1958-2024*, Pew Research Ctr. (June 24, 2024), https://tinyurl.com/bcz8jn6k. This is a decline from almost 75% in 1958. *Id.* In 2019, nearly two-thirds of Americans "surveyed said that this lack of trust in the federal government made it harder to solve many of the country's problems. Lee Raine & Andrew Perrin, *Key Findings about Americans' Declining Trust in Government and Each Other,* Pew Research Ctr. (Jul. 22, 2019), https://tinyurl.com/bder3awe.

This case brings the dangers of unaccountable administrative governance into clear relief because the Task Force is not merely lending technical expertise, it is instead making moral value judgments that it forces upon insurers and private employers. Governmentally designated experts have no more expertise on moral issues than do every-day citizens. Therefore, when it comes to matters affecting or impacting individual moral choices, rather than matters requiring technical expertise, the decision-makers should be in some way accountable to the citizenry. Again, a cornerstone of self-government is that the people who make the law—whether through

legislation or regulation—must ultimately be accountable to—not shielded from—those that they govern by using the shibboleth of "independence." Indeed, "[w]hen citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences." *Assn. of Am. Railroads*, 575 U.S. at 57 (Alito, J., concurring). This accountability "is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'" *W. Virginia* v. *Env't Prot. Agency*, 597 U.S. 697, 737 (2022) (Gorsuch, J., concurring) (quoting The Federalist No. 11, at 85 (A. Hamilton) (C. Rossiter ed. 1961)).

II. The canons of statutory construction do not support the government's reading of 42 U.S.C. § 299b-4(a)(6).

The "starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.,* 484 U.S. 49, 56 (1987). The statute at issue here states that "[a]ll 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." 42 U.S.C. § 299b-4(a)(6).

The government argues that the phrase "to the extent practicable" refers not only to the clause following those words but also to the independence of the Task Force. Therefore, it argues, the phrase "to the extent practicable" implicitly gives the Secretary of

Health and Human Services wide authority over the Task Force, including the authority to ratify its decisions and to appoint, remove, or reconstitute the Task Force. See Pet. at 14–22. Thus, the Task Force is not really independent and so there is no Appointments Clause problem. As noted by both lower courts, reading the phrase "to the extent practicable" to swallow the rest of the statute cannot be squared with common sense and well-established canons of statutory construction.

"As this Court has noted time and time again," the well-established canons of statutory construction require that a court must "'give effect, if possible, to every word Congress used.'" *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 583 U.S. 109, 128–29 (2018) (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Applying that rule, the conjunction "and" indicates that Congress set two related—but distinct—requirements for the Task Force. First, the Task Force members and their recommendations must be "independent." And second, "to the extent practicable," it shall "not be subject to political influence." The first question is thus whether it is possible for the Court to give meaning to both requirements. Plainly, it is.

"Independent," as used in the statute, means not reliant on any outside source or authority. The statute fully authorizes Task Force members to make up their own minds on Task Force "recommendations"—which, in this situation—are binding. They are not required, by statute or otherwise, to consult with any other person, agency, or other governmental body in reaching their decisions. Nor are they required to

defer to any other person or entity. And their decisions are not subject to appeal or review. Indeed, courts have developed a set of objective factors to determine when an agency is "independent." See *Bowsher* v. *Synar*, 478 U.S. 714, 725 n.4 (1986).

In contrast, the requirement that members and their decisions be "not subject to political pressure" is more aspirational or hortatory. The term "political pressure" is not defined and could include many varieties of influence ranging from industry lobbying, media campaigns, or overt pressure from the administration. Perhaps most obviously, the Task Force extensively uses outside resources in reaching its recommendations. It has an entire procedures manual explaining the process. See Preventative Services Task Force, *Procedure Manual* (2015), https://tinyurl.com/yhjuvaz4. The statute does not provide for any penalty for applying political pressure to a Task Force member. Indeed, such a prohibition would almost certainly run afoul of the First Amendment.

By including the phrase "to the extent practicable," the drafters acknowledged that they could no more outlaw political influence than they could repeal the law of gravity. Political pressure would always exist, for example, to the extent that Congress could always repeal the statute and abolish the Task Force if it made recommendations with which a majority of Congress disagreed. Interest groups like the American Cancer Society and others who have filed amicus briefs in support of the government's position could quite appropriately advocate for the Task Force to include certain services

in its recommendations. The press could editorialize on the wisdom of requiring that certain preventative services be covered. Because medical insurance coverage is a topic of great interest and importance to many Americans, it has been and will always be a topic for public debate and—quite appropriately—subject to the political pressures inherent to government by the people.

More importantly, though, applying standard rules of grammar, the phrase "to the extent practicable" modifies only the clause "not subject to political pressure." While the government's reading would conflate the two provisions, there is no qualification that the members are independent only "to the extent practicable." Courts have held that when a statute qualifies one provision but not another, the non-qualified provision is mandatory. See *Oceana, Inc.* v. *Locke,* 670 F.3d 1238, 1242–43 (D.C. Cir. 2011) (reading statutory provision as mandatory where, in contrast to a neighboring provision, the duty imposed was not modified by the phrase "to the extent practicable").

The use of the mandatory "shall" further supports this reading. See *Maine Cmty. Health Options* v. *United States*, 590 U.S. 296, 310 (2020). "Shall" appears immediately before the independence requirements and without modification. Indeed, "the word 'shall' usually connotes a requirement." *Id.* (quoting *Kingdomware Techs., Inc.* v. *United States*, 579 U.S. 162, 171 (2016). The independence provision is thus mandatory, while the second, qualified provision is merely directory.

Assuming that both provisions may be given meaning, the second inquiry is whether the meaning that the government assigns to the second clause can be reconciled with the first. It cannot. The government argues that although the members of the Task Force are independent because they are protected from political influence only to the extent practicable, they are also subordinate to the Secretary of Health and Human Services. As the Fifth Circuit correctly decided, this reading would allow the exception to swallow the rule. More importantly, it would remove all meaning from the requirement that the Task Force be "independent." Simply put, because the Task Force cannot be both independent and also subject to absolute political control by the Secretary, the government's reading must be rejected.

The bottom line is that Congress has effectively elevated the previously only advisory Task Force into an independent agency with binding lawmaking authority, at least with respect to required insurance coverage issues. Accordingly, the Task Force members must be appointed consistent with the Appointments Clause. They were not. Therefore, the Task Force is unconstitutional in its present form and operation, and any of its binding "recommendations" must fall.

CONCLUSION

For the above reasons, the Court should affirm the circuit court's decision on the issue of the applicability of the Appointments Clause to the members of the Task Force.

Respectfully submitted,

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