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

BRIEF FOR TEXAS, FLORIDA, IDAHO, INDIANA, IOWA, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

States have a vital interest in "protecting [the] separation of powers by curtailing unlawful executive action." *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided Court*, 579 U.S. 547 (2016) (per curiam). States regularly file amicus briefs to vindicate that interest, with the "ultimate purpose" of "protect[ing] the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991).

States have a special interest, moreover, in ensuring that those who wield federal power are properly appointed. On its face, the Appointments Clause protects States by ensuring that no officer can be appointed without the Senate's consent or, at a minimum, without legislation vesting the appointment "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, §2, cl. 2; *see also Edmond v. United States*, 520 U.S. 651, 660-61 (1997) ("The prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers."). Because every State enjoys equal representation in the Senate, and because the difficulty of navigating bicameralism and presentment inherently benefits the States, these structural safeguards help protect States from federal overreach.

In addition, a coalition of States has filed an amicus brief in support of the federal government. Given the importance of the issues in this litigation, the Court should also hear from States supporting Respondents.[1]

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

SUMMARY OF ARGUMENT

"[T]he very definition of a Republic, is 'an Empire of Laws, and not of men.'" John Adams, *Thoughts on Government* (1776). This principle motivates the vertical separation of powers: Congress lacks the States' "broad authority to enact legislation for the public good—what [courts] have often called a 'police power.'" *Bond v. United States*, 572 U.S. 844, 854 (2014) (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)). It also runs through the horizontal separation of powers: A federal official "'literally has no power to act' … unless and until Congress" confers power to do so. *FEC v. Cruz*, 596 U.S. 289, 301 (2022) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

Here, the federal government has amassed an armada of amici. Almost all of them, however, advance policy arguments why the U.S. Preventive Services Task Force is valuable—not legal arguments why the appointment of Task Force members comports with the Constitution. States are mindful of such policy concerns and understand why insurers offer coverage for preventive care. In fact, mandates for preventive care often are not necessary precisely because such care can reduce an insurer's costs. *See, e.g.*, Greg Goth, *Why Broad Preventive Care Coverage Is Here to Stay*, SHRM (Dec. 2, 2022), https://perma.cc/AX6Q-W8JU ("Even without a mandate, employers are unlikely to impose cost-sharing for preventive services.").

Courts, however, are not the forum for policy arguments. Under the Constitution, those who wield "significant authority pursuant to the laws of the United States" are officers who must be appointed consistent with the Appointments Clause. *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)

(per curiam)). Every principal officer thus must be nominated by the President and confirmed by the Senate, and every inferior officer must be similarly appointed unless Congress by law vests their appointment "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, §2, cl. 2.

Although amici States agree with Respondents that Task Force members are principal officers, the Court need not reach that issue because—even if they were inferior officers—Congress has not vested their appointment "in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* Accordingly, the "default" rule, *Edmond*, 520 U.S. at 660, of presidential nomination and senatorial confirmation controls. "Calls to abandon" separation-of-powers requirements based on claimed "necessity are not unusual," of course, but a federal "judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 501 (2010) (quoting *New York v. United States*, 505 U.S. 144, 187-88 (1992)).

Not only are Petitioners' amici's policy arguments irrelevant, moreover, they also are overstated. Nothing bars the President from nominating Task Force members for senatorial confirmation, which could be accomplished via unanimous consent. And to the extent that the Task Force members' nominations may be controversial and so prompt greater debate in the Senate, that point cuts in favor of requiring their confirmation, not against it. "The Constitution's deliberative process was viewed by the Framers as a valuable feature, not something to be lamented and evaded." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring) (citation omitted).

The federal government does not advance a persuasive counterargument. It does not contend that Task Force members aren't officers. Rather, it argues that they are inferior officers. That distinction is irrelevant to this case. Under the Appointments Clause, the default requirement that the President must nominate and the Senate must confirm applies until valid legislation changes that default. Because Congress has not vested appointment "in the President alone, in the Courts of Law, or in the Heads of Departments," U.S. Const. art. II, §2, cl. 2, with respect to the Task Force, the *only* question the Court must answer is whether Task Force members are officers. Because the federal government concedes (as it must) that they are, the Court need not decide whether (i) they are principal officers and, (ii) if so, whether the provisions of statutory law that make them principal officers can be severed as the federal government urges. In all events, severability would be especially inappropriate here.

ARGUMENT

I. The Court Need Not Decide Whether Task Force Members Are Principal Officers.

Although distinguishing between principal and inferior officers is sometimes necessary, the Court need not do so here. Even if Task Force members are inferior officers, they still have not been properly appointed because Congress has not by law departed from the default rule that the President nominates and the Senate confirms. If following the Constitution's language proves difficult, Congress can amend the statutes to ensure that Task Force members are inferior officers whose appointment is vested in the President or a department head. Appeals to policy thus widely miss the mark.

A. The Appointments Clause safeguards liberty.

1. Although the Bill of Rights helps protect liberty, the Framers understood that "mere parchment" is not enough. *The Federalist* No. 73, at 441 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Rather than relying on a list of rights, the Framers created the separation of powers "as the absolutely central guarantee of a just Government." *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). In so doing, they "recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

Article II vests "[t]he executive Power," U.S. Const. art. II, §1, cl. 1, in a single executive—the President—who is compelled to "take Care that the Laws be faithfully executed," *id.* art. II, §3. This vesting makes "emphatically clear from start to finish" that the president is "personally responsible for his branch." Akhil Reed Amar, *America's Constitution: A Biography* 197 (2005). The Framers demanded "unity in the Federal Executive" to guarantee "both vigor and accountability," *Printz v. United States*, 521 U.S. 898, 922 (1997), as well as "[d]ecision, activity, secre[c]y, and d[i]spatch," 3 Joseph Story, *Commentaries on the Constitution of the United States* §1414, at 283 (1833). "[B]ecause it would be 'impossib[le]' for 'one man' to 'perform all the great business of the State,' the Constitution assumes that lesser executive officers will 'assist the supreme Magistrate in discharging the duties of his trust.'" *Seila L. LLC v. CFPB*, 591 U.S. 197, 213 (2020) (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)).

But the Constitution also provides important checks on the President's power. Of particular significance, the

Constitution "give[s] Congress broad authority to establish and organize the Executive Branch." *Id.* at 266 (Kagan, J., concurring in judgment in part and dissenting in part). Although Article II speaks to the appointment of inferior officers by "Heads of Departments," for example, nowhere does it create any such departments. U.S. Const. art. II, §2, cl. 2. Thus, "[a]lthough the Constitution contemplates" federal departments and officers, "it clearly requires that those offices 'shall be established by Law,'" meaning "an office that Congress creates 'by statute.'" *Trump v. United States*, 603 U.S. 593, 645 (2024) (Thomas, J., concurring) (first quoting U.S. Const. art. II, §2, cl. 2; and then quoting *Lucia*, 585 U.S. at 254 (Thomas, J., concurring)).

The Framers' decision to empower Congress to create departments and almost all federal executive offices was no accident. "The limitation on the President's power to create offices grew out of the Founders' experience with the English monarchy," in which "[t]he King could wield significant power by both creating and filling offices as he saw fit"—thus allowing the Crown to "create a multitude of offices and then fill them with his supporters." *Id.* (citing, *inter alia*, Jennifer Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 492 (2018)). Abuses of this power so enraged the Colonists that they included the King's creation of a "multitude of New Offices" in the Declaration of Independence itself. *Id.* at 646 (quoting The Declaration of Independence ¶12 (U.S. 1776)).

Congress has long exercised authority to create and structure federal departments. For example, in connection with the famous Decision of 1789, the First Congress determined not only that the Department of Foreign Affairs would be headed by a Secretary, *see* An Act for

establishing an Executive Department, to be denominated the Department of Foreign Affairs, Jul. 27, 1789, ch. 4, 1 Stat. 28 §1, but resolved that "[h]e shall receive the applications of all foreigners relative to his department," and "the books, records, and other papers of the United States, that relate to this department, [should] be committed to his custody," *id.* §1 n.(a); *see also id.* §4 ("[T]he Secretary … shall forthwith after his appointment, be entitled to have the custody and charge of all records, books and papers in the office."). Congress also determined that "there shall be in the said department, an inferior officer, to be appointed by the said principal officer," who would "be called the chief Clerk in the Department of Foreign Affairs," who, during the Secretary's "vacancy," would "have the charge and custody of all records, books and papers appertaining to the said department." *Id.* §2.

Once an office is created, the President's authority respecting that office includes "controlling those who execute the laws." *Free Enter. Fund*, 561 U.S. at 492 (quoting 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834) (remarks of James Madison)). "The text and structure of Article II provide the President with the power to control subordinates within the executive branch." Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1215 (2014). Indeed, the President's authority to control the Executive Branch includes a plenary removal power. *See, e.g.*, *Seila L.*, 591 U.S. at 213-15; *Collins v. Yellen*, 594 U.S. 220, 250 (2021). Otherwise, the President could not fulfill his duty to "take Care that the Laws be faithfully executed." *Seila L.*, 591 U.S. at 213 (quoting U.S. Const. art. II, §3); *see also Myers v. United States*, 272 U.S. 52, 117 (1926). But constitutional text, structure,

and history also confirm that before that the President can exercise such power, Congress must create the relevant department and federal office.

2. Not only does the Constitution give Congress the power to create departments and offices, it also sets forth the process for appointing officers to those offices. By design, that process checks federal power.

The Appointments Clause was included to address the fact that "[t]he 'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances" and "was deemed 'the most insidious and powerful weapon of eighteenth-century despotism.'" *Freytag v. Commissioner*, 501 U.S. 868, 883 (1991) (quoting Gordon Wood, *The Creation of The American Republic 1776-1787*, at 79, 143 (1969)). The Clause provides that the President

> 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.

U.S. Const. art. II, §2, cl. 2.

This text makes several points clear. *First*, essentially "all officers of the United States are to be

appointed in accordance with the Clause …. No class or type of officer is excluded because of its special functions." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 311 (2017) (Thomas, J., concurring) (quoting *Buckley*, 424 U.S. at 132); *see also United States v. Germaine*, 99 U.S. 508, 510 (1878) ("That all persons who can be said to hold an office … were intended to be included within one or the other of these modes of appointment there can be but little doubt."). The provision's breadth confirms the Framers' understanding "that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884.

Second, the Senate plays a pivotal role. "Although the Framers recognized the potential value of leaving the selection of officers to 'one man of discernment' rather than to a fractious, multimember body, they also recognized the serious risk for abuse and corruption posed by permitting one person to fill every office in the Government." *SW Gen*, 580 U.S. at 317 (Thomas, J., concurring) (quoting *The Federalist* No. 76, at 510 (Alexander Hamilton) (J. Cooke ed., 1961)). The Framers thus "empowered the Senate to confirm principal officers on the view that 'the necessity of [the Senate's] co-operation in the business of appointments will be a considerable and salutary restraint upon the conduct of' the President." *Id.* (quoting *The Federalist* No. 76, at 514). The Senate can prevent the President from appointing officers "possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure." *The Federalist* No. 76, at 456 (Alexander Hamilton) (Clinton Rossiter ed. 1961). This is an important "principle of limitation." *Freytag*, 501 U.S. at 884.

Third, the division of appointment authority between the President and the Senate always applies to principal officers, and, as a "default," *Edmond*, 520 U.S. at 660, to any inferior officer. That default can only be changed if Congress by law vests such an appointment in one of three designated entities: in "the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, §2, cl. 2. In other words, only legislation enacted by bicameralism and presentment can change the default rule that the Senate must consent to essentially every appointment of an Executive Branch officer.

The federalism implications of the Appointments Clause are readily apparent. Because of the Senate's critical role in appointments, each State has an equal say in who is appointed because all States enjoy equal representation in the Senate. *See* U.S. Const. art. I, §3, cl. 1. Furthermore, the Senate can divest itself of its checking power only if majorities in both Houses of Congress agree.

Bicameralism and presentment—the lawmaking process for Congress to vest appointment powers—also protect the States. "Even the quickest look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high[-]volume lawmaking. … [The] three institutions answer to different constituencies, are selected at (mostly) different times, and are made independent of one another's direct control." John F. Manning, *Lawmaking Made Easy*, 10 Green Bag 2d 191, 198 (2007). And because state law is supreme absent preemption by federal law, *see* U.S. Const. art. VI, cl. 2, the inherent difficulty of bicameralism and presentment necessarily protects the States. "The Founders

understood that the means established for adopting federal law would have a direct impact on federalism" and that "federal lawmaking procedures … preserve federalism both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism." Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1323-24 (2001).

3. The Appointments Clause, however, also prompts questions. For example, who is an "Officer[] of the United States," and within that group, who are "inferior Officers"? U.S. Const. art. II, §2, cl. 2. What bodies constitute "Courts of Law" or "Departments," and within "Departments," who are "[h]eads"? *Id.*

The Court has answered such questions. The Court's current test for officer status asks whether the individual "occup[ies] a 'continuing' position" and "exercis[es] significant authority pursuant to the laws of the United States." *Lucia*, 585 U.S. at 245 (first quoting *Germaine*, 99 U.S. at 511; and then quoting *Buckley*, 424 U.S. at 126); *compare* Mascott, *supra*, at 6 (urging a broader test). The Court has advanced a couple of tests for inferior officers, one using a balancing approach and another emphasizing supervision alone. *Compare Morrison*, 487 U.S. at 670-72, *with Edmond*, 520 U.S. at 662-63. The Court has also indicated—controversially—that Article I tribunals can be "Courts of Law." *Freytag*, 501 U.S. at 890. And of special relevance here, the Court has defined a "Department" as "a freestanding component of the Executive Branch, not subordinate to or contained within any other such component," and has held that "multimember agencies" can constitute department heads. *Free Enter. Fund*, 561 U.S. at 511-12.

Another question is what remedies are available for violations of the Appointments Clause. Actions taken by officers who have not been empowered to act are "void *ab initio*." *Collins*, 594 U.S. at 257-58. This makes sense: By definition, someone without a lawful appointment cannot "exercise … power that the actor d[oes] not lawfully possess." *Id.* at 258 (citing, *inter alia*, *Lucia*, 585 U.S. at 251-52). In fact, to remedy Appointments Clause violations with regard to certain proceedings, not only must "a new hearing" take place "before a properly appointed official," but that hearing must also occur before a different person (that is, not the previously unlawfully appointed official). *Lucia*, 585 U.S. at 251 (quotations omitted). Such strong medicine is necessary to vindicate the Constitution's safeguards on liberty.

4. Finally, the Court has set forth what effectively amounts to an order of operations for resolving Appointments Clause challenges. Where Congress enacts a scheme that bestows appointment power outside of the bounds that the Appointments Clause permits, the Court can assess that scheme's constitutionality by determining whether the appointed individuals are officers. If the appointed individuals are officers, such a scheme is unconstitutional *per se*.

That is the lesson from *Buckley*. There, the Court addressed the constitutionality of the then-newly established Federal Election Commission. Congress vested appointment of two Commissioners in the President alone, but also two each in "the President pro tempore of the Senate" and "the Speaker of the House [of Representatives]." 424 U.S. at 126-27. Such a statute could be constitutional only if the Commissioners were not officers of the United States. Yet the Court reasoned that because "a postmaster first class, and the clerk of a

district court, are inferior officers of the United States within the meaning of the Appointments Clause, as they are, surely the Commissioners … are *at the very least* such 'inferior Officers' within the meaning of that Clause." *Id.* at 126 (emphasis added) (citations omitted). In other words, the Court did not need to decide whether the Commissioners were principal officers because it was sufficient that they were officers whose appointment had not been lawfully vested.

B. Congress has not vested appointment of Task Force members in the Secretary.

No one disputes that Task Force members are officers whom the President did not nominate and the Senate did not confirm. As the federal government concedes (at 3), "[a]ll agree that Task Force members are officers of some kind, because they exercise significant, continuing governmental authority." Instead, the parties disagree about whether Task Force members are principal or inferior officers. The Court need not resolve that question because, even if those officers are inferior, Congress never vested their appointment "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, §2, cl. 2. The "default" rule, *Edmond*, 520 U.S. at 660, thus applies—presidential nomination followed by senatorial confirmation. Because that indisputably did not happen here, it does not matter whether Task Force members are principal or inferior officers because the federal government's argument fails either way.

1. The Task Force is housed within the Agency for Healthcare Research and Quality (AHRQ), which itself if housed within the Public Health Service, which in turn is part of the Department of Health and Human Services. *See, e.g.*, U.S.Br.3 ("The Task Force sits within the

Public Health Service, which is itself a component of [HHS]."). AHRQ is managed by its own "director," 42 U.S.C. §299(a), while the Public Health Service is managed by "the Assistant Secretary for Health," *id.* at §202; *see also id.* at §203 ("The Service shall consist of (1) the Office of the Surgeon General, (2) the National Institutes of Health, (3) the Bureau of Medical Services, and (4) the Bureau of State Services, and the [AHRQ]."). A Senate-confirmed Secretary runs HHS. *See* 42 U.S.C. §3501; 67 Stat. 631, Reorganization Plan No. 1 of 1953, §1.

Several statutory provisions are relevant to whether Congress has departed from the Appointment Clause's default rule with respect to the Task Force:

(1) 42 U.S.C. §299b-4(a)(1) states that "[t]he Director [of AHRQ] shall convene an independent Preventive Services Task Force … to be composed of individuals with appropriate expertise." The statute does not provide a tenure term for Task Force members but does provide 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." *Id.* at §299b-4(a)(6). AHRQ also "shall provide ongoing administrative, research, and technical support for the operations of the Task Force." *Id.* at §299b-4(a)(3).

(2) 42 U.S.C. §299(a) provides that "[t]here is established within the Public Health Service an agency to be known as the [AHRQ], which shall be headed by a director appointed by the Secretary. The Secretary shall carry out this subchapter acting through the Director."

(3) An uncodified statute from 1966 allows the Secretary to perform "all functions of the Public Health Service … and of all other officers and employees of the Public Health Service." 80 Stat. 1610, Reorganization Plan No. 3 of 1966. That statute, however, does "not apply to the functions vested by law in any advisory council … in the Public Health Service." 80 Stat. 1610 §1(b).

Notably, 42 U.S.C. §299b-4, 42 U.S.C. §299(a), and the 1966 statute are the only statutes that the federal government identified to the Fifth Circuit to support its theory that Congress departed from the Appointments Clause's default rule with respect to the Task Force. *See* U.S.Opening.Br.30-35, *Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930 (5th Cir. 2024) (No. 23-10326); *see also* U.S.Resp.&Rep.Br.5-13, *Braidwood*, 104 F.4th 930 (No. 23-10326).

2. Because Task Force members indisputably are officers whom the President did not nominate and the Senate did not confirm, the Court need not decide more because Congress has not vested their appointment "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, §2, cl. 2. The Court's order-of-operations analysis from *Buckley* should be dispositive here.

To begin, Congress has not expressly authorized anyone to appoint Task Force members. Instead, by the federal government's own account, "Congress codified the Task Force's role by expressly authorizing the Director of [AHRQ], … to 'periodically convene' the Task Force." U.S.Br.5 (quoting Healthcare Research and Quality Act of 1999, Pub. L. No. 106-129, sec.2(a), §915(a)(1), 113 Stat. 1659). Allowing AHRQ's Director to "convene" the Task Force does not remotely equate to

appointing them. To "convene" means "[t]o call together, esp[ecially] for a formal meeting; to cause to assemble." Black's Law Dictionary (12th ed. 2024); *see also Convene*, Collins Dictionary (12th ed. 2014) (defining "convene" as "to gather, call together, or summon, esp. for a formal meeting"); *Convene*, Cambridge Dictionary, https://perma.cc/84U9-LTDS (defining "convene" as "to bring together a group of people for a meeting, or to meet for a meeting"); *Convene*, The American Heritage Dictionary, https://perma.cc/39AA-J2C9 (defining "convene" as "1. [t]o cause to come together formally; convoke" and "2. [t]o summon to appear, as before a tribunal"). True, someone occupying a government role cannot be convened to do anything until he or she has been appointed, but convening itself is not appointment. *See, e.g.*, *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 273 (1953) (Jackson, J., dissenting) ("In cases of intracircuit conflict or other exceptional situations which actually demand the attention of the full court, the judges of a court should be trusted to convene on their own initiative.").

The distinction between appointing and convening, moreover, is familiar to Congress. By statute, "the Secretary of State shall convene a Security Review Committee" should certain events arise, yet the Secretary does not appoint every member of the Committee. 22 U.S.C. §4831(a)(1)-(2). Likewise, "the Secretary of the military department concerned shall convene selection boards," 10 U.S.C. §611, but appointment to those selection boards is addressed separately, *id.* at §612. As Respondents demonstrated to the Fifth Circuit in an extensive statutory appendix, such distinctions between convening and appointing are common. *See* Appellees/Cross-Appellants.Appendix.008-

099, *Braidwood*, 104 F.4th 930 (5th Cir. 2024) (No. 23-10326) (citing, *inter alia*, 10 U.S.C. §151(a), (g); 15 U.S.C. §634c(b)(2)(A); 16 U.S.C. §3951(9), §3952(a)(1)-(2); 18 U.S.C. §3168(a); 20 U.S.C. §107d-2(a)-(b); 20 U.S.C. §1090(f)(3)(A); 21 U.S.C. §379dd(d)(1)(D)(i); 22 U.S.C. §7302(b)(1), (d); 42 U.S.C. §290ee-(5)(e)(1)-(2); 50 U.S.C. §3022(b), (d)).

The fact that Congress did not provide a statutory method to appoint Task Force members should not be surprising. When Congress created the Task Force in 1984, its members merely gave advice, and "members of a commission that has purely advisory functions need not be officers of the United States." Constitutional Limitations on Federal Government Participation in Binding Arbitration, 19 Op. O.L.C. 208, 216 (1995) (quotation omitted); *see also* Cong. Rsch. Serv., R40856, *The Debate Over Selected Presidential Assistants and Advisors: Appointment, Accountability, and Congressional Oversight* at 22 n.110 (2014) (repeating view of Office of Legal Counsel). The Director therefore could retain them as volunteers. That changed, however, following the Affordable Care Act's enactment in 2010, where "Congress for the first time provided that some of the Task Force's recommendations could have binding legal effects." U.S.Br.6. If Congress wished to depart from the Constitution's longstanding default rule, at that time it should have (i) made sure that Task Force members are not principal officers and (ii) vested their appointments in the President or HHS Secretary. Congress's decision not to do so is dispositive.

Even if the AHRQ Director's power to convene implicitly carries with it the power to appoint, however, that would not help the federal government. The AHRQ Director is not a department head. Instead, all concede

that the AHRQ is a component of the Public Health Service, which is a component of a cabinet-level agency. Accordingly, under *Free Enterprise Fund*, neither the AHRQ nor the Public Health Service is "a freestanding component of the Executive Branch, not subordinate to or contained within any other such component." 561 U.S. at 511. Yet the AHRQ Director—not the HHS Secretary—appointed the Task Force members. *See, e.g.*, U.S.Opening.Br.5, *Braidwood*, 104 F.4th 930 (No. 23-10326) ("The Task Force is currently composed of 16 members (selected by the HHS official who convenes the Task Force)."); *id.* at 30 ("Although the existing Task Force members have not yet received an appointment consistent with the Appointments Clause, the Secretary has authority to appoint Task Force members and is in the process of providing them with a constitutional appointment.").

3. Before the Fifth Circuit, the federal government tried to avoid this constitutional infirmity by suggesting that the Secretary's control over the AHRQ Director satisfies the Appointments Clause. *Id.* at 30-35. Not so. Congress did not vest the appointment power for Task Force members in the Secretary, and lawyers for the Executive Branch cannot rewrite the statute to say otherwise. Congress alone decides whether to vest the appointment of inferior officers in department heads and, if so, in which department. Because Congress has not "by law" vested appointment power in the Secretary, U.S. Const. art. II, §2, cl. 2, the default rule governs.

Nor do 42 U.S.C. §299(a) or the 1966 statute help the federal government. The Secretary may act "through" the AHRQ Director, 42 U.S.C. §299(a), or perform the functions "of all other officers and employees of the Public Health Service," 80 Stat. 1610. The AHRQ

Director, however, is not an officer or employee of the Public Health Service; by statute, it is a separate entity that is merely housed within the Public Health Service. *See* 42 U.S.C. §299(a). Accordingly, the 1966 statute is irrelevant.

Regardless, the Secretary acts "*through*" the AHRQ director; he does not *become* the AHRQ director. *Id.* (emphasis added). This distinction is a familiar one. The President acts through subordinate officials but does not become them. *See, e.g.*, *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 204 (2020) ("[T]he Framers expected that the President would rely on subordinate officers for assistance."). Instead, "[i]n the case of inferior officers whose appointment is by law vested in the heads of Departments, or in officers appointed by the President, he can only act *indirectly* by his authority over his own appointees." *Removal of Assistant Postmaster of Washington, D.C.*, 17 Op. Att'ys Gen. 475, 475 (1882) (emphasis added); *accord* U.S. Const. art. II, §2, cl. 1 ("The President … may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."); The President and Accounting Officers, 1 Op. Att'y Gen. 624, 625 (1823) ("[I]t could never have been the intention of the constitution, in assigning the general power to the President to take care that the laws be executed, that he should in person execute them himself."). It could not be otherwise: Per the Appointments Clause, there is a distinction between "the President alone" and "the Heads of Departments." U.S. Const. art. II, §2, cl. 2.

The federal government's view that the Secretary can appoint Task Force members because he supervises the Public Health Service and the AHRQ has no limiting

principle and would nullify the Appointments Clause. Because "[t]he executive Power"—in its entirety—"shall be vested in a President," U.S. Const. art. II, §1, every power lodged within the Executive Branch must be subject to the President's supervision, *see, e.g.*, *Seila L.*, 591 U.S. at 213. The Appointment Clause's reference to "the Heads of Departments," U.S. Const. art. II, §2, cl. 2, would serve no purpose if the mere fact that anyone that Congress vests with appointment authority is subject to supervision were sufficient to satisfy the Constitution, because everyone in the Executive Branch is subject to the President's supervision. Unsurprisingly, the Court has rejected such a theory. *See Edmond*, 520 U.S. at 658 ("Congress could not give the Judge Advocates General power to 'appoint' even inferior officers of the United States; that power can be conferred only upon the President, department heads, and courts of law."). It should do so again here.

The best contrary authority the federal government offered the Fifth Circuit was *United States v. Hartwell*, 73 U.S. 385 (1867), where the Court addressed a statute providing that "the assistant treasurer of the United States at Boston is hereby authorized to appoint" a clerk "*with the approbation of the Secretary of the Treasury*." General Appropriations Act of July 23, 1866, ch. 208, 14 Stat. 191, 202 (emphasis added). But that case proves Respondents' point. If Congress wishes to vest appointment power in an agency head, it says so. The language of *Hartwell*'s 1866 statute expressly provided that the Secretary was the ultimate decisionmaker. *See* 14 Stat. 202; *Hartwell*, 73 U.S. at 393. The statutes relevant to this case contain no such language. Accordingly, the constitutional default rule applies. *Edmond* confirms this point. Because Congress there

declared that "[t]he Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers," 49 U.S.C. §323(a), a provision allowing a Judge Advocate General to "assign" military judges did not constitute the power to appoint, *see Edmond*, 520 U.S. at 656-57. The federal government points to no such language here vesting power in the Secretary.

Furthermore, the federal government's views are contrary to HHS's practice. The AHRQ Director appointed the Task Force members. If some statute allows the Secretary to make such appointments, appointments by the AHRQ Director are inexplicable. It was not until after this case was filed that the Secretary purported to ratify their appointments. *See* U.S. Dep't of Health & Hum. Servs., Ratification of Prior Appointment and Prospective Appointment Affidavit (2023), https://perma.cc/8TAA-7AMN. The Executive Branch's initial interpretation of the statutes should receive more respect than its *post hoc* reinterpretation. *Accord Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 386 (2024) (explaining that courts sometimes afford "respect" to "Executive Branch interpretation[s] … issued roughly contemporaneously with enactment of the statute" and that "remain[] consistent over time").

C. The federal government's amici's policy arguments are irrelevant and overstated.

The federal government's amici fret that following the Appointments Clause will result in bad policy. Even if that were true, the Court's duty is to the Constitution. Here, however, policy concerns are especially misplaced—even apart from the fact that insurers often

do not need a mandate to cover preventive care.[2] Because Congress has not vested appointment power elsewhere, the Appointments Clause's default rule applies, meaning that the President must nominate Task Force members to the Senate for confirmation. The President has not yet attempted to follow the Appointments Clause with respect to these officers, but doing so would enable the Task Force to perform its statutory functions.

1. What is remarkable about almost all of the amicus briefs filed in support of the federal government is how little law they offer. Instead, the briefs repeat the theme that affirming the Fifth Circuit's decision will harm patients. For example, the American Hospital Association begins its argument by announcing that "preventive-care services save lives, improve health, and reduce healthcare costs." Am.Hosp.Ass'n.Br.6 (capitalization omitted). The brief of 48 Bipartisan Economics and Other Social Science Scholars begins its argument by observing that "the preventive services provision rests on sound economic principles specific to preventive care." Bipart.Econ.&Soc.Scholars.Br.5 (capitalization omitted). And the American Public Health Association's brief opens its argument by warning that "the Court of Appeals' ruling will cause Americans to suffer preventable illness and even death." Am.Pub.Health.Br.5 (capitalization omitted). Not one of those briefs, however, cites the Appointments Clause—the constitutional text before the Court.

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[2] *See, e.g.*, Goth, *supra* ("When [the nonprofit Employee Benefit Research Institute] asked respondents for reasons why they would continue to provide preventive services at no cost to members, a number said covering preventive services in full 'incentivizes their use, promotes better health, prevents more serious conditions, is insignificant in costs and saves money in the long term.'").

No one disputes that expertise is important or that Task Force members may be able to help foster positive health outcomes. But this is a court of law. If Congress concludes there is a policy problem, Congress can fix it. The Court is not in the business of refereeing—let alone resolving—policy arguments. *See, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 698 (1976) (rejecting "the proposition that federal judges, perhaps judges as a whole, have a role of their own, quite independent of popular will, to play in solving society's problems"). The federal government's amici should direct their efforts to the "elected representatives across the street." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 383 (2023).

2. Policy arguments are especially inappropriate here. Affirming the Fifth Circuit's judgment would not mean that the Task Force cannot function, much less that health-care expertise will be lacking. Instead, before the Task Force members can act as officers, the President must nominate and the Senate must confirm them. No statute prevents the President from sending the members' nominations to the Senate. When Congress gave the Task Force additional powers in 2010, *see* U.S.Br.6, that enactment triggered the Senate-confirmation requirement, but Congress never blocked the President's ability to submit nominations to the Senate.[3]

The federal government's amici's policy arguments thus rest on the premise that presidential nomination

[3] Because Congress has not vested appointment of Task Force members in any Executive Branch official, the Court need not decide in this case whether a president could cure an unconstitutional vesting of appointment power in an agency official other than a department head by nominating a person for Senate confirmation.

and senatorial confirmation is unrealistic. Yet this process is ubiquitous. "[A]pproximately 45,000 nominations are received by the Senate each two-year Congress." *Hearing on Senate Procedures to Confirm Nominees Before the S. Rules & Admin. Comm.* 1 (Jul. 30, 2024) (statement of Elizabeth Rybicki, Spec. on Cong. & the Legis. Process), https://perma.cc/KJE4-J7RA. Although some nominees, especially for high-profile positions, occasionally must wait a long time to be confirmed, many do not. Congress confirms thousands of nominations through unanimous consent. *Id.* at 2 ("Nominations supported by the committee of jurisdiction are most often taken up and approved by the full Senate without a roll call vote."). If Congress determines, moreover, that the process is unduly onerous, it can amend the statutes regarding these officers to ensure that they are inferior officers and vest their appointment in the Secretary.

Implicit in the federal government's amici's appeals to policy, therefore, is apprehension that confirmation for Task Force members *in particular* may be difficult. Such apprehension should give the Court pause. One explanation for why some amici may fear that Senate confirmation would not be quick and easy, after all, is that the Task Force must reconcile coverage mandates with religious liberty. Concerns about how to do that are at the heart of a significant public debate. The Senate—through confirmation or vesting of appointment power via bicameralism and presentment—should play a role in that debate. In short, because Congress changed the playing field when it made Task Force members officers by empowering them to create binding obligations, the Senate's federalism-protecting function governs.

II. Severability Is Irrelevant and Misplaced.

The federal government and some amici urge the Court to remedy the Appointments Clause violation by "severing" pieces of the statutory scheme. Such slicing and dicing would not help Petitioners because Congress never vested appointment power in the Secretary. Nor would severing the statutes be proper in any event. Whatever role severability may play in other cases, it does not allow courts to refashion this particular scheme.

A. Severability is irrelevant to the principal-vs.-inferior question.

At the outset, any severability question is irrelevant to whether Congress has departed from the Appointments Clause's default rule with respect to Task Force members. The problem for the federal government is not that Congress has said too much, but that it has said too little. Under the Appointments Clause, Congress must affirmatively act by statute to vest power to appoint inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, §2, cl. 2. Because Congress has not done so, no amount of severing can allow the Secretary to ratify or make these appointments. Instead, the default rule applies whatever constitutional status Task Force members enjoy.

Nor would severing parts of this statutory structure comport with the Appointments Clause. Even if Congress had vested the power to appoint Task Force members in the AHRQ Director, no amount of severing would allow the Court to transform that statute into a vesting of power in the Secretary. Not only is that not what the statutes say, but the rule that Congress can vest appointment only in department heads would serve no purpose if the judiciary could refashion statutes

vesting appointment powers in someone who is not a department head into a statute vesting such powers in a department head. And in any event, that kind of approach would not work here because—even if a power to convene is a power to appoint—the very statute that allows the AHRQ Director to convene the Task Force is the statute that creates the Task Force. If the AHRQ Director were severed from 42 U.S.C. §299b-4(a)(1), there no longer would be a Task Force to speak of. The Court thus cannot sever those provisions.

B. Expansive theories of severability are especially inappropriate here.

The Court should be wary of expansive severability theories for this particular statutory scheme for other reasons. The Court has severed provisions where Congress placed an unconstitutional removal restriction in a statute. *See, e.g.*, *Seila L.*, 591 U.S. at 238. The Court has done the same where a principal officer could become an inferior office with only a small statutory excision. *See, e.g.*, *United States v. Arthrex*, 594 U.S. 1, 25 (2021). These decisions are controversial. *See, e.g.*, *Seila L.*, 591 U.S. at 2552 (Thomas, J., dissenting in part); *Arthrex*, 591 U.S. at 28 (Gorsuch, J., dissenting in part); *accord* Christopher J. Walker, *What* Arthrex *Means for the Future of Administrative Adjudication: Reaffirming the Centrality of Agency-Head Review*, Yale J. on Reg. Notice & Comment (Jun. 21, 2021) https://perma.cc/M6SH-K59C ("[I]t would be aggressive to judicially restructure the statutory review scheme to grant agency-head review—something that seems contrary to pretty clear congressional intent.").

The Court should not extend such precedents here. In addition to general concerns about the nature of the judicial power and the difficulty of ascertaining what

Congress would have intended, this particular scheme's structure counsels against such an approach.

First, the point of creating this Task Force was for it to do something different than what the Secretary does. If Congress wanted the Secretary to make the decisions that the Task Force would make, Congress would not have placed the power in a Task Force housed in one specialized body (AHRQ), which itself nests within another specialized body (Public Health Service). Nor would Congress say not only that the Task Force "shall be independent," but also that it "shall be …, to the extent practicable, not subject to political pressure." 42 U.S.C. §299b-4(a)(6). The Court has not extended severability so far as to disregard such a clear statement from Congress.

The statutory severing that the federal government proposes, moreover, is unorthodox. The federal government does not urge the Court to sever 42 U.S.C. §299b-4(a)(1) in its entirety, but only as applied "to Task Force 'A' and 'B' recommendations." U.S.Br.40. Yet courts cannot sever statutes only in certain applications. Doing so would be in obvious tension with an "elementary rule of statutory interpretation: the rule against '[a]scribing various meanings to a *single* iteration' of a statutory term in different applications." *In re Woolsey*, 696 F.3d 1266, 1277 (10th Cir. 2012) (Gorsuch, J.) (following *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994)). The Court has "reject[ed] 'the dangerous principle that judges can give the same statutory text different meanings in different cases.'" *Id.* (quoting *Clark v. Martinez*, 543 U.S. 371, 386 (2005)).

Second, this is not a case where the law cannot work absent severability. Instead, reading the statutes to mean what they say would simply result in the President

nominating Task Force members to the Senate for confirmation. Similar congressionally created bodies require that very process.[4] Put differently, the relevant statutes are not unconstitutional—the only actions that violate the Appointments Clause are the Executive Branch's failure to abide by this statutory scheme.

There is thus no need to sever. The laws on the books already allow presidential nomination and senatorial confirmation—the Constitution's default rule. The President, however, has not nominated Task Force members. The Court should not sever statutory provisions to excuse the Executive Branch's noncompliance with a perfectly constitutional law.

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[4] *See, e.g.*, 22 U.S.C. §1465c(a) ("The Advisory Board [for Cuba Broadcasting] shall consist of nine members, appointed by the President by and with the advice and consent of the Senate."); *id.* §2511(c)(2)(A) ("The [Peace Corps National Advisory] Council shall consist of fifteen voting members who shall be appointed by the President, by and with the advice and consent of the Senate."); 33 U.S.C. §982(b) ("There is established the Advisory Board of the Great Lakes St. Lawrence Seaway Development Corporation which shall be composed of five members appointed by the President, by and with the advice and consent of the Senate …. The Advisory Board shall meet at the call of the Administrator."); 42 U.S.C. §903(c)(1)(A) ("3 members [of Social Security Advisory Board] shall be appointed by the President, by and with the advice and consent of the Senate."); *see also* 42 U.S.C. §10703(a)(1) ("The [State Justice] Institute shall be supervised by a Board of Directors, consisting of eleven voting members to be appointed by the President, by and with the advice and consent of the Senate.").

CONCLUSION

The Court should affirm the Fifth Circuit.

Respectfully submitted.

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