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

MOTION OF THE NEW CIVIL LIBERTIES ALLIANCE FOR LEAVE TO FILE LETTER BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS WITHOUT 10 DAYS' NOTICE AND IN PAPER FORMAT

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The New Civil Liberties Alliance ("NCLA") respectfully moves for leave to file the enclosed letter brief as *amicus curiae* in support of Respondents pursuant to this Court's Order for Supplemental Letter Briefs dated April 25, 2025, without ten days' advance notice to the parties of *Amicus*'s intent to file as ordinarily required by Sup. Ct. R. 37.2(a). In light of the expedited briefing schedule set by the Court, it was not feasible to give ten days' notice, but on April 29, 2025, two working days after this Court's order setting the time for amicus briefs to be filed on May 5, 2025, *Amicus* promptly gave advance notice of its intent to file the attached letter brief to all parties.

Because the task force is structured in violation of the Appointments Clause, and new questions have arisen during and after oral argument as well as in the public sphere with respect to the statutory scheme in which these structural constitutional principles are to be applied in this case, this Court should remand to the Fifth Circuit for it to consider in the first instance these certified questions. NCLA's proposed *amicus* letter includes relevant material not yet fully brought to the attention of the Court by the parties. *See* Sup. Ct. R. 37.1.

Amicus also moves to file this brief in an unbound format on 8½-by-11-inch paper rather than booklet form. These requests are necessary due to the press of time related to the Court's allowance of only one week in which the supplemental letter briefs are to be filed.

For the foregoing reasons, proposed *amicus* respectfully requests that the Court grant its motion to file the attached proposed *amicus* letter brief and accept

it in the format and at the time submitted.

Respectfully submitted,

/s/ Margaret A. Little

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INTEREST OF THE AMICUS[1]

NCLA is a nonpartisan, nonprofit public-interest law firm. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other forms of advocacy. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to be tried in front of impartial judges who provide their independent judgments on the meaning of the law. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because executive agencies and even the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state. Although Americans still enjoy a shell of their Republic, a very different sort of government has developed within it—a type, in fact, the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by the transformation of what was initially a purely advisory task force, the United States Preventive Services Task Force, into a powerful and wholly unaccountable "agency" unilaterally imposing mandatory medical coverage obligations in the billions of dollars upon Americans and American insurers. NCLA represents clients potentially affected by the new Question Presented and would have filed an *amicus curiae* brief at an earlier stage of these proceedings had it been on notice that this question would be before the Court.

Whether these decisionmakers are "principal officers" or "inferior officers," Congress has not "by Law" vested the Secretary of the Department of Health and Human Services with authority to appoint them. Americans were thus wholly unrepresented in authorizing the appointments of the members of this task force who are accountable for the momentous and costly decisions by which they now bind millions of Americans—in violation of their core liberty of self-government.

QUESTION PRESENTED

Whether Congress has "by Law" vested the Secretary of the Department of Health and Human Services with the authority to appoint members of the United States Preventive Services Task Force. U.S. Const. art. II, § 2, cl. 2. The briefs should address this Court's decisions in *United States v. Hartwell*, 6 Wall. 385 (1868), and *United States v. Smith*, 124 U.S. 525 (1888).

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[1] No party's counsel authored any part of this letter brief and no person or entity, other than NCLA and its counsel, paid for its preparation or submission. Rule 37.6. All parties received advance notice of NCLA's intent to file this amicus letter brief. Rule 37.2(a).

ARGUMENT

I. THE MAJOR UNBRIEFED IMPLICATIONS OF *HARTWELL* AND *SMITH* SHOULD BE FIRST ADDRESSED ON REMAND

Neither *Hartwell* nor *Smith* was properly briefed or argued to this Court. In this court, neither party even cited the cases in their opening briefs. Indeed, the government raised *Hartwell* only on reply with respect to Petitioner's "alternative" argument that even if "this Court concludes that Task Force members are 'inferior officers,' Congress has not 'vested' the Secretary with power to appoint those members," an argument which the government concedes is distinct from the question of whether Task Force members are inferior officers. Pet. Rep. Br.16. The government correctly notes that the Fifth Circuit did not address that distinct issue, and this Court did not grant certiorari on it. Pet. Rep. Br. 17.

Although, according to the government, *Hartwell* supports its contention that Congress vested the Secretary with power to appoint Task Force members, that is a misreading of the precedent. The government's tortuous argument goes like this: 42 U.S.C. § 299(a)'s provision "that '[t]he Secretary shall carry out' the statutory provisions governing the Agency for Healthcare Research and Quality (AHRQ) by 'acting through the [AHRQ] Director,' who is himself appointed and removable at will by the Secretary," combined with the statutory provision "that '[t]he Director shall convene' the Task Force, which shall be 'composed of individuals of appropriate expertise,' 42 U.S.C. § 299(b)-4(a)(1)," empowers "the Secretary to personally appoint Task Force members while acting through the AHRQ Director—and at minimum, to approve (or reject) the Director's selections." Pet. Rep. Br. at 17. As made clear at oral argument, "convene" is not a synonym for "appoint."[2]

Neither statute provides for appointments of the Task Force members "by Law"—whether separately or combined. This loose daisy chain of appointments powers for other HHS subagencies cannot just casually loop in unnamed positions that lack statutory appointment instructions. This is especially consequential when persons in what initially were "advisory" roles have now assumed the constitutional "significant authority" of "officers of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) and unilaterally decide what preventive services must be covered by insurers without imposing any cost-sharing requirements on patients.

Hartwell

Hartwell cannot carry the weight the government places on it, nor can *Smith*. Both cases involved embezzlement statutes that imposed penalties on specified

[2] *See* Justice Thomas at Tr. pp. 5-8, 34; Justice Gorsuch pp. 63-64.

persons entrusted with public monies—so the Court in both cases had to strictly construe the statutes under the canon of lenity. Mr. Hartwell, a clerk in the office of an assistant treasurer was convicted under an 1846 penalty statute that expressly defined those persons "intended to be brought within its scope" to include 1) "All officers and other persons charged by this act … with the safe-keeping of the public money" 2) "any officer or agent of the United States, and all persons participating in such act" and 3) "all persons charged with the safe-keeping, transfer or disbursement of the public money." The *Hartwell* majority accordingly posed the question presented as: "Was the defendant an "*officer* or *person* 'charged with the safekeeping of the public money' within the meaning of the act?" (emphasis in original). And it answered the question by saying, "We think he was both." 73 U.S. 393. Accordingly, the case rested on two holdings, and whether Hartwell was an officer or not was not necessary to the Court's decision that the embezzlement statute applied to him.

While it is true that the majority also proceeded to find that that this clerk was an "officer" because he was appointed by the assistant treasurer "with the approbation of the Secretary of the Treasury," it relied upon a specific provision in the General Appropriation Act of July 23, 1866 to find that he was an officer. That provision was cited as 14 Stat. at Large, 200 but actually appears at 14 Stat. at Large 202. (Appended at Ex. A). It provided an appropriation "[f]or salaries of the clerks … in the office of assistant treasurer at Boston" and, among other things, "authorized" the assistant treasurer "to appoint, with the approbation of the Secretary of the Treasury … one chief clerk" and 15 additional clerks, at 8 different salary levels ranging from $3000/year to $800/year, one porter at $700/year and a watchman at $600/year. In a single sentence, *Hartwell* held this "approbation" by the Secretary of the Treasury sufficient to satisfy the Appointments Clause, thus elevating these 18 employees to the status of "officers of the United States."

Three justices dissented, finding that Mr. Hartwell could not, by order of the assistant treasurer by whom he was appointed, "be placed … [under a duty] imposed on him by some act of Congress." The dissent specifically objected to the holding that he was an "officer," pointing out that under the 1846 statute he was appointed by the assistant treasurer alone, and that "by an act passed long since [in 1866], and which can have no effect on the construction of this one, the assent of the Secretary of the Treasury is required." The dissent viewed the penalties to apply "exclusively to the legal custodians of the public money and not to their clerks."

From this, the government argues that "[u]nder *Hartwell*, Congress properly vests the appointment power in a head of a department where, as here, it gives that department head ultimate authority over the appointment—even if a subordinate officer also plays a role in the appointment process." Pet. Rep. Br. 17." The government even cites *Free Enter. Fund v. PCAOB*, 561 U.S. 477 at 512 n.13 (2010) (*FEF*) to say that this Court "ha[s] previously found that the department head's mere

approval of a subordinate's appointment satisfies the Appointments Clause." *Id.*

Not quite. The *FEF* Court in fact recites this proposition, but notes that these are "precedents that petitioners do not ask us to revisit." *Id.* This Court's order of April 25 is precisely an invitation to revisit these holdings.

Smith

Smith is even less illuminating about the questions presented in this case. *Smith*, also an embezzlement case (Oh, those faithless 19th century clerks!), held that a clerk in the office of the collector of the customs could not be charged under the statutes of the United States that imposed penalties upon "officers":

> A clerk of the collector is not an "officer of the United States" … . An officer of the United States can only be appointed by the president, by and with the advice and consent of the senate, or by a court of law, or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States. 124 U.S. 525, 531-2.

Smith distinguishes *Hartwell* by stating that Mr. Hartwell's appointment by the assistant treasurer "could only be made with the approbation of the secretary of the treasury," 124 U.S. at 532, referring to that "approbation" as a "fact" which "in the opinion of the [*Hartwell*] court rendered his appointment one by the head of the department within the constitutional provision." The unanimous *Smith* decision also distinguished *Hartwell* by noting that the Secretary [of the Treasury] "is not invested with the selection of the clerks of the collector [of customs]; nor is their selection in any way dependent upon his approbation." 124 U.S. at 533.

Acknowledging that the indictment had averred that Mr. Smith's appointment had such "approbation," the court held that "*as no law required this approbation*, the averment cannot exert any influence on the mind of the court." *Id.* Indeed, it held that because the Constitution "declares that '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[,]' [t]here must be, therefore, a law authorizing the head of department to appoint clerks of the collector before his approbation of their appointment can be required. No such law is in existence." 124 U.S. at 533.

The government has argued, despite *Smith*, that the same daisy chain of "appointment by approbation" applies to inspectors of the customs office. See Pet. Rep. Br. 17-18 n. 1 ("That method of appointing inferior officers traces back to the Founding era. *See* Act of Mar. 2, 1799, ch. 22, § 21, 1 Stat. 642 (1799) (authorizing

customs officers to appoint customs inspectors "with the approbation of the principal officer of the treasury department)"); 4 Op. Att'y Gen. 164 (1843) (concluding that customs inspectors were "inferior officers" whose appointment was vested in the Treasury Secretary")). But opinions of the Attorney General are not law.[3] Moreover, *Smith* holds that a proper appointment requires a predicate law for the head of department to appoint the official as well as a law providing for approbation of the subordinate's appointment, both of which are missing here.

Because the majority's holding that Mr. Hartwell was an "officer" was not necessary to its decision—he was liable whether an officer or a person—*Hartwell* is an exceedingly slender reed upon which to erect the Task Force's legitimacy. The context of the cases matters, too. Neither *Smith* nor *Hartwell* involved questions of the legitimacy of either clerk's appointment to exercise executive powers and authority to influence the lives of Americans, but instead the more technical question of their personal exposure to criminal statutes. For this Court to render a decision that relies on these out-of-context cases that antedate modern Appointments Clause jurisprudence, and to do so as a matter of "first view" not final review, without a lower court record and consideration based upon robust briefing, would depart from settled practice and precedent of this court. The Supreme Court is "a court of final review and not first view," *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001), and ordinarily "do[es] not decide in the first instance issues not decided below." *NCAA v. Smith*, 525 U.S. 459, 470 (1999). To do so on this cursory record risks setting binding precedent with unknown implications across the wide terrain of far-flung administrative agencies and law.

Moreover, this Court should revisit *Hartwell* in an appropriate, fully briefed case because its alternate holding that mere "approbation" by a head of department satisfies the Appointments Clause is both substantively and intuitively incorrect. On its facts, *Hartwell*'s reading of an *appropriations* statute swept eight levels of Boston clerks, a porter and a watchman into the class of "officers of the United States," a status that might well have come as a surprise to the watchman and porter and some or all of the eight tiers of assistant and subordinate clerks. These counter-intuitive promotions, moreover, were not necessary to the holding and thus *Hartwell*'s putative significance is both misleading and erroneous.

The government's deployment of this ancient, ill-considered, outlier case to legitimize the far more shocking and consequential elevation of members of a

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[3] *See McElroy v. U.S. ex rel. Guagliardo*, 361 U.S. 281, 285-86 (1960) (an 1872 opinion of the Attorney General is "entitled to some weight" but such opinions "do not have the force of judicial decisions."); *Lewis Pub. Co. v. Morgan*, 229 U.S. 288, 311 (1913) (opinion of the Attorney General was not "adequate to control or modify the conclusion we have reached as to the meaning of the provision."); *Schick v. Reed*, 419 U.S. 256, 275 n.12 (1974) (Marshall, J., dissenting) ("A legal opinion from the Attorney General … hardly bears the force of law.").

volunteer advisory council into "officers of the United States" through verbal legerdemain where "approbation" equals "appointment" and "convene" is good enough to mean both, eviscerates the whole purpose of the Appointments Clause by diluting the accountability of heads of departments. These early cases predate the Court's modern Appointments Clause formalism and are not invoked in such cases as *Lucia v. SEC*, 585 U.S. 237 (2018) and *Seila Law, LLC v. CFPB*, 591 U.S. 197 (2020). The Appointments Clause exists to ensure that the people are governed by officials who are answerable to the public. *NFIB v. Dep't of Labor*, 595 U.S. 109, 126 (2022) (Gorsuch, J., concurring) ("The question before us is not how to respond to the pandemic, but who holds the power to do so. … [W]e do not impugn the intentions behind the agency's mandate. Instead, we only discharge our duty to enforce the law's demands when it comes to the question who may govern the lives of 84 million Americans.").

II. NO STATUTE VESTS AUTHORITY IN ANYONE TO APPOINT MEMBERS OF THE TASK FORCE AS OFFICERS OF THE UNITED STATES, EITHER "PRINCIPAL" OR "INFERIOR"

So, what do *Hartwell* and *Smith* teach us? That in the first instance, a statute properly passed by Congress through bicameralism and presentment must first vest the authority to appoint inferior officers of the United States in someone, whether a head of department, a court of law, or the President. Inferior officers cannot just spring up as the transformed members of an advisory task force that later morph into persons holding constitutional status and authority—without the Constitution's required appointments process being followed to ensure accountability.

This is not only NCLA's view of the principal teaching to be drawn from these cases, but also the conclusion of two scholars who recently published a thoughtful analysis of this new aspect of the case *sub judice*. In their trenchant and timely assessment, Professors Josh Blackman and Seth Barrett Tillman challenge whether the 1966 Reorganization Plan, cited by the government as ostensible statutory authority for vesting powers in the Secretary of HHS to appoint Task Force members, is even a "law" at all.[4] *See U.S. v. Maurice.* 26 F. Cas. 1211, 1214-15 (C.C. D. Va. 1823) (No. 15,747) (Marshall, C.J.).

The professors also reviewed the statutes the government cites and came away empty-handed on authority for members of the Task Force to operate as lawful "officers of the United States." Noting that "this litigation has focused closely on whether the task force members are 'principal' or 'inferior' officers, Blackman and

[4] *See* Josh Blackman and Seth Barrett Tillman, *The Supreme Court's Order for Supplemental Briefing in* Kennedy v. Braidwood *and the Reorganization Plan of 1966*, THE VOLOKH CONSPIRACY, April 28, 2025, *available at* http://bit.ly/3YruL52.

Tillman conclude that the request for supplemental briefing:

> "shift[s] focus to whether any of the appointments of Task Force members … by the Secretary were supported by some statute. Indeed, the Court's focus on *Hartwell* and *Smith* may suggest the Court believes only *express* statutory authority is permissible to validate an exercise of the appointment power by an inferior officer.
>
> "If the positions of Task Force members are not filled consistent with the Appointments Clause and Inferior Office Appointments Clause, that is, if members are not appointed under the authority of a statute, then the purported officeholders are not officers of the United States of any stripe, principal or inferior. At most, they would be 'employees.' And, as a general matter, we do not think employees can exercise the 'significant authority' of an officer of the United States. … Such employees certainly cannot be vested with any sort of 'independence' vis-à-vis principal officers and the President. Here, and elsewhere, so much turns on whether a person is or is not an officer of the United States."

Accordingly, if the Court decides this issue on the merits without remand, it should hold that no statute vests authority in anyone to appoint members of the Task Force, much less in a head of department, the judiciary, or the President. Hence, the Task Force members lack constitutionally required appointments necessary to authorize their exercise of unilateral "significant authority" to mandate preventive health care that must be covered by insurers without imposing any cost-sharing requirements on patients. *Buckley*, 424 U.S. at 126.

Respectfully submitted,

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Exhibit A

14 Stat. at Large 202

For employés in seed-room, five thousand two hundred dollars.

Propagation, &c. of plants, cuttings, and shrubs.

For propagation and distribution of plants, cuttings, and shrubs, fourteen thousand dollars: *Provided*, That the propagation of plants, cuttings, and shrubs shall be confined to such as are adapted to general cultivation and to promote the general interests of horticulture and agriculture throughout the United States.

Proviso.

Experimental garden.

For experimental garden in reservation number two, eight thousand eight hundred dollars.

Mint at Philadelphia.

Mint at Philadelphia. — For salaries of the director, treasurer, assayer, melter and refiner, chief coiner and engraver, assistant assayer, and seven clerks, thirty-five thousand five hundred dollars.

For wages of workmen and adjusters, one hundred and twenty-five thousand dollars.

For specimens of ores and coins to be preserved in the cabinet of the mint, six hundred dollars.

For freight on bullion and coin, five thousand dollars.

Branch at San Francisco.

Branch Mint at San Francisco, California. — For salaries of superintendent, treasurer, assayer, melter and refiner, coiner, and six clerks, thirty-two thousand dollars.

For wages of workmen and adjusters, two hundred thousand dollars.

For incidental and contingent expenses, repairs and wastage, one hundred thousand dollars.

Assay office, New York.

Assay Office, New York. — For salaries of superintendent, assayer and melter, and refiner, assistant assayer, officers and clerks, twenty-five thousand seven hundred dollars.

For wages of workmen, forty thousand dollars.

For incidental and contingent expenses, thirty-five thousand dollars.

Branch mint at Denver.

Branch Mint at Denver. — For superintendent, assayer, melter, refiner, coiner, and clerks, thirteen thousand dollars.

For wages of workmen, twenty thousand three hundred and one dollars.

For incidental and contingent expenses, twelve thousand dollars.

Independent treasury.

Independent Treasury. — For salaries of the assistant treasurers of the United States at New York, Boston, Charleston, and St. Louis, viz: for the assistant treasurer at New York, eight thousand dollars; those at Boston and Saint Louis, each, five thousand dollars; and the one at Charleston, two thousand five hundred, — twenty thousand five hundred dollars.

Additional salary of treasurer at Philadelphia; at New Orleans;

For additional salary of the treasurer of the mint at Philadelphia, one thousand dollars.

For additional salary of the treasurer of the branch mint at New Orleans, five hundred dollars.

at Denver.

For additional salary of the treasurer of the branch mint at Denver, five hundred dollars.

Clerks at office of assistant treasurer at Boston; Appointment of clerks in lieu of those now authorized, and their salaries.

For salaries of the clerks and messengers in the office of assistant treasurer at Boston, twenty-five thousand two hundred dollars: *Provided*, That in lieu of the clerks heretofore authorized, the assistant treasurer of the United States at Boston is hereby authorized to appoint, with the approbation of the Secretary of the Treasury, one chief clerk, at a salary of three thousand dollars per annum; one clerk, at a salary of twenty-five hundred dollars per annum; one clerk, at a salary of two thousand dollars per annum; two clerks, at a salary of eighteen hundred dollars per annum, each; two clerks, at a salary of fifteen hundred dollars per annum, each; six clerks, at a salary of twelve hundred dollars per annum, each; one clerk, at a salary of one thousand dollars per annum; two clerks, at a salary of eight hundred dollars per annum, each; one porter, at a salary of seven hundred dollars per annum; and one watchman, at a salary of six hundred dollars per annum.

For salaries of clerks, messengers, and watchmen, in office of the as-