No. 24-316

In the Supreme Court of the United States

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

BRAIDWOOD MANAGEMENT, INC., ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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The Secretary of Health and Human Services (HHS) may remove members of the U.S. Preventive Services Task Force (Task Force) at will and supervise them by virtue of his statutory authority over the Public Health Service. The Fifth Circuit nonetheless erroneously held that Task Force members are principal officers who must be appointed by the President with the advice and consent of the Senate. And the court compounded its error by then declining to sever the lone provision that, in its view, insulated the Task Force from secretarial supervision. The Fifth Circuit's decision defies this Court's precedents, declares an important federal statutory provision unconstitutional, and jeopardizes healthcare protections enjoyed by millions of Americans under the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119.

Although respondents defend the judgment below on the merits, they "agree with the Solicitor General that the Court should grant the petition for certiorari" because "[t]he court of appeals determined that a key provision of the Affordable Care Act violates Article II's Appointments Clause." Br. in Support of Cert. 1. The Court should accordingly grant the petition and reverse the judgment below.

A. Respondents Agree That The Fifth Circuit's Decision Warrants This Court's Review

The petition demonstrates (at 27-33) that the Fifth Circuit's decision warrants review. That decision held that "constitutional problems * * * inhere in the Task Force's" structure, Pet. App. 30a, and "when a lower court has invalidated a federal statute," this Court's "usual" approach is to grant review, *Iancu* v. *Brunetti*, 588 U.S. 388, 392 (2019). The court of appeals' decision also threatens to upend a key part of the ACA that provides preventive-services coverage without cost-sharing for millions of Americans.

Respondents' brief supporting certiorari correctly recognizes that the court of appeals declared unconstitutional "a key provision of the Affordable Care Act," and that "this Court's usual practice" in such circumstances "is to grant certiorari without awaiting a circuit split." Br. in Support of Cert. 1; see *id.* at 19-20. While respondents characterize (*id.* at 2) our arguments about the practical consequences of the decision below as "dire predictions," they never explain how or why those arguments are incorrect. And numerous amici agree with our assessment of the practical stakes. See American Pub. Health Ass'n Amici Br. 5-14; American Cancer Soc'y Amici Br. 20-28; 35 Health Care Access Orgs. Amici Br. 23-30; Illinois Amici Br. 4-19. In any event,

respondents acknowledge (Br. in Support of Cert. 2) that any "disagreements" about the consequences of the Fifth Circuit's decision do not "affect the certworthiness of this case."

The petition further demonstrates (at 30-31) that absent this Court's review, a future plaintiff with Article III standing could sue in the Fifth Circuit and obtain a universal remedy as the default under circuit precedent, thus rendering the Task Force preventive-services scheme inoperative nationwide. Respondents likewise recognize (Br. in Support of Cert. 22) that risk and agree that this Court should "grant certiorari before allowing" a lower court to grant such a universal remedy.[1]

B. The Fifth Circuit's Decision Is Wrong

Respondents also contend (Br. in Support of Cert. 24-34) that the Fifth Circuit's decision was correct. A complete discussion of the merits can await the full briefing and argument that both parties agree is warranted. But respondents' discussion of the merits offers no persuasive defense of the Fifth Circuit's decision.

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[1] Respondents propose (Br. in Support of Cert. i) to split the petition's question presented into two separate questions—with one addressing the Appointments Clause and the other addressing severability. Respondents' proposal is unnecessary because the Appointments Clause and severability issues are both already expressly included in the petition's question presented, see Pet. i, and dividing them into two questions would neither alter the issues before the Court nor otherwise aid the Court's consideration of the case. But to the extent the Court prefers respondents' formulation, it should grant certiorari on both of respondents' questions presented to ensure that both the Appointments Clause and severability issues are properly before the Court.

1. Task Force members are inferior officers because the Secretary may remove them at will; and to the extent further means of secretarial oversight were required, the Secretary also has the authority to "supervis[e] and direct[]" the Public Health Service, 42 U.S.C. 202, which includes the Task Force. See also Reorganization Plan No. 3 of 1966 (Reorganization Plan), §§ 1(a), 2, 80 Stat. 1610. Respondents do not dispute that the Secretary may remove Task Force members at will. Nor do they cite any case in which an official who was removable at will by a principal officer was herself a principal officer. Instead, they seek to downplay (Br. in Support of Cert. 27) removability as "merely one factor" in the inferior-officer analysis. But even the Fifth Circuit recognized that "an officer's removability" is "the most important" "hallmark[] of inferiority." Pet. App. 17a. And beyond removability, respondents entirely ignore the Secretary's additional express authority to supervise and direct the Public Health Service.

Respondents contend (Br. in Support of Cert. 27) that Task Force members' recommendations are "not subject to review or reversal" by the HHS Secretary because 42 U.S.C. 299b-4(a)(6) requires that those recommendations "be independent and, to the extent practicable, not subject to political pressure." As the certiorari petition explains (at 19-20), however, the statutory reference to independence and freedom from political pressure simply requires that Task Force members make unbiased and evidence-based recommendations, even while those recommendations remain subject to secretarial review. Respondents do not explain why such a scheme is unconstitutional—particularly given that administrative law judges and immigration judges, who operate under similar structures and exercise their

independent judgment, properly serve as inferior officers. Pet. 20.

Respondents also insist (Br. in Support of Cert. 31) that Task Force members must be principal officers because the Secretary cannot "direct" their recommendations in the first instance. That argument cannot be squared with *Edmond* v. *United States*, 520 U.S. 651 (1997), where this Court held that judges of the Coast Guard Court of Criminal Appeals were inferior officers even though no superior could "attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings." *Id.* at 664. "What [wa]s significant" in *Edmond*—and what is significant here—was that the officials at issue had "no power to render a final decision on behalf of the United States unless permitted to do so by" a principal officer. *Id.* at 665. Cf. *Myers* v. *United States*, 272 U.S. 52, 135 (1926) (explaining that while "the President can not in a particular case properly influence or control" certain "quasi judicial" decisions of executive officers, "he may consider the decision after its rendition as a reason for removing the officer").

Respondents further argue (Br. in Support of Cert. 29) that even if the government's interpretation of Section 299b-4(a)(6) is correct, an Appointments Clause problem still exists because "Congress has not 'vested' Secretary Becerra with appointment authority over the Task Force." The Fifth Circuit did not embrace that argument, and for good reason. Multiple statutory provisions empower the Secretary to appoint Task Force members. First, the Secretary may appoint Task Force members when "acting through the Director" of the Agency for Healthcare Research and Quality (AHRQ), 42 U.S.C. 299(a), who normally convenes the Task Force, 42 U.S.C. 299b-4(a)(1). See *United States* v.

Hartwell, 73 U.S. (6 Wall.) 385, 393-394 (1868) (holding that a similar statutory provision properly vested appointment authority in a principal officer). Second, the Secretary may appoint Task Force members when performing "all functions of the Public Health Service" and its "officers"—including the AHRQ Director—and when "mak[ing] such provisions as he shall deem appropriate authorizing the performance of any of the functions * * * of the Public Health Service." Reorganization Plan, §§ 1(a), 2, 80 Stat. 1610. And even if the Secretary's appointment authority were ambiguous, this Court should adopt the government's "reasonable interpretation" recognizing such authority over respondents' suggestion that Congress impermissibly and conclusively vested appointment authority of inferior officers (Task Force members) in a different inferior officer (the AHRQ Director). *Edmond*, 520 U.S. at 658; see *ibid.* (applying the constitutional-avoidance canon to hold that Congress vested appointment of inferior officers in a principal officer).

2. Assuming this Court were to conclude that Task Force members are unconstitutionally insulated from secretarial direction and supervision, it should sever Section 299b-4(a)(6) to cure the constitutional defect. That approach follows directly from this Court's decision in *United States* v. *Arthrex*, 594 U.S. 1 (2021). See Pet. 22-27. Respondents hardly grapple with *Arthrex*—let alone show why its logic should not control the severability analysis here.

Instead, respondents argue (Br. in Support of Cert. 33) that severing Section 299b-4(a)(6) would not cure the constitutional defect because the Secretary would still lack the "ability to review or countermand [the Task Force's] decisions *not* to adopt an 'A' or 'B'

recommendation." But the Secretary's lack of review over Task Force *inaction* does not violate the Constitution. If the Task Force determines that an item or service should not receive an "A" or "B" rating, then no health plan is required to cover it under 42 U.S.C. 300gg-13(a)(1), and there is thus no exercise of federal authority over any private party.

Finally, respondents object (Br. in Support of Cert. 33-34) to the entire enterprise of severability. But this Court has repeatedly emphasized that "'when confronting a constitutional flaw in a statute, [it] tr[ies] to limit the solution to the problem' by disregarding the 'problematic portions while leaving the remainder intact.'" *Arthrex*, 594 U.S. at 23 (quoting *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 328-329 (2006)). And the Court has consistently applied that approach in separation of powers cases after identifying a constitutional defect. See *id.* at 23-27; *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 234-238 (2020) (plurality opinion); *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508-510 (2010). To the extent the Court believes that the Task Force's current structure is unconstitutional, it should follow the same course here.[2]

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[2] Respondents briefly suggest (Br. in Support of Cert. 34) that severing Section 299b-4(a)(6) would not "redress [their] Article III injuries." But the Court should adhere to its normal practice of finding the defective provision severable and then remanding for consideration of the proper relief (if any) that should be provided to the plaintiffs. See *Collins* v. *Yellen*, 594 U.S. 220, 259-260 (2021); *Seila Law*, 591 U.S. at 238 (plurality opinion); *Free Enter. Fund*, 561 U.S. at 514.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant the petition.

Respectfully submitted.

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Solicitor General

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