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., RESPONDENTS

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

BRIEF IN SUPPORT OF CERTIORARI

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QUESTIONS PRESENTED

The Affordable Care Act requires private health insurers to cover "preventive health services." 42 U.S.C. § 300gg-13(a). It also empowers the U.S. Preventive Services Task Force to dictate and decree the preventive care that private insurance must cover. *See* 42 U.S.C. § 300gg-13(a)(1). A separate statute requires that the Task Force members and their preventive-care coverage edicts be "independent and, to the extent practicable, not subject to political pressure." 42 U.S.C. § 299b-4(a)(6).

The court of appeals held that the Task Force members are "principal officers" who must be appointed by the president with Senate confirmation. The court of appeals reached this conclusion because of the powers that the Task Force wields under the Affordable Care Act, and because 42 U.S.C. § 299b-4(a)(6) shields the Task Force from direction or supervision by others. And because the Task Force members were not appointed in conformity with Article II, the court of appeals enjoined Secretary Becerra from enforcing the Task Force's preventive-care coverage mandates against the plaintiffs. The questions presented are:

1. Did the court of appeals correctly hold that the Task Force members are "principal officers" who must be appointed by the president with Senate confirmation?

2. Did the court of appeals correctly refuse the defendants' request to "sever," *i.e.*, nullify, 42 U.S.C. § 299b-4(a)(6) and allow Secretary Becerra to direct and supervise the Task Force's preventive-care coverage decisions?

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The respondents agree with the Solicitor General that the Court should grant the petition for certiorari. The court of appeals determined that a key provision of the Affordable Care Act violates Article II's Appointments Clause by empowering the U.S. Preventive Services Task Force to determine the "preventive care" that private insurers must cover. Pet. App. 1a–26a. And when a lower court holds an Act of Congress unconstitutional, this Court's usual practice is to grant certiorari without awaiting a circuit split—especially when the contested legislation is as significant as the Affordable Care Act. *See, e.g.*, *National Federation of Independent Business v. Sebelius*, 565 U.S. 1033 (2011); *California v. Texas*, 140 S. Ct. 1262 (2020); *see also* Pet. at 27–28 (citing authori-

ties). The Solicitor General is also correct to observe that a denial of certiorari will open the door for a new plaintiff to sue within the fifth circuit and obtain a nationwide remedy that will vacate all agency actions taken to implement the preventive-care coverage mandates recommended by the U.S. Preventive Services Task Force since March 23, 2010. *See* Pet. at 30–31. The respondents believe that this Court should weigh in on the constitutionality of 42 U.S.C. § 300gg-13(a)(1) and the appointments of the Task Force members before that happens.

The respondents disagree with the Solicitor General's criticisms of the court of appeals' opinion, as well as her dire predictions of what might happen if the court of appeals' ruling is allowed to stand. But none of those disagreements affect the certworthiness of this case. The petition satisfies this Court's criteria for certiorari and presents an issue of exceptional importance. And there are no vehicle problems that might counsel in favor of waiting for a different case. The Court should grant the petition.

OPINIONS BELOW

The opinion of the court of appeals is reported at 104 F.4th 930 and reproduced at Pet. App. 1a–48a. The opinions of the district court are reported at 666 F. Supp. 3d 613 and 627 F. Supp. 3d 624 and reproduced at Pet. App. 49a–84a and Pet. App. 85a–136a.[1]

1. Throughout this brief, we will use "Pet. App." to refer to the appendix to the petition filed by the Solicitor General. We will use "App." to refer to the appendix attached to the respondents' brief in support of certiorari.

JURISDICTION

The court of appeals entered its judgment on June 21, 2024. The Solicitor General timely petitioned for certiorari on September 19, 2024. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions appear in the appendix to the Solicitor General's petition. Pet. App. 137a–143a.

STATEMENT

The Affordable Care Act requires most private health insurers to cover certain forms of preventive care without any cost-sharing arrangements such as deductibles, co-pays, or out-of-pocket expenses. *See* 42 U.S.C. § 300gg-13(a) (Pet. App. 142a–143a).[2] The statute does not specify or delineate the preventive care that private insurers must cover. Instead, the statute delegates this authority to the U.S. Preventive Services Task Force (the Task Force), the Advisory Committee on Immunization Practices (ACIP), and the Health Resources and Services Administration (HRSA)—and it empowers these bodies to unilaterally determine the "preventive

2. The Affordable Care Act exempts "grandfathered" plans from these preventive-care coverage requirement. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. Short-term limited-duration insurance plans are also exempt from these coverage mandates. *See* Department of Health and Human Services, *Short-Term, Limited-Duration Insurance*, 83 Fed. Reg. 38,212 (2018).

care" that should be covered and impose their compulsory-coverage edicts on private insurers. *See* 42 U.S.C. § 300gg-13 (Pet. App. 142a–143a).

Section 300gg-13(a) contains four subsections that confer these powers on the Task Force, ACIP, and HRSA. The statute reads as follows:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—
>
> (1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;
>
> (2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[3]
>
> (3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[4]

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3. So in original. The word "and" probably should not appear.
4. So in original. The period probably should be a semicolon.

> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[5]
>
> (5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009.

42 U.S.C. § 300gg-13(a).

The "recommendations" and "guidelines" issued by the Task Force, ACIP, and HRSA do not immediately compel private insurers to cover the relevant care or services. Instead, the ACA requires the Secretary of Health and Human Services to establish a "minimum interval" of at least one year between the issuance of a "recommendation" or "guideline" and the plan year in which it becomes binding on private insurers:

> **(1) In general**
>
> The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) or (a)(2) or

5. So in original. The period probably should be a semicolon.

> a guideline under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.
>
> **(2) Minimum**
>
> The interval described in paragraph (1) shall not be less than 1 year.

42 U.S.C. § 300gg-13(b). The "minimum interval" requirement does not apply to HRSA's guidelines regarding preventive care and screenings for women. *See* 42 U.S.C. § 300gg-13(a)(4).

Since the Affordable Care Act's enactment, these entities have issued numerous decrees that force health-insurance issuers and self-insured plans to cover certain forms of preventive care without cost-sharing. In 2011, for example, the Health Resources and Services Administration issued a highly controversial pronouncement that compels private insurance to cover all FDA-approved contraceptive methods, including contraceptive methods that some regard as abortifacients—and to do so without requiring the beneficiary to pay anything in copays or out-of-pocket expenses, and without allowing the expenses to count toward an annual deductible. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014). In June of 2019, the U.S. Preventive Services Task Force issued an equally controversial diktat that requires all private insurers to cover pre-exposure prophylaxis (PrEP) drugs such as Truvada and Descovy starting in 2021. These drugs, like contraception, must

be covered without any cost-sharing arrangements and must be funded entirely by premiums paid by others, without any marginal costs imposed on the beneficiary.

I. THE U.S. PREVENTIVE SERVICES TASK FORCE

The U.S. Preventive Services Task Force was created in 1984, and the statute governing the Task Force is codified at 42 U.S.C. § 299b-4(a) (Pet. App. 138a–141a). The Task Force's statutory mandate is to "review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community, and updating previous clinical preventive recommendations." 42 U.S.C. § 299b-4(a)(1); *see also* 42 U.S.C. § 299b-4(a)(2) (listing other "duties" of the Task Force).

The statute governing the Task Force requires the Director of the Agency for Healthcare Research and Quality (AHRQ) to "convene" an "independent Preventive Services Task Force" for these purposes. 42 U.S.C. § 299b-4(a)(1). The statute requires that the Task Force be "composed of individuals with appropriate expertise." 42 U.S.C. § 299b-4(a)(1). The statute also guarantees the independence of the Task Force and its recommendations by specifying that:

> All members of the Task Force convened under this subsection, and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure.

42 U.S.C. § 299b-4(a)(6).

Although the statute does not specify the number of Task Force members and is silent about their tenure, there are currently 16 Task Force members and each of them has been appointed to a four-year term.[6] Until June of 2023, Task Force members were appointed by the Director of the Agency for Healthcare Research and Quality (AHRQ).[7] In response to this lawsuit, however, the Task Force members received new appointments from Secretary Becerra in an effort to blunt the plaintiffs' Appointments Clause challenge to 42 U.S.C. § 300gg-13(a)(1).[8]

Before the enactment of the Affordable Care Act, the Task Force performed only advisory functions, and its "recommendations" had no binding legal force. And be-

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6. *See* http://bit.ly/48cdU9X [https://perma.cc/7DJS-5VAF]; *see also* Pet. at 4.

7. *See* http://bit.ly/3Nrntbo [https://perma.cc/B68B-VTMW] (archived website taken on September 28, 2023) ("Task Force members are appointed by the Director of AHRQ to serve 4-year terms.").

8. *See* Secretary of HHS, *Ratification of Prior Appointment and Prospective Appointment: Appointment Affidavits* (June 28, 2023), http://bit.ly/3Yt94C0 [https://perma.cc/8TAA-7AMN]; *see also* http://bit.ly/4dR3xK7 (archived website taken on December 20, 2023) ("Task Force members are appointed by the Secretary of HHS to serve 4-year terms."); Opening Br. for the Federal Defendants, *Braidwood Management Inc. v. Becerra*, No. 23-10326 (5th Cir.), ECF No. 159, at 30, available at http://bit.ly/40b9IFt [https://perma.cc/SYK3-FPBA] ("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.").

cause the Task Force served as a purely advisory committee before the ACA, its members did not wield "significant authority pursuant to the laws of the United States"[9] and did not qualify as "officers of the United States" under Article II of the Constitution. *See* Walter Dellinger, *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 U.S. Op. Off. Legal Counsel 208, 216 (1995) ("[T]he members of a commission that has purely advisory functions need not be officers of the United States because they possess no enforcement authority or power to bind the Government." (citation and internal quotation marks omitted)). But the Task Force no longer acts in a "purely advisory" role now that 42 U.S.C. § 300gg-13(a)(1) empowers the Task Force to unilaterally dictate the preventive care that health insurance must cover without cost sharing. The members of the Task Force became "officers of the United States" when the Affordable Care Act was signed into law—and they must be appointed consistent with the requirements of Article II.

II. THE PLAINTIFFS' LAWSUIT

On March 29, 2020, the plaintiffs sued and asked a federal district court to declare 42 U.S.C. § 300gg-13(a)(1) unconstitutional and enjoin the government from enforcing the preventive-care coverage mandates

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9. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam); *see also id.* ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.").

imposed by the Task Force.[10] The plaintiffs argued that the Task Force members qualify as "officers of the United States" under Article II because they wield "significant authority pursuant to the laws of the United States"[11]—and that they must therefore be appointed by the president with the Senate's advice and consent. And because the Task Force members were not appointed as "officers of the United States" in conformity with Article II, their "recommendations" cannot be given legal force and cannot bind private insurers.

In response to the plaintiffs' lawsuit, Secretary Becerra issued a document on January 21, 2022, that purports to "ratify" all preventive-care coverage mandates that had previously been imposed by the Task Force. App. 5a–6a.

A. The District Court's Ruling

The district court agreed with the plaintiffs that the members of the U.S. Preventive Services Task Force qualify as "officers of the United States" because they (1) occupy a "continuing position established by law" and (2) exercise "significant authority pursuant to the laws of the United States." Pet. App. 107a (quoting *Lucia v. SEC*, 585 U.S. 237, 245 (2018)). The district court further held that the Task Force members are "principal" officers who must be appointed by the president with the

10. The plaintiffs raised other claims in the district court and in the court of appeals, but none of those claims are at issue in the Solicitor General's petition.

11. *See Buckley*, 424 U.S. at 126; *see also* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443 (2018).

Senate's advice and consent, rather than "inferior" officers who can be appointed by a Head of Department. Pet. App. 115a–116a; *see also* U.S. Const. art. II, § 2 ("[B]ut the Congress may by Law vest the Appointment of such interior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). The district court explained that "inferior" officers must be "'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" Pet. App. 115a (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)). And it held that Task Force members cannot qualify as "inferior" officers because "they have no superior"[12] and because 42 U.S.C. § 299b-4(a)(6) guarantees their independence and shields the Task Force and its recommendations from "political pressure." Pet. App. 115a–116a; *see also* 42 U.S.C. § 299b-4(a)(6) ("All members of the Task Force convened under this subsection, and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure.").

The district court also held, in the alternative, that the Task Force members would be unconstitutionally appointed even if they were deemed "inferior" officers because they were appointed by the AHRQ director, who is not a "Head of Department" under Article. II. Pet. App. 116a ("'[T]he term "Department" refers only to a part or division of the executive government, as the Department of State, or of the Treasury, expressly created and given

12. Pet. App. 116a.

the name of a department by Congress.'" (quoting *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 886 (1991)). *id.* at 116a–117a ("Defendants do not dispute that the AHRQ Director is not a head of a department as understood in Article II.").

The district court therefore held that all preventive-care coverage mandates imposed by the Task Force since March 23, 2010, were unconstitutional, and it ordered that any "agency actions" taken to implement these unlawful coverage edicts be "set aside" (*i.e.* formally vacated) under section 706 of the APA. Pet. App. 72a–84a; App. 2a–3a. *See Nat'l Ass'n of Private Fund Managers v. SEC*, 103 F.4th 1097, 1114 (5th Cir. 2024) ("Under section 706 of the APA, when a court holds that an agency rule violates the APA, it 'shall'—not may—'hold unlawful and set aside' [the] agency action." (citation and some internal quotation marks omitted)). This was a "universal" remedy because it formally revoked the disputed agency actions and rendered the defendants incapable of enforcing those vacated agency actions against anyone. *See Data Marketing Partnership, LP v. United States Dep't of Labor*, 45 F.4th 846, 859 (5th Cir. 2022) ("§ 706 extends beyond the mere non-enforcement remedies available to courts that review the constitutionality of legislation, as it empowers courts to 'set aside'—*i.e.*, formally nullify and revoke—an unlawful agency action." (citation and some internal quotation marks omitted)); *Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S. Ct. 2440, 2460–70 (2024) (Kavanaugh, J., concurring) (endorsing this interpretation of 5 U.S.C. § 706); *Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct.

1, 2 n.1 (2023) (statement of Kavanaugh, J.) (same); *but see United States v. Texas*, 599 U.S. 670, 693–704 (2023) (Gorsuch, J., concurring in the judgment) (joined by Thomas and Barrett, JJ.) (criticizing the idea that "set aside" in section 706 of the APA authorizes formal vacatur of unlawful agency action). In accordance with its universal vacatur remedy under section 706, the district court issued a concomitant nationwide injunction that restrained the defendants from "implementing or enforcing" the ACA's preventive-services "coverage requirements in response to an 'A' or 'B' rating from the Task Force in the future." Pet. App. 83a.

B. The Appellate-Court Proceedings

The defendants appealed and asked for a stay pending appeal of the district court's universal remedies. The plaintiffs eventually stipulated to a stay of the nationwide injunction and the universal vacatur of the disputed "agency actions," leaving in place only relief that shields the named plaintiffs from statutory penalties and enforcement actions for violations of 42 U.S.C. § 300gg-13(a)(1).[13] In exchange for this stipulation, the defendants promised that they would not seek penalties against the plaintiffs for actions taken in reliance on the district court's judgment if that judgment were to be vacated or narrowed on appeal.[14]

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13. *See* Joint Stipulation and Proposed Order ¶¶ 6–7, *Braidwood Management Inc. v. Becerra*, No. 23-20326 (5th Cir.), ECF No. 147-1.

14. *See id.* at ¶¶ 4–5. An injunction or declaratory judgment from a federal district court merely restrains the defendants from initi-

(continued…)

On appeal, the defendants conceded that the Task Force members were "officers of the United States" who needed to be appointed in conformity with Article II.[15] The defendants also acknowledged that the initial appointments of the Task Force members violated Article II because the AHRQ Director who appointed the Task Force members is not a "Head of Department."[16] But the defendants attempted to rectify this problem on appeal by having Secretary Becerra reappoint the Task Force

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ating enforcement actions while the order remains in effect; it does not confer a perpetual or permanent immunity from punishment if the judgment is overturned on appeal. *See Edgar v. MITE Corp.*, 457 U.S. 624, 648–53 (1982) (Stevens, J., concurring); *Lake v. HealthAlliance Hospital Broadway Campus*, --- F. Supp. 3d ----, 2024 WL 3226273, at *8 n.14 (N.D.N.Y.) ("[I]f an injunction is dissolved the State may enforce the statute against violators for conduct that occurred while the injunction was in place."); Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 Sup. Ct. Rev. 193, 209 ("If the final judgment holds the statute valid, dissolves the interlocutory injunction, and denies permanent relief, state officials would be free to prosecute any violation within the limitations period."); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 986–1000 (2018) (discussing effects of preliminary and permanent injunctions).

15. In the district court, the defendants had insisted that the Task Force members did not qualify as "officers of the United States," a stance that the district court rejected. Pet. App. 107a–114a.

16. *See* Opening Br. for the Federal Defendants, *Braidwood Management Inc. v. Becerra*, No. 23-10326 (5th Cir.), ECF No. 159, at 30, available at http://bit.ly/40b9IFt [https://perma.cc/SYK3-FPBA] ("[T]he existing Task Force members have not yet received an appointment consistent with the Appointments Clause").

members and "ratify" the "prior appointments" that they had received from the AHRQ Director.[17]

1. The Court Of Appeals' Ruling On The Appointments Clause Issues

The court of appeals affirmed the district court's ruling that the Task Force members were unconstitutionally appointed. Pet. App. 12a–26a. The court of appeals also agreed with the district court (and the plaintiffs) that the Task Force members are "principal" officers who must be appointed by the President with the Senate's advice and consent, rather than "inferior" officers who can be appointed by a Head of Department. *See id.* The court of appeals cited this Court's definition of "inferior officer" in *Edmond v. United States*, 520 U.S. 651 (1997), which equates "inferior officers" with "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663; *see also* Pet. App. 16a. The Task Force members fall outside *Edmond*'s definition of "inferior officers," according to the

17. *See* Secretary of HHS, *Ratification of Prior Appointment and Prospective Appointment: Appointment Affidavits* (June 28, 2023), http://bit.ly/3Yt94C0 [https://perma.cc/8TAA-7AMN]; Opening Br. for the Federal Defendants, *Braidwood Management Inc. v. Becerra*, No. 23-10326 (5th Cir.), ECF No. 159, at 30, available at http://bit.ly/40b9IFt [https://perma.cc/SYK3-FPBA] ("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.").

court of appeals, because 42 U.S.C. § 299b-4(a)(6) immunizes their work and recommendations from direction and supervision by others:

> [W]e cannot say that any such supervision exists—as a matter of law or reality. . . . [W]e need look no further than the statutory provision we just addressed, 42 U.S.C. § 299b-4(a)(6), which again provides 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." . . . . [I]t is a clear and express directive from Congress that the Task Force be free from any supervision. In our view, the Task Force cannot be "independent" and free from "political pressure" on the one hand, and at the same time be supervised by the HHS Secretary, a political appointee, on the other.

Pet. App. 20a. The court of appeals declined the defendants' invitation to invoke the constitutional-avoidance canon and construe 42 U.S.C. § 299b-4(a)(6) in a manner that would allow the Secretary to "direct" and "supervise" the Task Force's recommendations, holding that any such interpretation of section 299b-4(a)(6) would be incompatible with the statutory text and structure. Pet. App. 23a ("[T]he statutory scheme . . . envisions no supervisory role for the Secretary, and that is especially clear in light of the express congressional preference that the Task Force be independent and not subject to political pressure."); *see also Jennings v. Rodriguez*, 583

U.S. 281, 296 (2018) (constitutional-avoidance canon may not be invoked unless the proposed interpretation is both "plausible" and "fairly possible").

2. The Court Of Appeals' Ruling On The Remedial Issues

The court of appeals rejected the universal remedy imposed by the district court because the plaintiffs had failed to explicitly assert an APA claim in their pleading. Pet. App. 37a. But the court of appeals left in place the declaratory and injunctive relief that restrains the defendants from enforcing 42 U.S.C. § 300gg-13(a)(1) and the Task Force "recommendations" against the named plaintiffs. Pet. App. 30a–43a.

The defendants had proposed a different remedy that would "sever the limitations on secretarial oversight in 42 U.S.C. § 299b-4(a)(6)" and authorize Secretary Becerra to direct and supervise the Task Force's preventive-care coverage mandates despite the restrictions under section 299b-4(a)(6). Pet. App. 30a (internal quotation marks omitted). But the court of appeals rejected this remedy because the federal judiciary has no power to formally revoke a statute or confer new powers on a cabinet secretary that Congress has explicitly withheld. Pet. App. 31a–33a.

SUMMARY OF ARGUMENT

The Court should grant certiorari for three reasons. First, the court of appeals determined that 42 U.S.C. § 300gg-13(a)(1) violates the Appointments Clause by conferring authority on Task Force members who were not appointed in conformity with Article II. This Court

will almost always grant certiorari when a lower court pronounces an Act of Congress unconstitutional, and there is nothing out of the ordinary that might be invoked to suggest a different approach here.

Second, although the court of appeals rejected the district court's universal remedy and limited relief to the named plaintiffs, a denial of certiorari will leave the court of appeals' ruling and opinion in place as binding precedent in the fifth circuit. This will allow other plaintiffs in the fifth circuit to sue the defendants under the APA and obtain the universal remedies that the district court had awarded under 5 U.S.C. § 706(2)(a), as the precedent of the fifth circuit compels federal district courts to "set aside," *i.e.*, formally vacate, any "agency actions" taken to implement 42 U.S.C. § 300gg-13(a)(1) or the preventive-care coverage mandates recommended by the Task Force. *See In re Clarke*, 94 F.4th 502, 512 (5th Cir. 2024) ("Should plaintiffs prevail on their APA challenge, this court must 'set aside' CFTC's *ultra vires* recission action, with nationwide effect."). This Court should rule on the merits of the plaintiffs' constitutional claims before authorizing a dramatic nationwide remedy of this sort.

Third, this petition presents a suitable vehicle for reaching the Appointments Clause and remedial issues discussed in the Solicitor General's petition. There are no lingering jurisdictional issues that might prevent this Court from reaching the merits, and no competing petitions (or soon-to-be-filed petitions) in the pipeline.

ARGUMENT

I. THE COURT'S NORMAL PRACTICE IS TO GRANT CERTIORARI WHEN AN ACT OF CONGRESS IS HELD UNCONSTITUTIONAL

As the Solicitor General observes, this Court's usual practice is to grant certiorari when a lower court finds an Act of Congress unconstitutional, without regard to whether the lower court's ruling implicates a circuit conflict. Pet. 27–28 (citing authorities). And for good reason. This Court has repeatedly (and correctly) observed that pronouncing an Act of Congress unconstitutional is "'the gravest and most delicate'" task of the federal judiciary. *Shelby County v. Holder*, 570 U.S. 529, 556 (2013) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)). The respect to which Congress is entitled as a coordinate branch of the federal government demands review from the highest court before a federal statute's enforcement is permanently thwarted or enjoined.

The Solicitor General suggests that the lower courts merely declared the Task Force's structure unconstitutional,[18] but the rulings also address the constitutionality of the underlying legislation. The court of appeals' ruling means that 42 U.S.C. § 300gg-13(a)(1) is unconstitutional to the extent it confers authority on Task Force members who were not appointed by the president with the Senate's advice and consent. Pet. App. 12a–26a. And the dis-

18. Pet. at 27 ("The Fifth Circuit's decision declares the Task Force's structure unconstitutional").

trict court's judgment (as modified by the court of appeals) continues to enjoin the government from enforcing 42 U.S.C. § 300gg-13(a)(1) against the named plaintiffs. App. 2a. The statute itself was ruled unconstitutional—at least in part and at least as applied to the plaintiffs—and that warrants review consistent with the longstanding practice of this Court.

There is also no reason to depart from the Court's usual practice here. The federal statute at issue is of immense importance, and it is a key component of one of the most significant and controversial pieces of legislation that Congress has ever enacted. The Court should weigh in rather than leaving the constitutionality of 42 U.S.C. § 300gg-13(a)(1) and the appointments of the Task Force members to be resolved entirely by the court of appeals.

II. A DENIAL OF CERTIORARI WILL ALLOW A NEW LITIGANT TO SUE AND OBTAIN NATIONWIDE RELIEF AGAINST THE ENFORCEMENT OF 42 U.S.C. § 300gg-13(a)(1)

The Solicitor General is also correct to observe that a denial of certiorari will leave the door open for a new plaintiff to sue and quickly revive the universal remedies that the district court had awarded to the plaintiffs. Pet. at 30–31. The court of appeals vacated the district court's universal remedies only because the plaintiffs had not pleaded an APA claim in their complaint. Pet. App. 37a. In doing so, the court of appeals acknowledged that fifth circuit precedent requires courts to "set aside—*i.e.*, formally nullify and revoke" any unlawful agency actions that a litigant challenges under section 706 of the APA.

Pet. App. 35a (quoting *Data Marketing Partnership, LP v. United States Dep't of Labor*, 45 F.4th 846, 859 (5th Cir. 2022); *see also In re Clarke*, 94 F.4th 502, 512 (5th Cir. 2024) ("Should plaintiffs prevail on their APA challenge, this court must 'set aside' CFTC's *ultra vires* recission action, with nationwide effect."). Vacatur in the fifth circuit is a universal remedy that wipes out the disputed agency actions and prevents the agency from enforcing them against anyone. *See id.*; *Career Colleges & School of Texas v. United States Dep't of Education*, 98 F.4th 220, 255 (5th Cir. 2024) ("Section 706 . . . is not party-restricted and allows a court to 'set aside' an unlawful agency action. The term 'set aside' means invalidation—and an invalid rule may not be applied to anyone." (citations and some internal quotation marks omitted)). So if this Court denies certiorari, a new litigant can sue the defendants anywhere in the fifth circuit, and that plaintiff will be entitled to a universal remedy so long as he pleads a claim under the APA. This will result in a nationwide injunction that vacates every agency action taken to enforce 42 U.S.C. § 300gg-13(a)(1) and the preventive-care coverage mandates imposed by the Task Force.[19]

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19. The government could try to limit the scope of relief by raising a statute-of-limitations defense. But the plaintiffs can easily get around this by recruiting an employer plaintiff that only recently came into existence, or by creating a new membership association and using that as the plaintiff. *See Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 144 S. Ct. 2440 (2024); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 200–01 (2023).

The Court should grant certiorari before allowing this to happen. A universal remedy against the enforcement of 42 U.S.C. § 300gg-13(a)(1) will undo every preventive-care coverage mandate imposed by the Task Force with nationwide effect. And a ruling of this sort will surely be appealed (if not by the Department of Justice than by a defendant–intervenor) and reach this Court again on petition for certiorari, as any fifth circuit panel will remain bound by that court's precedent on both the constitutional and remedial issues. The sounder approach is to grant certiorari now and resolve these issues, rather than invite a future lawsuit that will restore the universal remedies issued by the district court and produce another certiorari petition presenting the same questions as this one.

III. THERE ARE NO VEHICLE PROBLEMS THAT MIGHT COUNSEL IN FAVOR OF WAITING FOR A DIFFERENT PETITION

This case also presents a suitable vehicle for resolving the Appointments Clause and remedial issues described in the Solicitor General's petition. There are no potential jurisdictional landmines that could derail this case if certiorari is granted. Braidwood Management Inc., the lead respondent, easily has Article III standing because it operates a self-insured plan and employs more than 50 full-time workers.[20] Braidwood is compelled by 42 U.S.C. § 300gg-13(a)(1) and the preventive-care cov-

20. Declaration of Steven F. Hotze ¶¶ 5–6, *Braidwood Management Inc. v. Becerra*, No. 4:20-cv-00283-O (N.D. Tex.), ECF No. 46.

erage mandates to underwrite services that it would rather exclude, and it is restricted from imposing any cost-sharing arrangements for any of the preventive care decreed by the Task Force.[21] That alone is enough to establish standing. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014); Pet. App. 95a ("Braidwood presents the easiest case for standing."); *id.* ("[T]he mandates deprive Braidwood of the ability to choose whether and to what extent its insurance plan covers preventive care."); Pet. App. 95a–97a (describing each of Braidwood's Article III injuries). And there is no need for any of the remaining respondents to make an independent showing of standing when Braidwood's standing is secure. *See Biden v. Nebraska*, 600 U.S. 477, 489 (2023) ("If at least one plaintiff has standing, the suit may proceed.").[22]

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21. Declaration of Steven F. Hotze ¶¶ 7–19, *Braidwood Management Inc. v. Becerra*, No. 4:20-cv-00283-O (N.D. Tex.), ECF No. 46.

22. The Solicitor General notes that Braidwood "does not allege . . . that any of its employees have ever sought coverage for PrEP medications." Pet. at 7. But that does not defeat Braidwood's Article III standing to challenge the appointments of the Task Force members, or the lawfulness of the PrEP drug coverage mandate, and the Solicitor General does not argue or even suggest that it does. The mere requirement to provide this coverage inflicts injury in fact because it requires Braidwood to alter the content and scope of its self-insured plan documents. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) ("[A]n identifiable trifle is enough for standing" (citation and internal quotation marks omitted)).

This case also presents a good vehicle because the court of appeals' opinion is careful and scholarly. Pet. App. 1a–48a. Even if one disagrees with its ultimate conclusions, the opinion contains helpful and thoughtful discussion that will assist the parties and this Court when they argue and decide these issues. Finally, we are unaware of any other cases pending in the lower courts that involve the questions presented in this petition, so there are no other candidates or potential competitors that will arise any time soon if the Court decides to pass on this case.

IV. THE COURT SHOULD GRANT CERTIORARI EVEN THOUGH IT SHOULD REJECT THE SOLICITOR GENERAL'S CRITICISMS OF THE COURT OF APPEALS' OPINION

The Solicitor General spends much of her petition arguing that the court of appeals' decision is wrong and that the Court should grant certiorari for that reason. Pet. 13–27. None of this, however, affects the certworthiness of the petition. The Court should grant certiorari regardless of whether it agrees with the court of appeals' analysis because the lower courts pronounced an Act of Congress unconstitutional—and that alone is sufficient to warrant certiorari when the case involves a federal statute of this significance and magnitude. *See supra*, at 19–20.

A petition-stage brief is not normally the place to debate the merits of the court of appeals' ruling. But the Solicitor General's attacks on the court of appeals' opinion are unwarranted and should not go unanswered. We will briefly rebut the Solicitor General's criticisms and

defend the court of appeals' holdings on the Appointments Clause and the remedial issues, which should be affirmed across the board if the Court decides to take up this case.

A. The Court Of Appeals Correctly Held That The Task Force Members Are "Principal" Rather Than "Inferior" Officers

The Solicitor General acknowledges that the Task Force members are "officers of the United States" who must be appointed in conformity with Article II. Pet. 14. But she insists that the Task Force members are "inferior officers," and that Congress may therefore vest their appointment in a "Head of Department" such as Secretary Becerra. *See id.* at 14–22. The court of appeals correctly rejected this argument.

An "inferior" officer is an officer whose work is "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 662–63; *United States v. Arthrex, Inc.*, 594 U.S. 1, 13 (2021) (same). That direction and supervision is absent here. 42 U.S.C. § 300gg-13(a)(1) empowers the Task Force—and the Task Force alone—to determine the preventive care that private insurers must cover. Neither Secretary Becerra, nor any other officer of the United States, has statutory authority to countermand any preventive-care edict issued by the Task Force. Indeed, no other officer can even *influence* the Task Force's decisions, as 42 U.S.C. § 299b-4(a)(6) provides that Task Force members and their recommendations "shall be independent and, to the extent practicable, not subject to political pressure."

See also 42 U.S.C. § 299b-4(a)(1) (requiring the Director of AHRQ to "convene an *independent* Preventive Services Task Force" (emphasis added)). These statutory guarantees of independence preclude *any* officer of the United States from reviewing or reversing the Task Force's recommendations, and the absence of "statutory authority" to review Task Force decisions makes its members principal officers. *See Arthrex*, 594 U.S. at 15 ("statutory authority to review" decisions is needed to make one an inferior officer); *id.* at 19 ("[A]dequate supervision entails review of decisions issued by inferior officers.").

The Solicitor General nonetheless insists that the Task Force is "directed and supervised" by Secretary Becerra despite the guarantees of independence in sections 299b-4(a)(1) and (a)(6). First, the Solicitor General observes that Task Force members are removable at will by the Secretary, which (according to the Solicitor General) gives the Secretary all the powers of "direction" and "supervision" needed to satisfy *Edmond*'s test for inferior-officer status. Pet. at 14–18. Second, the Solicitor General contends that the constitutional-avoidance canon requires courts to interpret 42 U.S.C. § 299b-4(a)(6) in a manner that gives the Secretary whatever supervisory powers he needs to make the Task Force members into "inferior" officers. Neither argument works.

1. An Officer Does Not Automatically Become An "Inferior" Officer Whenever He Is Subject To At-Will Removal By A Principal Officer

This Court has never held that an officer is automatically deemed "inferior" whenever he is subject to at-will

removal by a principal officer. Instead, removability is merely one factor to consider in deciding whether an officer falls on the "principal" or "inferior" side of the line. *See Edmond*, 520 U.S. at 664–65 (designating military judges inferior officers because they were subject to administrative oversight, were "remov[able] . . . without cause," *and* had "no power to render a final decision"); *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988) (an officer's removability is one of four factors in the inferior-officer inquiry); *Appointment and Removal of Federal Reserve Bank Members of the Federal Open Market Committee*, 43 Op. O.L.C. ___, 2019 WL 11594453, at **9–10 (2019) ("To decide whether an officer has a superior, the Supreme Court has considered whether the officer is subject to the policy direction of another official, whether the officer can take 'final' action without the approval of another officer, and whether an executive officer other than the President has the 'power to remove [the] officer[].'" (quoting *Edmond*, 520 U.S. at 664–65)).

The Task Force members are principal officers because their preventive-care coverage decisions are not subject to review or reversal by anyone else in the executive branch—and that remains the case regardless of whether the Secretary can remove them at will. *See Edmond*, 520 U.S. at 665 ("What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."). The touchstone for inferior-officer status is whether the individual is "directed and supervised" by a principal officer, not whether he is subject to at-will removal. *Id.* at

663; *see also Arthrex*, 594 U.S. at 13 ("An inferior officer must be 'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" (quoting *Edmond*, 520 U.S. at 663)). The Task Force members—even if removable at will—would *still* have the "'power to render a final decision on behalf of the United States' without . . . review by their nominal superior or any other principal officer in the Executive Branch." *Arthrex*, 594 U.S. at 14 (quoting *Edmond*, 520 U.S. at 665)). At-will removal would allow Secretary Becerra to fire Task Force members if he is unhappy with their performance, but it would not empower him to overrule their recommendations or direct their decisionmaking given the guarantee of independence in 42 U.S.C. § 299b-4(a)(6).

2. 42 U.S.C. § 299b-4(a)(6) Cannot Be Interpreted To Give The Secretary Powers To "Direct" Or "Supervise" The Task Force Members Or Their Recommendations

The Solicitor General also urges this Court to interpret 42 U.S.C. § 299b-4(a)(6) to give the Secretary just enough powers of "direction" and "supervision" over the Task Force so that its members can be squeezed into the "inferior officer" cubbyhole. Pet. at 19–22. The Solicitor General insists that the constitutional-avoidance canon compels this construction, even though the statutory text requires Task Force members and recommendations to remain "independent" and "to the extent practicable, not subject to political pressure." There are two insurmountable problems with the Solicitor General's argument.

First. The constitutional-avoidance canon is inapplicable because the Solicitor General's proposed interpretation of 42 U.S.C. § 299b-4(a)(6) will not avoid an Appointments Clause violation. Even if one adopts the Solicitor General's construction of 42 U.S.C. § 299b-4(a)(6) and gives the Secretary all of the powers needed to turn the Task Force members into "inferior officers," the Task Force *still* has not been constitutionally appointed because it members were tapped by the Director of AHRQ, who is not a "Head of Department." The government recognizes this problem and is trying to fix it by having the Secretary re-appoint the Task Force.[23] But Congress has not "vested" Secretary Becerra with appointment authority over the Task Force, as required by Article II. And even if Congress had "vested" this appointment power in the Secretary, the *past* coverage recommendations of the Task Force still cannot be implemented because its members were unconstitutionally appointed when those recommendations were made. *See Lucia v. SEC*, 585 U.S. 237, 251–52 (2018); *Ryder v. United States*, 515 U.S 177, 182–83 (1995). The statutes governing the Task Force and its coverage mandates violate the Appointments Clause no matter how 42 U.S.C. § 299b-4(a)(6) is construed—and regardless of whether the Task Force members are pigeonholed as "principal" or "inferior" officers.

Second. The language of 42 U.S.C. § 299b-4(a)(6) is not "readily susceptible" to the Solicitor General's interpretation. *See United States v. Stevens*, 559 U.S. 460, 481

23. *See* note 8 and accompanying test.

(2010) ("[T]his Court may impose a limiting construction on a statute only if it is readily susceptible to such a construction. We will not rewrite a . . . law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain" (citations and internal quotation marks omitted)); *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197, 230 (2020) ("Constitutional avoidance is not a license to rewrite Congress's work to say whatever the Constitution needs it to say in a given situation."). Consider the text of 42 U.S.C. § 299b-4(a)(6):

> All members of the Task Force convened under this subsection, and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure.

42 U.S.C. § 299b-4(a)(6). The idea that the Secretary can "direct" and "supervise" the Task Force members is incompatible with the statutory guarantees of "independence" and immunity from "political pressure." The Solicitor General acknowledges that the requirement of "independence" means that the Task Force members must use "their own best judgment," and that its recommendations may "not be influenced by outside pressures." Pet. at 19. But that means that the Secretary cannot "direct" the Task Force, because if he did then the Task Force members would no longer be using "their own best judgment" and would "be influenced by outside pressures." And that means that the Task Force members fail the *Edmond* test for inferior-officer status, even under the Solicitor General's proposed interpretation of "inde-

pendent," because their work is not "directed *and* supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 662–63.[24]

The Solicitor General also claims that the phrase "to the extent practicable" should be interpreted to mean "to the extent constitutional." Pet. 20–21. But this qualifier attaches *only* to the requirement that Task Force members be shielded from "political pressure." The command that Task Force members and recommendations "shall be independent" is absolute, and there is no statutory language that gives the Secretary wiggle room to compromise the independence required by 42 U.S.C. § 299b-4(a)(6) and 42 U.S.C. § 299b-4(a)(1). The Solicitor General does not explain how the Task Force members (and their recommendations) can simultaneously be "independent" yet subject to the "direction" of the Secretary. Does anyone think the Federal Reserve would remain "independent" (under any understanding of that word) if the president or the Secretary of the Treasury could "direct" its interest-rate decisions?

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24. The Solicitor General is careful to claim only that her interpretation of the word "independent" allows for secretarial "supervision" of the Task Force — and not secretarial "direction" of its decisions. Pet. at 19–20 ("[T]he reference to 'independence' is most naturally read to require the Task Force members to make "unbiased, independent judgments," even while subject to secretarial *supervision* with respect to their conduct and the effect of their recommendations." (emphasis added)).

B. The Court Of Appeals Correctly Refused To Remedy The Appointments Clause Violations By "Severing" 42 U.S.C. § 299b-4(a)(6)

The Solicitor General insists that the district court should have remedied the Appointments Clause violations by "severing" the statutory provision that guarantees the independence of the Task Force and prohibits political interference with its recommendations, thereby allowing the Secretary to direct and supervise the Task Force and its preventive-care coverage recommendations. Pet. at 22–27. This remedy is unlawful for many reasons.

The first problem is that a regime in which the Secretary is permitted to countermand the "A" or "B" recommendations of the Task Force still violates the Appointments Clause. The Solicitor General's proposed remedy would allow the Secretary to overrule the Task Force's "A" and "B" recommendations but not its failure to recommend coverage of items or services under 42 U.S.C. § 300gg-13(a)(1). *See* Pet. at 24 ("The court therefore should have severed Section 299b-4(a)(6)'s application to Task Force 'A' and 'B' recommendations, thus giving the Secretary 'authority to provide for a means of reviewing' those recommendations."). This would create a regime in which *both* the Secretary and the Task Force have gatekeeping functions in deciding which preventive care the private insurers must cover. But that means the Task Force will *still* wield "significant authority pursuant to the laws of the United States,"[25] because preventive-care

25. *Buckley*, 424 U.S. at 126.

coverage mandates cannot and will not take effect under 42 U.S.C. § 300gg-13(a)(1) without its recommendation and approval.[26] And it does not make the Task Force members into "inferior officers," because no principal officer has any ability to review or countermand their decisions *not* to adopt an "A" or "B" recommendation. *See Arthrex*, 594 U.S. at 14–15. Moreover, even if the defendants' proposed remedy converted the Task Force members into "inferior officers," their appointments would *still* violate the Constitution because Congress has not opted out of the default method of appointment in Article II.

There is a more serious problem with the Solicitor General's proposed remedy: A federal court has no power to cancel the statutory provision in 42 U.S.C. § 299b-4(a)(6) or confer powers on a cabinet secretary that Congress has explicitly withheld. A federal district court's remedial tools extend to declaratory judgments, injunctions, APA remedies, and writs—and these remedies are limited by statute and historical practice. *See Whole Woman's Health v. Jackson*, 595 U.S. 30, 44 (2021). The Solicitor General does not explain how her proposed remedy fits into any of these categories, or how the district-court judgment that must be entered on remand will be able to implement her proposed remedy.

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26. The Solicitor General appears to acknowledge that her proposed remedy would not strip Task Force members of their status as "officers." *See* Appellants' Br. at 38 (describing the Task Force members as "inferior officers").

The final problem with the Solicitor General's remedy is that it will not redress the plaintiffs' Article III injuries, which are caused by the Secretary's *enforcement* of the preventive-care mandates, not by his failure to review or ratify them. A remedy that fails to redress the plaintiffs' injuries is incompatible with Article III. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court.").

* * *

The Court should nonetheless grant certiorari because the court of appeals' opinion, though well-reasoned and correct, declared an Act of Congress unconstitutional (at least in part) and enjoined its enforcement against the named plaintiffs. The Court typically grants certiorari when a court of appeals disapproves a federal statute on constitutional grounds, and there is no reason not to do so here.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:20-cv-00283-O

BRAIDWOOD MANAGEMENT, INC., ET AL., PLAINTIFFS

v.

XAVIER BECERRA, ET AL., DEFENDANTS

Filed: Mar. 30, 2023

FINAL JUDGMENT

This Judgment is issued pursuant to Fed. R. Civ. P. 58(a).

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered in the Court's orders partially granting and partially denying the parties' motions for summary judgment.

It is therefore **ORDERED**, **ADJUDGED**, and **DECREED** that:

1) All claims of Joel Miller and Gregory Scheideman in the above-entitled and numbered cause are hereby DISMISSED without prejudice for lack of subject matter jurisdiction.

2) The Advisory Committee on Immunization Practices (ACIP) and the Health Resources and Services Administration (HRSA) do not, on the record in this case, violate Article II's Appointments clause. Therefore, Braidwood Management Inc., Kelley Orthodontics, John Kelley, Joel Starnes, Zach Maxwell, and Ashley Maxwell's (remaining Plaintiffs) **Claim No. 1** as it pertains to ACIP and HRSA is **DISMISSED with prejudice** to the refiling of same or any part thereof.

3) The U.S. Preventive Services Task Force's (PSTF) recommendations operating in conjunction with 42 U.S.C. § 300gg-13(a)(1) violate Article II's Appointments Clause and are therefore unlawful. Therefore, any and all agency actions taken to implement or enforce the preventive care coverage requirements in response to an "A" or "B" recommendation by the PSTF on or after March 23, 2010 are **VACATED** and Defendants and their officers, agents, servants, and employees are **ENJOINED** from implementing or enforcing 42 U.S.C. § 300gg-13(a)(1)'s compulsory coverage requirements in response to an "A" or "B" rating from PSTF in the future.

   Further, any and all agency action taken to implement or enforce the preventive care mandates

in response to an "A" or "B" recommendation by PSTF on or after March 23, 2010 and made compulsory under 42 U.S.C. § 300gg-13(a)(1) are **DECLARED** unlawful as violative of the Appointments Clause. Therefore, Braidwood Management Inc. and Kelley Orthodontics, and to the extent applicable, individual Plaintiffs need not comply with the preventive care coverage recommendations of PSTF issued on or after March 23, 2010, because the members of the Task Force have not been appointed in a manner consistent with Article II's Appointments Clause. Accordingly, the Court **ENJOINS** Defendants and their officers, agents, servants, and employees from implementing or enforcing the same against these Plaintiffs.

4) 42 U.S.C. § 300gg-13(a)(1)–(a)(4) do not violate the nondelegation doctrine. Therefore, remaining Plaintiffs' **Claim No. 2** is **DISMISSED with prejudice** to the re-filing of same or any part thereof.

5) The operation of 42 U.S.C. § 300gg-13(a)(1) does not violate Article II's Vesting Clause. Therefore, remaining Plaintiffs' **Claim No. 3** is **DISMISSED with prejudice** to the re-filing of same or any part thereof.

6) Remaining Plaintiffs' **Claim No. 4** is **DISMISSED with prejudice** to the re-filing of same or any part thereof for failure to state a claim upon which relief may be granted.

7) The PrEP mandate violates remaining Plaintiffs' rights under the Religious Freedom Restoration Act and is therefore **DECLARED** unlawful. As such, remaining Plaintiffs need not comply with the preventive care coverage recommendations of PSTF issued on or after March 23, 2010 and the Court **ENJOINS** Defendants and their officers, agents, servants, and employees from implementing or enforcing the PrEP mandate as against these Plaintiffs.

8) All costs shall be paid by the party incurring the same.

9) All relief not expressly granted herein is denied.

The Clerk of Court is **DIRECTED** to close the above-captioned case.

SO ORDERED on this **30th day** of **March, 2023**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX B

The Affordable Care Act's preventive services provision, Section 2713 of the Public Health Service Act, 42 U.S.C. § 300g-13(a)(1)–(4), requires that group health plans and health insurance issuers provide coverage without cost-sharing for preventive services recommended by or contained in guidelines supported by the United States Preventive Services Task Force (USPSTF), the Advisory Committee on Immunization Practices (ACIP), and the Health Resources and Services Administration (HRSA). Through this provision, Congress recognized the scientific expertise of these entities. Litigation has been brought questioning the authority under which these entities have issued recommendations and guidelines for preventive services that the Affordable Care Act requires health plans and issuers to cover without cost-sharing. To resolve questions raised in litigation and out of an abundance of caution, for purposes of coverage under the statute, I ratify the below listed guidelines and recommendations for the reasons relied on by the USPSTF, ACIP and the Director of the Centers for Disease Control and Prevention (CDC Director), and the HRSA Administrator in their previously published decisions or analyses regarding the relevant recommendations. This action is not intended to suggest any legal defect or infirmity in the authority of these entities to issue preventive service guidelines and recommendations.

- Evidence-based clinical preventive services that have in effect a rating of "A" or "B" in the recommendations of the USPSTF as of the date of this ratification, with the exception of the 2016

USPSTF recommendation on screening for breast cancer, set forth in Exhibit A, attached;

- Immunizations that have in effect a recommendation from ACIP and the CDC Director with respect to the individual involved as of the date of this ratification, set forth in Exhibit B, attached;
- With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by HRSA as of the date of this ratification, set forth in Exhibit C, attached; and
- With respect to women, such additional preventive care and screenings as provided for in comprehensive guidelines supported by HRSA for purposes of 42 U.S. Code § 300gg13(a) as of the date of this ratification, set forth in Exhibit D, attached.

Pursuant to my authority as Secretary of Health and Human Services, and based on my independent and considered review of the actions and decisions listed above, I hereby affirm and ratify the above recommendations and guidelines.

Xavier Becerra

January 21, 2022
Date