U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

May 5, 2025

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Robert F. Kennedy, Jr., Secretary of Health and Human Services, et al. v. Braidwood Management, Inc., et al., No. 24-316

Dear Mr. Harris:

On April 24, 2025, the Court directed the parties to file supplemental letter briefs addressing "[w]hether Congress has 'by Law' vested the Secretary of the Department of Health and Human Services [HHS] with the authority to appoint members of the United States Preventive Services Task Force [Task Force]." The answer to that question is yes, in light of the relevant statutory text and judicial precedent.

First, 42 U.S.C. 299b-4(a)(1) is the law that authorizes the appointment of Task Force members. That law provides that the Director of the Agency for Healthcare Research and Quality (AHRQ) "shall convene" the Task Force. *Ibid.* No other law speaks to the method of selecting Task Force members. Given the absence of any other such law, the best reading of Section 299b-4(a)(1) is that the authority to convene the Task Force includes the authority to appoint the Task Force's members. To "convene" a body means to cause it to come together, which naturally includes selecting the body's members if no other selection method is specified. By contrast, Section 299b-4(a) cannot plausibly be read either to be silent on the critical question of who appoints Task Force members or to presume that the members will be appointed by the President after confirmation by the Senate.

Second, although Section 299b-4(a)(1) nominally authorizes the AHRQ Director to appoint Task Force members, two other laws ultimately vest that appointment authority in the Secretary. To begin, the Director is an officer within the Public Health Service (PHS), 42 U.S.C. 299(a), and under Reorganization Plan No. 3 of 1966, 80 Stat. 1610 (Reorganization Plan), "all functions of the [PHS]" and its "officers" "are * * * transferred" to the Secretary, § 1(a), 80 Stat. 1610. So when Congress "ratifie[d] and affirm[ed] as law" the Reorganization Plan, Act of Oct. 19, 1984 (1984 Act), Pub. L. No. 98-532, § 1, 98 Stat. 2705, it enacted a law transferring to the Secretary the Director's authority to convene and thus appoint the Task Force. In addition, 42 U.S.C. 299(a) provides that "[t]he Secretary shall carry out" the statutory provisions governing AHRQ "acting through the Director." *Ibid.* Section 299(a) therefore imposes the duty on the Secretary to "carry out" the appointment of Task Force members. The provision should be read to require the Secretary to satisfy his appointment duty "acting through the Director" either by instructing the Director

which Task Force Members to select in the first instance or by approving the Director's own selections on the back end. So construed, the Reorganization Plan and Section 299(a) each independently vests in the Secretary, not the Director, the power to appoint Task Force members under Section 299b-4(a)(1).

Third, this Court's precedent confirms that Congress has properly vested appointment authority in the Secretary. In *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868), the Court held that a statute authorizing an assistant treasurer to make certain appointments "with the approbation of the Secretary of the Treasury" satisfied the constitutional requirement that the appointment power must be vested in the Head of the Department rather than his subordinates. *Id.* at 393. Compared to the Treasury Secretary in *Hartwell*, the HHS Secretary here is more clearly vested by law with appointment power, because the statutes passed by Congress authorize him to directly appoint Task Force members without even needing to wait to review an initial selection by a subordinate. For the same reason, this case is distinguishable from *United States* v. *Smith*, 124 U.S. 525 (1888), where there was "no law" that "invested" the Treasury Secretary "with the selection of" certain officials or "required [his] approbation." *Id.* at 533.

Finally, principles of constitutional avoidance compel resolving any statutory ambiguities in favor of vesting the Secretary with the power to appoint Task Force members. In *Edmond* v. *United States*, 520 U.S. 651 (1997), this Court applied the constitutional-avoidance canon in similar circumstances—harmonizing two statutes to vest the power to appoint certain inferior officers in a Department Head rather than in other inferior officers. *Id.* at 658. Here, as in *Edmond*, nothing requires reading Section 299b-4(a)(1) "in a manner that would render it clearly unconstitutional," because "there is another reasonable interpretation available." *Ibid.* At the very least, the Reorganization Plan and Section 299(a) provide a reasonable basis for concluding that Congress vested the power to appoint Task Force members under Section 299b-4(a)(1) in the Secretary himself, not the Director alone. It is thus neither necessary nor appropriate to halt the Task Force's work and require Congress to pass new legislation confirming that the Secretary possesses this power.

ARGUMENT

CONGRESS VESTED THE APPOINTMENT OF TASK FORCE MEMBERS IN THE SECRETARY BY LAW

Under the Appointments Clause, "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. The law that authorizes the appointment of Task Force members is 42 U.S.C. 299b-4(a)(1). And two other laws—the Reorganization Plan and 42 U.S.C. 299(a)—ultimately vest in the Secretary the power to appoint Task Force members under Section 299b-4(a)(1). This Court's decision in *Hartwell* supports that conclusion, and the application of the constitutional-avoidance canon in *Edmond* resolves any remaining doubt.

A. Section 299b-4(a)(1) Is The Law That Authorizes The Appointment Of Task Force Members

1. Section 299b-4(a)(1) provides that "[t]he [AHRQ] Director shall convene an independent Preventive Services Task Force * * * to be composed of individuals with appropriate

expertise." 42 U.S.C. 299b-4(a)(1). Given the statutory context, the power to "convene" the Task Force is best read to include the power to "appoint" Task Force members.

"Around the time of the framing, the verb 'appoint'" meant "'[t]o allot, assign, or designate.'" *NLRB* v. *SW Gen., Inc.*, 580 U.S. 288, 312-313 (2017) (Thomas, J., concurring) (quoting 1 Noah Webster, *An American Dictionary of the English Language* 12 (1828)) (brackets in original). Although Section 299b-4(a)(1) does not use the term "appoint," it nevertheless grants the power to appoint, because the authority to convene the Task Force includes the authority to "allot, assign, or designate" the individuals who shall hold the office of Task Force members. See, *e.g.*, *Al Bahlul* v. *United States*, 967 F.3d 858, 873-875 (D.C. Cir. 2020) (holding that a Department Head's statutory authority to "designate" an individual to hold an inferior office satisfied the constitutional requirement of a law vesting the Department Head with authority to "appoint" the inferior officer), cert. denied, 142 S. Ct. 621 (2021).

As a matter of ordinary English, a person's power to convene a group often includes the power to designate the group's members, rather than merely gathering members designated by someone else. To "convene" means to "cause to come together formally." *The American Heritage Dictionary of the English Language* 400 (5th ed. 2016). While one can cause a body to come together by summoning its separately selected members, one can also do so by choosing its members if there is no other mechanism for selecting them. For example, a sheriff's authority to convene a posse includes the authority for the sheriff himself to select the posse members. And here, the context demonstrates that Congress used "convene" in the same way. See 42 U.S.C. 299b-4(a)(1). Section 299b-4(a)(1) governs the "[e]stablishment" of the Task Force, *ibid.*; it prescribes the qualifications for the Task Force members who are convened ("individuals with appropriate expertise"), *ibid.*; *no other statute addresses* the selection of Task Force members; and it is implausible that Congress failed to address the critical question of who would select them. Given all that, the power to "convene" the Task Force includes the power to designate Task Force members.

Indeed, Congress has passed other statutes that, like Section 299b-4(a)(1), use the term "convene" to grant the authority to designate the members of the group being convened. For example, 14 U.S.C. 3703(a) provides that "[t]he Secretary [of the relevant military department] shall convene a Coast Guard Reserve Policy Board." *Ibid.* That statute presumes the Secretary shall designate the members in convening the Board, as no other statute specifies who shall designate the Board members. Additional examples exist. See, *e.g.*, 10 U.S.C. 14903(a); 33 U.S.C. 3022(a)-(b) (Supp. V 2023). By contrast, when Congress wishes to uncouple the power to convene a group from the power to designate the group's members, it says so expressly, by addressing each power separately. See, *e.g.*, 22 U.S.C. 4831(a)(1) (Supp. V 2023) ("[T]he Secretary of State shall convene a Security Review Committee"); 22 U.S.C. 4831(a)(2)(A)-(E) (Supp. V 2023) (designating certain individuals who must serve on the Security Review Committee, regardless of the Secretary's preferences). Because Congress nowhere else addressed the power to designate the Task Force's members, it necessarily included that power within the power to convene the Task Force.

2. Respondents instead contended (Br. 22) that Congress was "agnostic on who appoints the Task Force and d[id] not assign the appointing power to anyone." At oral argument, respondents' counsel went so far as to assert that, under Section 299b-4(a)(1), "[t]he Secretary of Energy" or "[s]omeone from the private sector could appoint" Task Force members. Oral Arg. Tr. 59. That is an untenable reading of the statute.

The fact that Section 299b-4(a)(1) mentions the power to "convene" but not the power to "appoint" is a compelling reason to read the former to include the latter, not a reason to conclude the statute is silent about appointment. It would be absurd for Congress to allow the members of this Task Force convened by HHS to be appointed by random other government officials, let alone by private parties. It also would be patently impracticable: imagine, for instance, that the HHS Secretary appointed one group of individuals, but the Secretary of Energy purported to appoint a second group while the American Medical Association purported to appoint a third group; respondents' reading of Section 299b-4(a)(1) would provide no way to determine which group was the true Task Force, which AHRQ is required to support in various ways, 42 U.S.C. 299b-4(a)(3), and which makes certain recommendations binding on health insurers and health plans, 42 U.S.C. 300gg-13(a)(1). Respondents' interpretation would thus "render" the statutory scheme "unworkable or unthinkable or both." *Becerra* v. *Empire Health Found.*, 597 U.S. 424, 439 (2022). Unsurprisingly, they have identified no other statute that is "agnostic" about who appoints the individuals that will hold the offices the statute establishes.

Respondents fared no better with their alternative suggestion (Br. 54) that Section 299b-4(a)(1) calls for the President to appoint Task Members with the Senate's advice and consent. The statute says no such thing. Nor can respondents evade that fatal flaw because "[t]he prescribed manner of appointment for principal officers" in the Appointments Clause "is also the default manner of appointment for inferior officers." *Edmond*, 520 U.S. at 660. That default rule is displaced when Congress "by Law vest[s]" the appointment in a Department Head. *Ibid.* (quoting U.S. Const. Art. II, § 2, Cl. 2). That is what Congress did here, by providing that the AHRQ Director "shall convene" the Task Force, 42 U.S.C. 299b-4(a)(1), and then vesting the Director's powers in the Secretary pursuant to the Reorganization Plan and Section 299(a), see Pt. B, *infra*. Nor would it have been realistic for Congress to contemplate either the President appointing members to a Task Force before it has been convened by the Director, or the Director convening a Task Force before it has any members who have been appointed by the President.

Moreover, the statutory history is incompatible with reading Section 299b-4(a)(1) to allow appointment by the President after confirmation by the Senate. It is undisputed that, when Congress enacted Section 299b-4(a)(1) in 1999, see Healthcare Research and Quality Act of 1999, Pub. L. No. 106-129, § 2(a), 113 Stat. 1659, Task Force members were not officers of the United States because their recommendations were purely advisory and lacked any binding effect. See Resp. Br. 4; *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 77 (2007). At that time, the Appointments Clause and its "default" rule for officers did not even apply to Task Force members. *Edmond*, 520 U.S. at 660. Indeed, with the Appointments Clause inapplicable, the Senate lacked any constitutional authority to play a role in the selection of these non-officers outside of the Legislative Branch. Cf. *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986); *INS* v. *Chadha*, 462 U.S. 919, 954-955 (1983). Thus, in 1999, Section 299b-4(a)(1) necessarily meant that the power to appoint Task Force members was part of the power to convene the Task Force. And Congress did not disturb that preexisting method of appointment in 2010 when it converted Task Force members into officers in the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119. While the ACA gave binding effect to the Task Force's "A" and "B" recommendations, 42 U.S.C. 300gg-13(a)(1), it did not amend the language in Section 299b-4(a)(1) empowering the Director, not the President, to "[e]stablish[]" and "convene" the Task Force, 42 U.S.C. 299b-4(a)(1).

3. In sum, Section 299b-4(a)(1), by its plain terms, authorizes the AHRQ Director to appoint Task Force members as part of his authority to convene the Task Force. Of course, the Director is not a Head of Department for Appointments Clause purposes, because he leads a sub-agency within HHS. 42 U.S.C. 299(a). But as discussed below, two other laws—the Reorganization Plan and Section 299(a)—ultimately vest in the HHS Secretary himself the Director's power to appoint Task Force members under Section 299b-4(a)(1).

B. The Reorganization Plan And Section 299(a) Are Each Laws That Independently Vest In The Secretary The Power To Appoint Task Force Members Under Section 299b-4(a)(1)

1. Pursuant to the Reorganization Act of 1949 (Reorganization Act), Pub. Law No. 81-109, 63 Stat. 203, President Lyndon Johnson issued Reorganization Plan No. 3 of 1966 (the Reorganization Plan). Under the Reorganization Plan, "there are hereby transferred to the Secretary of Health, Education, and Welfare * * * all functions of the [PHS]" and "of [its] officers and employees," except for "functions vested by law in any advisory council, board, or committee." § 1(a)-(b), 80 Stat. 1610; see Department of Education Organization Act, Pub. L. No. 96-88, § 509(a)-(b), 93 Stat. 695 ("The Department of Health, Education, and Welfare is hereby redesignated the Department of Health and Human Services," and "[a]ny reference to * * * the Secretary of Health, Education, and Welfare * * * in any law * * * or other official paper * * * shall be deemed to refer and apply to the * * * Secretary of Health and Human Services," except for functions transferred to the Department of Education). In 1984, Congress "ratifie[d] and affirm[ed] as law" the Reorganization Plan. 1984 Act, § 1, 98 Stat. 2705.

Accordingly, the Reorganization Plan is a law enacted by Congress that vests the HHS Secretary with the power to appoint Task Force members under Section 299b-4(a)(1). As AHRQ is "an agency" "established within [PHS]," its Director is a PHS officer. 42 U.S.C. 299(a). Thus, while Section 299b-4(a)(1) nominally authorizes the Director to convene the Task Force and appoint its members, the Reorganization Plan "transferred" that "function[]" of a PHS officer "to the Secretary" himself. § 1(a), 80 Stat. 1610; see § 2, 80 Stat. 1610 (also providing "[t]he Secretary may from time to time make such provisions as he shall deem appropriate authorizing the performance of any of the functions transferred to him * * * by any officer, employee, or agency * * * of the Department"). And the Secretary has exercised this power to personally appoint the current Task Force members. See Gov't Br. 6-7.

Respondents have argued (Br. 35) that the Task Force is an advisory entity whose functions are "exempt[]" under Section 1(b) of the Reorganization Plan. But even setting aside the flaws with that argument as applied to the *Task Force's* functions, see Gov't Br. 42-43; Gov't Reply Br. 10-11, the argument is inapplicable to the *AHRQ Director's* own functions. AHRQ is indisputably not an advisory entity, as it performs research and grantmaking functions. 42 U.S.C. 299(b), 299a, 299c-5(c). So the Director's authority to appoint Task Force members is not exempt from the Reorganization Plan.

Respondents also contended (Br. 35) that the Reorganization Plan applies only to PHS-officer functions that "exist[ed] in 1966," and therefore does not apply to the authority that Congress gave the Director in 1999 to appoint Task Force members. But the Reorganization Plan contains no such temporal limitation. It transfers to the Secretary "*all* functions" of PHS officers,

not just "all [existing] functions." § 1(a), 80 Stat. 1610 (emphasis added); see *United States ex rel. Cairns* v. *D.S. Med. LLC*, 42 F.4th 828, 833 (8th Cir. 2022) ("All means all, not some or most."); cf. *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (using "all" to have the same sweeping scope as "any," defined as "indiscriminately of whatever kind" (citation omitted)). Moreover, the Dictionary Act instructs that, unless context indicates otherwise, "words used in the present tense include the future as well as the present," 1 U.S.C. 1, and the Reorganization Plan uses the present-tense phrase "*are* hereby transferred," § 1(a), 80 Stat. 1610 (emphasis added); see *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (describing the phrase "is or may be adversely affected" as a "telling use of the present tense"). Especially in conjunction with the unqualified object "all functions," the present-tense verb phrase "are hereby transferred" makes clear that the Reorganization Plan goes beyond a one-time past transfer of existing functions and effectuates a continuing transfer of future functions granted to PHS officers. § 1(a), 80 Stat. 1610. There also is no reason to think that Congress instead intended to create an arbitrary bifurcation of PHS functions, with pre-1966 functions of PHS officers transferred to the Secretary while post-1966 functions are retained by PHS officers themselves. To the contrary, "Congress legislates against the backdrop of existing law," *McQuiggin* v. *Perkins*, 569 U.S. 383, 398 n.3 (2013), and this Court "assume[s] that Congress is aware of existing law when it passes legislation," *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990). So when Congress in 1999 granted the Director the power to appoint Task Force members under Section 299b-4(a)(1), it knew that this power would be automatically transferred to the HHS Secretary by operation of the Reorganization Plan that it adopted in 1984, just like all other powers granted to PHS officers within HHS.[1]

2. Wholly apart from the Reorganization Plan, Section 299(a) provides that "[t]he Secretary shall carry out this subchapter [*i.e.*, the statutory provisions governing AHRQ] acting through the Director," who is "appointed by the Secretary." 42 U.S.C. 299(a). This means that the statutory duty to "carry out" the appointment of Task Force members under Section 299b-4(a)(1) is ultimately vested in the Secretary, not the Director. And the Secretary can satisfy his duty, while "acting through the Director," in two ways that comply with the Appointments Clause.

First, the Secretary can instruct the Director which individuals to select as Task Force members. After all, the entire PHS, including the AHRQ, "shall be administered * * * under the supervision and direction of the Secretary," 42 U.S.C. 202, and the Secretary's power to appoint the Director also provides the power to remove and thus further control the Director, *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492, 509 (2010). If the Secretary

[1] This conclusion is not affected by the Reorganization Act's provision stating that "[n]o reorganization plan shall provide for * * * authorizing any agency to exercise any function which is not expressly authorized by law at the time the plan is transmitted to Congress." § 5(a)(4), 63 Stat. 205. Section 5(a)(4) merely "prevent[ed] the President, under the guise of consolidating and rearranging, from actually creating authority in the Executive Branch which had not existed before." Office of Legal Counsel, U.S. Dep't of Justice, *Memorandum of William H. Rehnquist, Assistant Attorney General* (Sept. 11, 1969), in *Reorganization Plan No. 1 of 1969 (ICC): Hearing before the Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations*, 91st Cong., 1st Sess. 29 (1969). That provision in no way meant that the Reorganization Plan's transfer to the Secretary of "all functions" of PHS officers did not include any functions that *Congress later expressly authorized by law*, such as the Director's power to convene and appoint Task Force members under Section 299b-4(a)(1).

personally "designate[s]" the individuals that the Director must select for the Task Force, he is exercising the power to "appoint" those officers vested in him by Section 299(a). See *SW Gen.*, 580 U.S. at 312-313 (Thomas, J., concurring) (citation omitted).

Second, even if the Secretary allows the Director to make initial selections of Task Force members, the Secretary can insist, invoking the same authorities cited above, that those selections will take effect only if he personally approves them. And under this Court's decision in *Hartwell*, that too is exercising the appointment power vested in him by Section 299(a). See Pt. C, *infra*.

3. In the court of appeals, respondents maintained that the Reorganization Plan and Section 299(a) do not "'vest[]' the appointment of Task Force members in the Secretary," but rather merely "allow him to commandeer the Director's powers *if* the Secretary chooses to [do so]." Resp. C.A. Br. 31. The premise is wrong, and the conclusion does not follow.

First, the statutes are best read to *require*, rather than *permit*, the Secretary to personally appoint Task Force members, either directly or acting through the Director. For starters, the Reorganization Plan "transferred" the Director's authority to appoint Task Force members "to the Secretary." § 1(a), 80 Stat. 1610. In 1966 and still today, "transfer" means "[t]o convey * * * from one person or place to another." *The American Heritage Dictionary of the English Language* 1363 (1st ed. 1969); see *The American Heritage Dictionary of the English Language* 1844 (5th ed. 2016) (similar). Given the Reorganization Plan, it is the Secretary alone who is statutorily vested with the power to appoint Task Force members under Section 299b-4(a)(1). Furthermore, even setting aside the Reorganization Plan, Section 299(a) mandates that the Secretary "shall"—not "may"—"carry out" the duties of AHRQ, albeit "acting through the Director." 42 U.S.C. 299(a). In the context of the duty to appoint Task Force members, Section 299(a) should be read to require the Secretary himself to take action through the Director, rather than allowing the Director to select Task Force members without the Secretary's front-end direction or back-end approval.

Second, even if the Reorganization Plan and Section 299(a) were construed to permit the Director to unilaterally appoint Task Force members under Section 299b-4(a)(1), they at minimum *also* permit the Secretary to personally make, direct, or approve the appointment of Task Force members. At worst, therefore, Congress has "by Law vest[ed] the Appointment" of Task Force members in *both* the "Head[] of [a] Department[]" *and* an inferior officer within that Department. U.S. Const. Art. II, § 2, Cl. 2. Such a statutory scheme would not facially violate the Appointments Clause, and it would be constitutional as applied when, as here, the Secretary rather than the Director actually appointed the Task Force members. Notably, respondents' counsel appears to agree. In response to a question from Justice Gorsuch whether it would be "permissible" "if Congress vested the power to appoint an inferior officer in the Secretary plus [other] people," counsel answered "I'm not sure" but, "at the very least, * * * it still has to be, I think, ultimately, a head of department that exercises that power." Oral Arg. Tr. 67-68. In this case, the Secretary *did* exercise the power to appoint the Task Force members under Section 299b-4(a)(1), which was personally vested in him by the Reorganization Plan and Section 299(a). See Gov't Br. 6-7.

C. This Court's *Hartwell* Decision Confirms That Congress Permissibly Vested The Power To Appoint Task Force Members In The Secretary By Law

In *Hartwell*, this Court considered a statute "authoriz[ing] the assistant treasurer, at Boston, with the approbation of the Secretary of the Treasury, to appoint a specified number of clerks."

73 U.S. at 393. The Court held that such clerks were "appointed by the head of a department within the meaning of the [Appointments Clause]." *Id.* at 393-394. Under *Hartwell*, Congress properly vests the power to appoint an inferior officer so long as it enacts a law expressly giving a Department Head the ultimate decision over the appointment—even if a subordinate officer also plays a role in the selection. See *Free Enter. Fund*, 561 U.S. at 512 n.13 (citing *Hartwell* for the proposition that the Court "ha[s] previously found that the department head's approval satisfies the Appointments Clause"); *Appointment and Removal of Federal Reserve Bank Members of the Federal Open Market Committee*, 43 Op. O.L.C. 263, 276-277 (2019) (explaining that, under *Hartwell*, "so long as a head of a department approves the selection of an inferior officer, the department head's subordinates may do much of the legwork of the appointment process").[2]

If anything, compared to the statute in *Hartwell*, the statutes at issue here more clearly vest the appointment power in the Department Head. Namely, under the Reorganization Plan, the Secretary has been *personally given* the Director's authority to appoint Task Force members, which means he need not even wait to review an initial selection made by a subordinate, as in *Hartwell*. And while Section 299(a) does not specifically say that the Director must obtain the Secretary's "approbation" insofar as the Secretary allows him to select Task Force members in the first instance, cf. *Hartwell*, 73 U.S. at 393, the statutes should be construed to so require. After all, Section 299(a) imposes on the Secretary himself the ultimate duty to "carry out" the appointment, and the Appointments Clause requires the Secretary's personal approval.

For these reasons, *United States* v. *Smith*, 124 U.S. 525 (1888), is doubly inapposite. There, this Court held that a "clerk in the office of the collector of customs" was "not an officer of the United States." *Id.* at 531. Although it was alleged that, as a matter of fact, "the appointment of the defendant as clerk was made with [the] approbation" of the Treasury Secretary, "no law required this approbation." *Id.* at 533. To begin, there was no law, akin to the Reorganization Plan, that "invested" the Treasury Secretary himself "with the selection of the clerks of the collector." *Ibid.* Nor was there any law, akin to Section 299(a), that imposed on the Treasury Secretary the duty to carry out the selection acting through a subordinate and that therefore could have been construed to make "the[] selection * * * dependent upon his approbation." *Ibid.* In short, this case is nothing like *Smith*, and it is even stronger for the government than *Hartwell*.

D. Constitutional-Avoidance Principles Compel Reading The Laws At Issue To Vest The Power To Appoint Task Force Members In The Secretary

1. "When legislation and the Constitution brush up against each other, [this Court's] task is to seek harmony, not to manufacture conflict." *United States* v. *Hansen*, 599 U.S. 762, 781 (2023). Consequently, "even if the Government's reading" of this statutory scheme "were not the best one," the "canon of constitutional avoidance would still counsel [the Court] to adopt it" as long as that "interpretation is at least fairly possible." *Ibid.* (citation and quotation marks omitted).

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[2] That method of appointing inferior officers traces back to the Founding era. See Act of Mar. 2, 1799, ch. 22, § 21, 1 Stat. 642 (authorizing customs officers to appoint customs inspectors "with the approbation of the principal officer of the treasury department"); *Appointment and Removal of Inspectors of Customs*, 4 Op. Att'y Gen. 162, 164 (1843) (concluding that customs inspectors were "inferior officers" whose appointment was vested in the Treasury Secretary).

Edmond's application of the constitutional-avoidance canon is particularly instructive here. There, the Court similarly considered the interplay between several statutes to determine in whom Congress had vested the power to appoint certain inferior officers (judges of the Coast Guard Court of Criminal Appeals). See 520 U.S. at 655-658. Focusing on a statute specifically addressing those officers, the petitioners argued that Congress had vested their appointment in the Judge Advocates General. See *id.* at 656-657. But in so arguing, they were "asking [the Court] to interpret [the statute] in a manner that would render it clearly unconstitutional," because Judge Advocates General were themselves inferior officers rather than Department Heads. *Id.* at 658. The Court thus "avoid[ed]" that interpretation because "there [was] another reasonable interpretation available"—namely, that the specific statute did not address the power to appoint at all, and thus a more general statute had instead vested the appointment power in the Secretary of Transportation. *Ibid.*; see *id.* at 656.

As in *Edmond*, any ambiguities in the statutory scheme at issue here should be resolved in favor of reading the laws to vest the HHS Secretary with the power to appoint Task Force members. In particular, even if this Court harbored some doubts about the best textual reading, it is at least "fairly possible," *Hansen*, 599 U.S. at 781, to conclude that: (1) the power to "convene" the Task Force includes the power to appoint the Task Force's members, 42 U.S.C. 299b-4(a)(1); (2) the Reorganization Plan "transferred to the Secretary" the "function[]" of appointing Task Force members that Congress granted to the Director, § 1(a), 80 Stat. 1610; and (3) the Secretary's duty to "carry out" the appointment of Task Force members "acting through the Director" requires the Secretary either to provide front-end direction or back-end approval insofar as the Director selects Task Force members, 42 U.S.C. 299(a). Accordingly, the Court "must" adopt those "reasonable" interpretations, rather than reading the statutory scheme to vest appointment power in the Director alone (or no one at all) and thereby "render[ing] it clearly unconstitutional." *Edmond*, 520 U.S. at 658.

2. In the court of appeals, respondents claimed that a contrary interpretive canon applied. Quoting *Myers* v. *United States*, 272 U.S. 52, 164 (1926), they asserted that "exceptions to the default method of appointment in Article II are to be 'strictly construed, and not to be extended by implication.'" Resp. C.A. Br. 35-36. But respondents misunderstood the quoted language from *Myers*. That case did not present the question of how to interpret a statutory scheme that is ambiguous with respect to the vesting of appointment power, and it certainly did not adopt a rule requiring ambiguities to be resolved in favor of appointment by the President with advice and consent by the Senate. To the contrary, the whole point of the quoted passage in *Myers* was that the Senate's role with respect to the appointment and removal of executive officers should be *limited* because it "blend[s] action by the legislative branch * * * in the work of the executive." 272 U.S. at 164; accord *id.* at 118-119. In all events, Section 299b-4(a)(1) clearly and unambiguously forecloses appointment by the President with Senate confirmation. See p. 4, *supra*. The only plausible interpretive dispute is whether Section 299b-4(a)(1) vests appointment power solely in the Director or instead vests that power in the Secretary when construed in conjunction with the Reorganization Plan and Section 299(a). See Pt. B, *supra*. And the constitutional-avoidance canon compels the latter reading over the former—just as in *Edmond*.

Respondents also emphasized below that, until recently, the Secretary did not exercise his power to directly appoint Task Force members and instead left their appointments to the Director. Resp. C.A. Br. 36. But until the ACA in 2010 gave Task Force members the power to issue binding

recommendations, they were not officers at all. See p. 4, *supra*. It was thus both permissible and unsurprising that the Secretary allowed the Director to perform the appointment function. See Reorganization Plan, § 2, 80 Stat. 1610. And while the Secretary did not begin personally appointing Task Force members until 2023, there is no indication that this reflected a mistaken belief that the Secretary lacked the power to do so, as opposed to a failure to perceive that the ACA had made Task Force members into officers for Appointments Clause purposes. Regardless, the Secretary's past practice is irrelevant under *Edmond*. There too, the Secretary of Transportation personally appointed judges of the Coast Guard Court of Criminal Appeals for the first time only "[i]n anticipation" of constitutional litigation. 520 U.S. at 654. The Court nonetheless held the appointments to be valid, implicitly rejecting the proposition that the Secretary had forfeited his appointment power by not exercising it more promptly. See *id.* at 658.

* * * * *

In the end, respondents have not satisfied their "burden of establishing [the statute's] unconstitutionality." *Haaland* v. *Brackeen*, 599 U.S. 255, 277-278 (2023). On their view, Congress established the Task Force, enumerated its powers and duties, set the qualifications for its members, and authorized the AHRQ Director to convene it, but then either remained entirely silent about who would appoint the members or unconstitutionally vested appointment authority in another inferior officer. Neither possibility is a plausible construction of the statutory scheme. Instead, when read as a whole, the laws that Congress passed vest the Secretary with the power to appoint Task Force members—just as those laws grant the Secretary the power and duty to carry out virtually all other PHS functions. At minimum, that interpretation is reasonable enough to trigger the judicial obligation to avoid rather than create conflicts between legislation and the Constitution. Instead of halting the Task Force's work unless and until Congress enacts a new law, this Court should sensibly interpret the laws already on the books to vest the appointment of Task Force members in the Secretary.

Sincerely,

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cc: See Attached Service List

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