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***KENNEDY V. BRAIDWOOD MANAGEMENT INCORPORATED*: THE U.S. SUPREME COURT IN 2025 HOLDS THAT THE ACA PREVENTIVE SERVICES TASK FORCE MEMBERS ARE PROPERLY APPOINTED INFERIOR OFFICERS**

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I. INTRODUCTION

“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments.”¹

The United States Supreme Court decided in *Kennedy v. Braidwood Management, Inc.* on June 27, 2025, that the Preventive Services Task Force (“PSTF” or “Task Force”) members are now properly appointed under the Appointments Clause of the U.S. Constitution, above, because the Task Force members are inferior officers.² Under the Affordable Care Act, the Preventive Services Task Force is charged with recommending evidence-based preventive health items or services ranked “A” or “B” which health insurers must provide with no cost sharing.³ In *Braidwood Management*, the Supreme Court held six to three that the PSTF has been properly and Constitutionally appointed by the HHS Secretary since 2023.⁴ As a consequence of this Supreme Court precedent in *Braidwood Management*, all of the Task Force’s more than fifty current

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1. U.S. CONST. art. II, §2, cl. 2.

2. *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 793–94 (2025); *see infra* notes 171–211 and accompanying text.

3. 42 U.S.C. § 300gg-13(a)(1).

4. *Kennedy*, 606 U.S. at 793–94.

recommendations remain in effect.⁵ This decision by the Court reversed and remanded the judgment of the Court of Appeals for the Fifth Circuit, which held that the PSTF members were principal officers not properly appointed⁶ and remanded.⁷

This article gives a brief overview of the Patient Protection and Affordable Care Act (“ACA”) and reviews prior Supreme Court precedent on the ACA. This article then analyzes the important Affordable Care Act and Appointments Clause precedents in *Kennedy v. Braidwood Management*, prior Appointments Clause precedents, and discusses *Braidwood Management*’s ramifications.

II. THE AFFORDABLE CARE ACT

The Patient Protection and Affordable Care Act (ACA) was signed into law in March 2010, and this lengthy act ushered in many sweeping changes in healthcare and health insurance.⁸ A few of the major changes include: the coverage of preventive services⁹ which was an issue in this case; no lifetime or annual dollar limits or caps on health insurance payouts;¹⁰ extension of dependent coverage until age 26;¹¹ prohibiting preexisting condition exclusions in health insurance,¹² guaranteed availability¹³ and renewability¹⁴ of health insurance coverage, establishing qualified health plans¹⁵ which have essential health benefits requirements,¹⁶ and state health insurance exchanges.¹⁷ Under the ACA, individuals are required to have qualifying health insurance with the essential coverage.¹⁸ Large employers with 50 or more employees must provide minimum essential coverage or pay a penalty.¹⁹

5. See *A & B Recommendations*, U.S. PREVENTIVE SERVS. TASK FORCE, <https://www.uspreventiveservicestaskforce.org/uspstf/recommendation-topics/uspstf-a-and-b-recommendations> [https://perma.cc/26B3-CVHD] (last visited Nov. 16, 2025).

6. *Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 940–47 (5th Cir. 2024), *rev’d sub nom.*, *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748 (2025) (as a consequence, the PSTF requirement for Preexposure Prophylaxis HIV medication was not binding for religious objector plaintiffs); see *infra* notes 129–52 and accompanying text.

7. *Kennedy*, 606 U.S. at 794.

8. See generally Nicholas Bagley, *Legal Limits and the Implications of the Affordable Care Act*, 1604 U. PA. L. REV. 1715 (2016); see generally John G. Day, *The Patient Protection and Affordable Care Act: What Does It Really Do?*, 22 CONN. INS. L. J. 121 (2015).

9. See 42 U.S.C. § 300gg-13(a).

10. *Id.* § 300gg-11.

11. *Id.* § 300gg-14.

12. *Id.* § 300gg-3.

13. *Id.* § 300gg-1.

14. *Id.* § 300gg-2.

15. 42 U.S.C. § 18021.

16. *Id.* § 18022.

17. *Id.* § 18031.

18. *Id.* § 18091.

19. 26 U.S.C. § 4980H.

III. AFFORDABLE CARE ACT SUPREME COURT PRECEDENTS

The lawsuits started almost immediately after the enactment of the Patient Protection and Affordable Care Act.²⁰ The first case to reach the Supreme Court was *National Federation of Independent Business v. Sebelius*, decided in 2012.²¹ In that decision, twenty-six states and several individuals challenged both the Affordable Care Act's individual mandate and its required Medicaid expansion.²² The Court struck down the individual mandate under the Commerce Clause by a four-to-five vote²³ but upheld it, five to four,²⁴ as a valid exercise of Congress's taxing power.²⁵ At the same time, the Court held that the Medicaid expansion was unconstitutionally coercive and concluded by a seven-to-two vote that Congress could not condition existing Medicaid funding on state compliance.²⁶

In 2014, the Supreme Court decided *Burwell v. Hobby Lobby*, holding by a five-to-four vote that closely held corporations with sincerely held religious beliefs could not be required to provide employee health insurance coverage for items that violated those beliefs.²⁷ Under the essential health insurance coverage requirement of the Affordable Care Act, preventive services are covered without any cost sharing.²⁸ The Health Resources and Services Administration (HRSA) in the Department of Health and Human Services (HHS) is authorized by the ACA to decide what these preventive services include.²⁹ In 2011, the HRSA promulgated guidelines that mandated that all qualified health insurance include all FDA approved contraceptive methods for women.³⁰ Hobby Lobby and other plaintiffs claimed that four of these types of FDA approved contraceptives, out of twenty approved at that time, could keep a fertilized egg from implanting, so requiring Hobby Lobby to provide health insurance which covered these four types of contraceptives would violate their sincerely held religious beliefs against abortion. The majority, in an opinion authored by Justice Alito, agreed

20. Abbe R. Gluck, Mark Regan, & Erica Turret, *The Affordable Care Act's Litigation Decade*, 108 GEO. L. REV. 1471, 1472 (2010).

21. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); see generally Martha Minow, *Affordable Convergence: "Reasonable Interpretation" and the Affordable Care Act*, 126 HARV. L. REV. 117 (2012).

22. Sebelius, 567 U.S. at 520; see 26 U.S.C. § 5000A, 42 U.S.C. § 1396c.

23. Sebelius, 567 U.S. at 529, 561, 588 (it also was not constitutional under the necessary and proper clause).

24. *Id.* at 574.

25. U.S. CONST. art. I, § 8, cl. 1.

26. See Sebelius, 567 U.S. at 588.

27. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 731 (2014); see generally Sue Ganske, *Burwell v. Hobby Lobby Stores, Inc. – The U.S. Supreme Court Holds that the Religious Freedom Restoration Act Trumps the Affordable Care Act*, 31 J. CONTEMP. HEALTH L. & POL'Y 1 (2015).

28. 42 U.S.C. § 300gg-13(a).

29. *Id.*

30. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8717, 8725 (Feb. 15, 2012).

with Hobby Lobby that providing health insurance which covered these four types would substantially burden their religious beliefs under the Religious Freedom Restoration Act.³¹

Back to the Supreme Court in 2015, the Court held six to three in *King v. Burwell* that the ACA language on a health insurance exchange established by a state³² is sufficient to include both state and federal exchanges.³³ The ACA allowed refundable tax credits for individuals who purchase health insurance on state exchanges.³⁴ If a state doesn't establish a health insurance exchange, then individuals in that state may purchase health insurance on the federal health insurance exchange.³⁵ If an individual doesn't have sufficient income, the individual isn't required to purchase health insurance.³⁶ Virginia was a state which did not have a state health insurance exchange at the time of this case, and thus Virginians needing qualified health insurance participated in the federal exchange.³⁷ King, a resident of Virginia, wanted to be exempt from the requirement to purchase health insurance.³⁸ King argued that without the tax credit, he didn't make enough money to be required to purchase health insurance.³⁹ An IRS regulation pursuant to the ACA discusses state and federal exchanges on the issue of the tax credit.⁴⁰ The majority of the Court, in an opinion authored by Chief Justice Roberts, held that the term "state exchange" was ambiguous, and Congress intended to mean any exchange which an individual used to purchase health insurance.⁴¹ Thus, King was required to purchase health insurance, using his credit from the national health insurance exchange, and was not exempt from the requirement.⁴²

In 2020, the Court ruled seven to two in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* that the Departments of Health and Human Services, Labor, and Treasury had legal authority to exempt religious and conscientious objectors from HHS's regulatory contraception mandate.⁴³ The HRSA, housed in HHS under the ACA, has the ability to recommend

31. *Burwell*, 573 U.S. at 733; see 42 U.S.C. § 2000bb(a)(1).

32. 42 U.S.C. § 18031.

33. *King v. Burwell*, 576 U.S. 473, 475–77 (2015).

34. 26 U.S.C. § 36B; see Andy S. Grewal, *King v. Burwell: Where Were the Tax Professors?*, 2015 PEPP. L. REV. 48, 50 (2015).

35. 42 U.S.C. § 18031.

36. 26 U.S.C. § 5000A(e)(2)

37. *King v. Burwell*, 576 US 473, 483 (2015).

38. *Id.* at 484.

39. *Id.* at 493–94

40. 45 C.F.R. § 155.20 (defining "Exchange," including state-based and federally facilitated Exchanges, for purposes of Affordable Care Act implementation).

41. *King*, 576 U.S. at 475.

42. *Id.* at 475–76.

43. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. 657, 687 (2020); see generally Kimberly A. Davis, *Administrative Agency has Authority to Promulgate Exemptions to ACA Requirement of Providing Contraceptive Coverage and Departs from Supreme Court Tradition*, 49 W. ST. L. REV. 141 (2022).

preventive services.⁴⁴ Under this delegation, the HRSA developed the contraceptive mandate with a safe harbor for religious nonprofits.⁴⁵ The Departments above, who oversee and enforce, streamlined the safe harbor for religious nonprofits and allowed for self-certification.⁴⁶ The Little Sisters of the Poor challenged the self-accommodation in court under the Religious Freedom Restoration Act.⁴⁷ The regulation was modified adding a moral component,⁴⁸ and the Commonwealth of Pennsylvania challenged the religious and moral exemptions.⁴⁹ The district court agreed with Pennsylvania and issued a nationwide injunction against the religious and moral exemptions,⁵⁰ and the Court of Appeals for the Third Circuit affirmed.⁵¹ The Supreme Court reversed, citing *Hobby Lobby*, holding that the agencies had the power to promulgate both the religious and the moral exemptions.⁵²

In 2021, the Court ruled seven to two in *California v. Texas* that the plaintiffs did not have standing to bring their ACA challenge.⁵³ In 2017, Congress set the penalty for not having qualified health insurance under the individual mandate at zero.⁵⁴ Texas and seventeen other states, along with two individuals, challenged ACA's individual mandate, stating that without a penalty, the minimal essential coverages is unconstitutional.⁵⁵ But the Court disagreed, holding that the plaintiffs lack standing because they haven't shown any injury, past or future, fairly traceable to the alleged illegal conduct.⁵⁶

44. 42 U.S.C. § 300gg-13(a)(3)–(4).

45. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8717, 8725–26 (Feb. 15, 2012).

46. Coverage of Certain Preventative Services Under the Affordable Care Act, 77 Fed. Reg. 39870, 39874 (July 2, 2013).

47. Little Sisters of the Poor Saints Peter and Paul Home, 591 U.S. at 668.

48. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47838, 47850 (Oct. 18, 2017) (to be codified at 45 C.F.R. pt. 147).

49. *California v. Texas*, 593 U.S. 659, 672 (2021).

50. *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 585 (E.D. Pa. 2017), *rev'd*, 816 F. App'x 632, 633 (3d Cir. 2020).

51. *Pennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019), *rev'd*, 591 U.S. 657.

52. *California*, 593 U.S. at 687.

53. *Id.*; see generally Jon Lucas, *California v. Texas: Avoiding an Antidemocratic Outcome*, 37 J. L. & HEALTH 387 (2024).

54. See 26 U.S.C. § 5000A(c).

55. *California*, 593 U.S. at 666 (the suit was against the HHS Secretary and the Commissioner of the IRS; other states including California intervened); see 26 U.S.C. § 5000A(a); see Lucas, *supra* note 53.

56. *California*, 593 U.S. at 667.

IV. *KENNEDY V. BRAIDWOOD MANAGEMENT, INC.*

“This case arises out of yet another dispute over the Patient Protection and Affordable Care Act (“ACA”).”⁵⁷

A. *The ACA Preventive Services Mandate*

The preventive services mandate of the Affordable Care Act mandates that group health plans “provide coverage for and shall not impose any cost sharing requirements” for preventive health services.⁵⁸ This health insurance coverage without cost sharing must at a minimum include: “evidence-based items or services” with an A or B rating recommended by the U.S. Preventive Services Task Force; immunizations recommended by the Centers for Disease Control and Prevention’s Advisory Committee on Immunization Practices; “evidence-informed preventive care and screening” for infants, children, and adolescents in the guidelines of the Health Resources and Services Administration; and preventive care for women in the guidelines of the Health Resources and Services Administration.⁵⁹

The PSTF was charged by Congress in the ACA with recommending preventive services covered by all qualified health insurance with no cost sharing.⁶⁰ The PSTF created by the Department of Health and Human Services (HHS) in 1984 is a group of sixteen volunteers with appropriate expertise to make recommendations.⁶¹ In the Healthcare Research and Quality Act of 1999, Congress stated that the Director of the Agency for Healthcare Research and Quality (“AHRQ”), housed in HHS, “convenes” the Task Force,⁶² whose purpose is to “review the scientific evidence related effectiveness, appropriateness, and cost-effectiveness” of preventive services to develop and update recommendations.⁶³ “Before 2010, Preventive Services Task Force recommendations were purely advisory.”⁶⁴ In 2010, the Affordable Care Act modified the statute, requiring the PSTF members to be independent,⁶⁵ and “to the extent practicable, not subject to political pressure.”⁶⁶

There are over fifty current PSTF A- and B-rated recommendations on

57. *Kelley v. Azar II*, No. 4:20-cv-00283-O, 2021 U.S. Dist. LEXIS 193410, at *2 (N.D. Tex. Feb. 25, 2021).

58. 42 U.S.C. § 300gg-13.

59. 42 U.S.C. § 300gg-13(a)(1)–(4).

60. *Id.* at (a)(1).

61. 42 U.S.C. § 299b-4(a)(1); see Kerry Dooley Young, *The US Preventive Services Task Force: What to know about this influential panel of health care experts*, THE JOURNALIST’S RESOURCE (Aug. 6, 2025), <https://journalistsresource.org/home/the-us-preventive-services-task-force-what-to-know-about-this-influential-panel-of-health-care-experts/> [<https://perma.cc/2D6E-7JDS>].

62. 42 U.S.C. § 299b-4(a)(1).

63. *Id.*

64. *Kennedy*, 606 U.S. at 748.

65. 42 U.S.C. § 299b-4(a)(1).

66. *Id.* § 299b-4(a)(6).

numerous issues, including, but not limited to: screening for certain pregnancy risk; screening for osteoporosis; detecting suicide and depression risk; and intervening to protect falls in the elderly.⁶⁷ In 2019, the Task Force recommended with an “A” recommendation pre-exposure prophylaxis (“PrEP”) drugs, which help prevent HIV infection, for those at high risk of HIV.⁶⁸ The 2023 final recommendation statement on PrEP also states that, “recommendations made by the USPSTF are independent. They should not be construed as an official position” of AHRQ or HHS.⁶⁹

The U.S. Advisory Committee on Immunization Practices (“ACIP”) was charged by Congress in the ACA to recommend vaccines covered by qualifying health insurance without cost sharing.⁷⁰ The ACIP was created by the Secretary of Health and Human Services (“HHS”) in 1964 to guide the Department of Health and Human Services on vaccines. A vaccine recommended for routine use by the advisory committee is effective when adopted by the Centers for Disease Control and Prevention Director (“CDC”).⁷¹ The ACIP has recommended the human papillomavirus (HPV) vaccine for females aged eleven to twelve since 2007 and now recommends the vaccine for older adults to prevent new HPV infections and HPV-associated diseases.⁷²

The Health Resources and Services Administration (“HRSA”) was charged by Congress with developing evidence based preventive services for women and children.⁷³ HRSA was created in 1982 as a subagency in HHS to improve access to healthcare for those who are medically vulnerable, uninsured, or isolated.⁷⁴

B. The Lawsuit

The plaintiffs were individuals and businesses which objected to some of

67. U.S. PREVENTIVE SERVS. TASK FORCE, *supra* note 5.

68. *Braidwood Mgmt. Inc. v. Becerra*, 627 F. Supp. 3d 624, 632 (N.D. Tex. 2022), *aff’d*, 104 F.4th 930 (5th Cir. 2024).

69. *Prevention of Acquisition of HIV: Preexposure Prophylaxis*, U.S. PREVENTIVE SERVS. TASK FORCE (Aug. 22, 2023), <https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/prevention-of-human-immunodeficiency-virus-hiv-infection-pre-exposure-prophylaxis> [<https://perma.cc/DX8B-4C9E>].

70. 42 U.S.C. § 300gg-13(a)(2).

71. 42 U.S.C. § 412(a); see L. Reed Walton, Walter A. Orenstein, & Larry K. Pickering, *The History of the United States Advisory Committee on Immunization Practices*, 33 VACCINE 405 (2015) (before 1964, the American Academy of Pediatrics’ Committee on Infectious Diseases informed physicians); 45 C.F.R. § 147.130(a)(1)(ii) (a vaccine is for routine use if it’s listed on the Immunization Schedule of the CDC); see also Kayva Sekar, *The Advisory Committee on Immunization Practices (ACIP)*, CONGRESS.GOV (Sep. 15, 2025), <https://www.congress.gov/crs-product/IF12317> [<https://perma.cc/9BPK-7J7W>].

72. *Braidwood Mgmt. Inc. v. Becerra*, 627 F. Supp. 3d 624, 632–33 (N.D. Tex. 2022), *aff’d*, 104 F.4th 930 (5th Cir. 2024).

73. 42 U.S.C. § 300gg-13(a)(3)–(4).

74. Health Resources and Services Administration, FED. REG., <https://www.federalregister.gov/agencies/health-resources-and-services-administration> [<https://perma.cc/5D72-6HR4>] (last visited Nov. 16, 2025); The HRSA was formed by merging the Health Resources Administration and the Health Services Administration; *Id.*

the preventive care mandates on Constitutional bases, for religious and free market reasons. The religious objector plaintiffs who objected to some preventive care mandates based on their religious beliefs include Braidwood Management, which is the management company hiring about seventy employees for Steven Hotze's Christian self-insured companies Hotze Health & Wellness Center, Hotze Vitamins, and Physicians Preference Pharmacies.⁷⁵ Other religious objector plaintiffs are Kelley Orthodontics, and its owner John Kelley. As a Christian organization, Kelley Orthodontics objects to providing contraceptives and PrEP drugs due to Kelley's Christian beliefs.⁷⁶

The free market or non-religious plaintiffs, Miller and Scheideman, and Scheideman's company Fort Worth Oral Surgery, do not want to purchase unwanted or unneeded preventive services coverage in health insurance.⁷⁷ The suit was filed against former HHS Secretary Becerra, along with the former Secretaries of Treasury and Labor.⁷⁸

The plaintiffs' first amended complaint requested summary judgment on five Constitutional or statutory violations discussed below.⁷⁹ The defense cross motioned for summary judgment.⁸⁰ The district court decided whether: (1) the plaintiffs had standing, (2) the groups making the relevant preventive services recommendations were convened properly under the appointments clause of the Constitution, (3) these same three groups violated the nondelegation doctrine, (4) the PTSF members have removal protections which violate the vesting clause, and (4) the PrEP mandates violate the RFRA.⁸¹

C. District Court Ruling

The Constitution requires a case or controversy for federal jurisdiction, thus requiring standing. To have standing, the plaintiff must have an injury in fact

75. *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914 (5th Cir. 2023) (this case was the first appellate case interpreting *Bostock v. Clayton*, 590 U.S. 644 (2020); in *Braidwood Management v. EEOC* the 5th Circuit exempted Braidwood Management from Title VII's Title VII requirements due to Steven Hotze's sincerely held religious beliefs on homosexuality and transgender); see Bri Daniel-Harkins, Comment, *Battle of the Statutes: The Fifth Circuit's decision in Braidwood Management v. EEOC Highlights the Conflict Between Religious Freedom and Antidiscrimination Laws*, 99 TUL. L. REV. 161 (2024).

76. *Braidwood Mgmt. Inc. v. Becerra*, 627 F. Supp. 3d 624, 633–34 (N.D. Tex. 2022), *aff'd*, 104 F.4th 930 (5th Cir. 2024) (other religious objector plaintiffs include Joel Starnes, and Zach and Ashley Maxwell, who want to purchase health insurance without coverage for items such as PrEP drugs, contraception, and the HPV vaccine; in an earlier opinion, the religious objectors had their challenges to the contraceptive mandate dismissed due to res judicata); Kelley, 2021 U.S. Dist. LEXIS 193410, at *2.

77. *Braidwood*, 627 F. Supp. 3d at 634 (the complaint was originally filed with additional free market plaintiffs, Starnes and the Riddles); Kelley, 2021 U.S. Dist. LEXIS 193410, at *2.

78. *Braidwood*, 627 F. Supp. 3d at 634 (the suit was originally filed against Secretary Azar, as well as the Secretaries of Labor and Treasury at that time); Kelley, 2021 U.S. Dist. LEXIS 193410, at *2.

79. *Braidwood*, 627 F. Supp. 3d at 634–35.

80. *Id.* at 635.

81. *Id.*

caused by the conduct complained of, with a likelihood that a favorable outcome for the plaintiff would redress the injury.⁸² The district court held that Braidwood Management had standing for all its claims.⁸³ Since Braidwood Management had standing, the district court could address the merits of each claim.⁸⁴

Under the Appointments Clause of the Constitution, principal officers of the United States, like ambassadors and other public ministers and consuls, are appointed by the President and approved by the Senate. Inferior officers' appointments may be vested by Congress in the President, in the courts, or in department heads.⁸⁵ Officers are defined by precedent as having a continued position established by law, and exercise significant authority under U.S. law.⁸⁶ The plaintiffs contended that the PSTF, ACIP, and HRSA are all composed of principal officers, who were neither appointed nor confirmed properly.⁸⁷ Absent that, they are inferior officers who also were not appointed properly, according to the plaintiffs.⁸⁸

The plaintiffs contended that the PSTF members are officers, because have a permanent and continuing role, while the defendants contended that the PSTF members were uncompensated and part-time, thus not fulfilling the first requirement to be an officer.⁸⁹ The district court sided with the plaintiffs on this, stating that the PSTF members have statutory positions continuing indefinitely, in four year terms, and are compensated for their triannual meetings, with numerous duties in between.⁹⁰ The district court also agreed with the plaintiffs that the Task Force members are officers exercising significant authority under law, because they decide which preventive services have an A or B rating, and thus must be covered under health insurance.⁹¹

Since the district court found that PSTF members are officers, the court then had to determine if they were principal or inferior officers. The difference is the relationship to any superior officer, not the authority the officer has.⁹² The district court concluded that PSTF members are principal officers.⁹³ While the Director of the Agency for Healthcare Research and Quality ("AHRQ") convenes the Task Force,⁹⁴ the Director is not a member; the members are independent.⁹⁵ The ACIP and HRSA are part of HHS and subject to the

82. U.S. CONST. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

83. *Braidwood*, 627 F. Supp. 3d at 638.

84. *Id.* at 638–39.

85. U.S. CONST. art. II, § 2, cl. 2.

86. *Lucia v. Sec. and Exch. Comm'n*, 585 U.S. 237, 245 (2018).

87. *Braidwood*, 627 F. Supp. 3d at 639.

88. *Id.*

89. *Id.* at 642.

90. *Id.* (these duties include emails, conference calls, and interaction with stakeholders, which could take about 200 hours per year).

91. *Id.* at 643–44.

92. *Edmond v. U.S.*, 520 U.S. 651, 662 (1997).

93. *Braidwood*, 627 F. Supp. 3d at 645.

94. 42 U.S.C. § 299b-4(a)(1).

95. *Braidwood*, 627 F. Supp. 3d at 645.

Secretary's control, and thus do not violate the Appointments Clause.⁹⁶ According to the district court, PSTF isn't part of HHS, and has no superior, thus the PSTF members are principal officers.⁹⁷ As principal officers, the district court concluded that the Task Force members are not Constitutionally appointed, but even if they were inferior officers, they are not Constitutionally appointed by Congressionally vested authority in a court, the President, or department head.⁹⁸

While the plaintiffs prevailed at the district court on the Appointments Clause issue for the PTSF, the plaintiffs lost on their removal argument.⁹⁹ The district court held that PSTF members may be removed at will and do not have tenure.¹⁰⁰

The plaintiffs also contended that since the Constitution grants legislative power to Congress,¹⁰¹ and since this power is vested in Congress and is not delegable to the other branches,¹⁰² that the preventive care mandates violate this.¹⁰³ The district court disagreed and granted summary judgment to the defendants on this issue.¹⁰⁴

The plaintiff Braidwood Management was granted summary judgment that the PrEP mandate violates the Religious Freedom Restoration Act,¹⁰⁵ under which the government may not substantially burden one's exercise of religion,¹⁰⁶ unless the government can show that there is a compelling governmental interest, and this is the least restrictive way to accomplish that interest.¹⁰⁷ According to the district court, Braidwood Management showed that the PrEP mandate substantially burdened its exercise of religion.¹⁰⁸ The defendants did not show that the PrEP mandate furthered a compelling governmental interest, and was the least restrictive way to accomplish that interest.¹⁰⁹

Back in the district court in 2023, Judge Reed O'Connor had to decide, after supplemental briefing, the additional issues of whether the non-Braidwood Management plaintiffs have standing like Braidwood Management does, whether the PrEP mandates violates the RFRA for the non-Braidwood Management plaintiffs as it does for Braidwood Management, and what is the appropriate remedy for prevailing plaintiffs.¹¹⁰ On the standing issue, the district

96. *Id.* at 645–46.

97. *Id.* at 646.

98. *Id.*

99. *Id.* at 648.

100. *Id.*

101. U.S. CONST. art. I, § 1.

102. *Whitman v. American Trucking Associations*, 531 U.S. 457, 472 (2001).

103. *Braidwood*, 627 F. Supp. 3d at 649.

104. *Id.* at 655.

105. *Id.*

106. 42 U.S.C. §2000bb-1(a) (1993).

107. 42 U.S.C. §2000bb-1(b) (1993).

108. *Braidwood*, 627 F. Supp. 3d at 653.

109. *Id.* at 653–54.

110. *Id.* at 620.

court split the plaintiffs, holding that the remaining religious objector plaintiffs met the requirements to have standing, while the non-religious objector plaintiffs did not.¹¹¹

Moving to the merits, the district court, using the same analysis, held that for the religious objector plaintiffs, the PrEP mandate violates the RFRA, just as it did for Braidwood Management.¹¹² These plaintiffs are substantially burdened because they have to choose between purchasing insurance that violates their religious beliefs, or not having health insurance.¹¹³ The defendants were not able to overcome this, and thus were enjoined from enforcing the PrEP mandates against all of the religious objector plaintiffs.¹¹⁴

The last issue for the district court was the appropriate remedy for the prevailing religious objector plaintiffs on their PSTF challenge under the Appointments Clause.¹¹⁵ The PrEP mandate violates the RFRA for the religious plaintiffs, and thus they do not have to comply, and the defendants may not force them to, according to the district court.¹¹⁶ Further, since the PSTF violates the Appointments Clause, all agency recommendations based upon the PSTF's recommendations on or after March 23, 2010 were vacated and enjoined by the district court.¹¹⁷

While on appeal, HHS Secretary Becerra ratified PSTF member appointments made by the AHRQ Director, by reappointing them, and started making new appointments to the PSTF.¹¹⁸

D. Court of Appeals for the Fifth Circuit

“Our decision today is something of a mixed bag.”¹¹⁹

On appeal, the Court of Appeals for the Fifth Circuit in 2024 affirmed that the district court properly enjoined the PSTF mandate for the religious plaintiffs since the Task Force was improperly convened under the Appointments Clause.¹²⁰ But, the appellate court reversed the district court on the remedy of universal relief, ruling that the district court should not have vacated all actions of the PSTF and should not have enjoined all agency actions related to the PSTF

111. *Id.* at 625 (neither class of plaintiffs have standing to pursue the contraceptive mandate challenge because HRSA does not have an Appointments Clause problem like the PSTF does; all HRSA and ACIP related claims were dismissed because they had no Appointments Clause problems); *Id.* at 633 (the claims of the non-religious, or free market plaintiffs, were dismissed).

112. *Id.* at 626; *see generally* Sabrina Geisler, *Braidwood Mgmt. v. Becerra & a Texas District Court's Decision to Stop Enforcement of Preventive Care Coverage Requirements under the ACA*, 49 AM. J.L. & MED. 112 (2023).

113. *Braidwood*, 666 F. Supp. 3d at 626.

114. *Id.*

115. *Id.* at 628.

116. *Id.*

117. *Id.*

118. *Kennedy*, 606 U.S. at 748.

119. *Braidwood*, 104 F.4th at 935.

120. *See id.*

by the defendants.¹²¹

The Court of Appeals for the Fifth Circuit examined whether the PSTF members were principal or inferior officers. The Fifth Circuit cited the Appointments Clause precedent of *Morrison v. Olson*,¹²² where the Court stated that the line isn't clear, and the Framers did not provide much guidance on the issue. In 1997 in *Edmond v. U.S.*,¹²³ the Court focused on the supervision of the officer; principal officers are not supervised, while inferior officers are supervised by someone appointed by the President and approved by the Senate.

*Edmond*¹²⁴ has been cited and affirmed twice by the Court. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,¹²⁵ members of the oversight board were deemed to be inferior officers because they had oversight by the Securities and Exchange Commission which could remove those members at will. In *United States v. Arthrex*, members of the Patent Trial and Appeal Board were deemed to be principal officers because they make final decisions on U.S. patents' validity without review by a superior officer.¹²⁶

The Court of Appeals agreed with the defendants that the HHS Secretary could remove PSTF members at will, but due to the statutory mandate of independence,¹²⁷ the Task Force members are not supervised by the HHS Secretary.¹²⁸ The former leans towards the PSTF members being inferior officers, while the latter indicates the Task Force members are principal officers.¹²⁹ But the Court's precedent in *Arthrex*¹³⁰ tilts towards the Task Force members being principal officers, according to the appeals court, because the cases are so close.¹³¹ Both the Patent Trial and Appeals Board and the PSTF make unreviewed unsupervised legally binding decisions.¹³² Thus, the appeals court deemed the PSTF members to be principal officers not Constitutionally appointed by the President and approved by the Senate.¹³³

The next issue for the Court of Appeals was whether the defendant was able to cure the Appointments Clause issue by ratification. "To our knowledge, neither we nor the Supreme Court has embraced ratification as a remedy for an Appointments Clause issue."¹³⁴ Some circuits have recognized such ratification

121. Braidwood, 104 F.4th at 939.

122. 487 U.S. 654 (1988).

123. 520 U.S. 654, 666 (1997) (Coast Guard Court of Criminal Appeals judges were deemed to be inferior officers).

124. *Id.*

125. 561 U.S. 477 (2010); see generally David Moon, *When Does Dual For-Cause Removal Protection Become Unconstitutional? Exploring the Scope of Free Enterprise Fund v. Public Company Accounting Oversight Board*, 2013 WIS. L. REV. 875 (2013).

126. 594 U.S. 1 (2021).

127. 42 U.S.C. §299b-4(a)(6).

128. Braidwood, 104 F.4th at 944.

129. *Id.*

130. *United States v. Arthrex*, 594 U.S. 1 (2021).

131. Braidwood, 104 F.4th at 946.

132. *Id.*

133. *Id.*

134. *Id.* at 947.

under agency law,¹³⁵ but this fails in *Braidwood Management*, according to the Court of Appeals,¹³⁶ because under agency law, a principal cannot ratify what the principal cannot do, and the HHS Secretary may not make preventive services recommendations, rather statutorily, the PSTF does. According to the Court of Appeals, the purported principal, HHS, cannot ratify what its purported agent did.¹³⁷ Similarly, the HHS Secretary may not supervise the PSTF through HHS's Assistant Secretary, which the defendants also purported.¹³⁸

Thus, “Secretary Becerra’s attempt to cure the constitutional defect” by ratification failed.¹³⁹ Finally, the defendants asked the court to “sever” or disregard the statutory lack of oversight, which the appeals court did not do, and observed that the constitutional problem would still exist anyway.¹⁴⁰

Moving to the remedy, the Fifth Circuit affirmed the party-specific relief, but held that the universal injunction was overbroad.¹⁴¹ The Fifth Circuit found no grounds to vacate all PSTF recommendations and similarly no grounds for the nationwide injunction.¹⁴² It is interesting to note that on the same day that the Supreme Court decided *Kennedy v. Braidwood Management*,¹⁴³ it also decided *Trump v. Casa Inc.*,¹⁴⁴ which limited universal nationwide injunctions by district courts. So, the Fifth Circuit ruled in line with subsequent Supreme Court precedent on this issue.

E. Certiorari Granted, Oral Arguments, and Additional Briefing

On January 10, 2025, the Supreme Court granted the defendants’ request for a writ of certiorari on the issue of whether the Fifth Circuit erred in holding that the PSTF violates the Appointments Clause and erred in not severing the statutory independence provision keeping the PSTF from HHS supervision.¹⁴⁵

Oral argument in *Kennedy v. Braidwood Management, Inc.* was held on April 21, 2025.¹⁴⁶ The petitioners, representing the federal government, contended

135. *Id.* (the D.C. Circuit, along with—according to the defendants—the Second, Third, and Ninth Circuits, has recognized this principle).

136. *Id.*

137. *Braidwood*, 104 F.4th at 948.

138. *Id.* at 949.

139. *Id.* at 949, 957 (whether Secretary Becerra effectively ratified the actions of HRSA and ACIP was not decided by the court of appeal).

140. *Id.* at 949–50.

141. *Id.* at 950.

142. *Id.* at 954.

143. *Kennedy v. Braidwood Mgmt.*, 606 U.S. 748 (2025).

144. *Trump v. Casa Inc.*, 606 U.S. 831 (2025).

145. *Becerra v. Braidwood Mgmt.*, No. 24-316, 2025 U.S. LEXIS 8 (U.S. Jan. 10, 2025); *Braidwood Mgmt. v. Becerra*, No. 24-475, 2025 U.S. LEXIS 157 (U.S. Jan. 13, 2025) (the Court denied *Braidwood Management*’s request for a writ of certiorari).

146. Oral Argument, *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748 (2025) (No. 24-316), https://www.supremecourt.gov/oral_arguments/audio/2024/24-316 (Kennedy became the HHS Secretary in a new administration, which continued to uphold the PSTF’s composition despite potential Appointments Clause issues).

that the PSTF members were inferior officers because they could be removed at will by the HHS Secretary and replaced, and are subject to the Secretary's supervision.¹⁴⁷ The petitioners further contended that the Court could sever the statutory independence language, and then the Appointments Clause wouldn't be an issue.¹⁴⁸ When questioned, the petitioner stated that nowhere does it say who appoints the PSTF members, but since statutorily the Assistant HHS Director "convenes" the Task Force, this means inferentially that the Assistant Director also appoints the members.¹⁴⁹

The respondents contended that the Court of Appeals for the Fifth Circuit correctly affirmed that PSTF members are principal officers under Article II.¹⁵⁰ Under statutory law,¹⁵¹ the PSTF makes preventive care mandates for insurance companies, independently and whenever practicable, free from politics.¹⁵² Further, the Court of Appeals for the Fifth Circuit was correct in holding that this statute is not severable,¹⁵³ according to the respondents.¹⁵⁴ The respondents essentially said that a court should not rewrite the Affordable Care Act.¹⁵⁵ Further, according to the respondents, the remedy should be an injunction against the PSTF's recommendations while they were improperly convened.¹⁵⁶

On April 24, 2025, the Court requested supplemental letter briefings from the parties on the issue of whether Congress, by law, has vested the HHS Secretary with the authority to appoint PSTF members.¹⁵⁷ The respondents' supplemental brief said the answer to this question is no.¹⁵⁸ According to the respondents, Congress did not vest this authority in anyone, and "convening"

147. *Id.* at 3 (further, the Assistant Secretary could "delegate up" to the HHS Secretary under the Reorganization Act of 1966, making the Task Force members inferior officers).

148. *Id.* at 4–5.

149. *Id.* at 7–8 (when asked, the petitioner could give no other example of when "convene" was used this way).

150. *Id.* at 44.

151. 42 U.S.C. §300gg-13(a)(1).

152. 42 U.S.C. §299b-4(a)(1).

153. 42 U.S.C. §299b-4(a)(6).

154. Oral Argument at 45, *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748 (2025) (No. 24-316), https://www.supremecourt.gov/oral_arguments/audio/2024/24-316 (navigate to oral argument transcript).

155. *Id.* at 46; *see id.* at 20–21 (further, being removable at will isn't sufficient to make the members inferior officers); *see id.* at 59 (the statute is silent about who appoints or where that authority is vested).

156. Oral Argument at 90, *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748 (2025) (No. 24-316), https://www.supremecourt.gov/oral_arguments/audio/2024/24-316 (navigate to oral argument transcript).

157. Letter from D. John Sawyer, Solicitor General, to Hon. Scott S. Harris, Clerk of the Supreme Court on Robert F. Kennedy, Jr., Secretary of Health and Human Services, et al. v. Braidwood Management, Inc., et al., No. 24-316 (May 5, 2025), https://www.supremecourt.gov/DocketPDF/24/24-316/358112/20250505125705982_24-316%20letter%20brief.pdf [<https://perma.cc/M48U-URGS>].

158. Letter from Jonathan F. Mitchell to Hon. Scott S. Harris, Clerk of the Supreme Court on *Kennedy v. Braidwood Management Inc.*, No. 24-316 (May 5, 2025), https://www.supremecourt.gov/DocketPDF/24/24-316/358123/20250505133736868_24-316_Supplemental%20Letter%20Brief%20and%20Appendix.pdf [<https://perma.cc/D9PR-JVRP>].

does not mean “convening and appointing.”¹⁵⁹ The petitioners, however, answer this same question with yes; since no statutory authority decides who appoints, then the convener must also be the appointer.¹⁶⁰

F. The Supreme Court

The issue in *Kennedy v. Braidwood Management* was whether PSTF members, as executive officers since the ACA in 2010, were principal executive officers not properly appointed under the Constitution’s Appointments Clause, or inferior officers.¹⁶¹ The majority in *Braidwood Management* concluded that the PSTF members were inferior officers who are directed and supervised by the HHS Secretary, and who are removable at will by the Secretary.¹⁶² The majority thus agreed with both the Biden and Trump administrations that as inferior officers, the PSTF members may be and actually were, since 2023, properly appointed by the HHS Secretary.¹⁶³

Justice Kavanaugh wrote the majority opinion, joined by Chief Justice Roberts and Justices Sotomayor, Kagan, Barrett, and Jackson. Justice Kavanaugh. The Court concluded that the PSTF members were inferior officers because they were directed and supervised by a principal officer, the HHS Secretary, who could remove them at will, and who could review and preemptively block Task Force recommendations.¹⁶⁴ Under the ACA, the HHS Secretary sets a minimum time, at least a year, between the time the Task Force recommends something and when it is effective.¹⁶⁵ According to the majority, in addition to the removal power, this ability to set the time, or to set no effective time, enables the HHS Secretary to direct and supervise these inferior officers in the PSTF.¹⁶⁶

Examining how the majority reached this conclusion, the Court observed that an officer who can be removed at will by a principal officer is typically an inferior officer.¹⁶⁷ The Court stressed that under *Edmond v. United States*,¹⁶⁸ being removable at will by a principal officer is a “powerful tool for control.”¹⁶⁹ In *Braidwood Management*, the Court found no statute barring the removal of PSTF members, and concluded that the Task Force members were inferior officers,¹⁷⁰ and “a fortiori,” this conclusion flows from *Edmond*.¹⁷¹ This power

159. *Id.* at 6.

160. *Id.* at 1.

161. *Kennedy*, 606 U.S. at 753–54.

162. *Id.* at 749.

163. *Id.* at 793.

164. *Id.* at 749.

165. 42 U.S.C. §300gg-13(b).

166. *Kennedy*, 606 U.S. at 762.

167. *Id.*

168. *Edmond v. United States*, 520 U.S. 651, 664 (1997).

169. *Kennedy*, 606 U.S. at 749 (citing *Edmond*, 520 U.S. at 664).

170. *Id.* at 764.

171. *Id.* at 769 (citing *Edmond*, 520 U.S. at 665).

to remove at will empowers the HHS Secretary to supervise and direct.¹⁷²

Moving to the precedent in *Free Enterprise Fund*,¹⁷³ the PCAOB members were deemed inferior officers because they were removable at will by the SEC, even though they could make decisions largely independently. PSTF members are similar, according to the majority in *Braidwood Management*.¹⁷⁴

The majority in *Braidwood Management* then turned to *U.S. v. Arthrex*, where the Supreme Court held by a five-to-four vote that Administrative Patent Judges (APJs), who are not removable at will, are principal officers who were not properly appointed and confirmed under the Appointments Clause, and seven to two that the proper remedy is to give the Director of the PTO the ability to review decisions of the Patent Trial and Appeals Board (“PTAB”).¹⁷⁵ The Court in *Arthrex* thus fixed the Appointments Clause problem by giving the Director the ability to review PTAB decisions by APJs.¹⁷⁶ Just as in *Arthrex*, after the Court gave the PTO Director the ability to review decisions ensuring that APJs were inferior officers, according to the majority in *Braidwood Management*, there is “no doubt” the PSTF members are inferior officers.¹⁷⁷ The majority of the Court concluded that it would be “odd” to infer Congressional creation of a new agency requiring Presidential appointments with Senate approval when the statute did not say that.¹⁷⁸

Next, the majority addressed *Braidwood Management*’s contention, agreed to by the dissent, that the Appointments Clause¹⁷⁹ requires Congress to vest the appointment of inferior officers in a department head, and this did not happen. The majority in *Braidwood Management* held, though, that this did happen, in two steps.¹⁸⁰ First, when Congress codified the PSTF in 1999, it authorized the Director of AHRQ to “convene” the Task Force members.¹⁸¹ According to the majority, this ability to “convene” also means to appoint.¹⁸² Second, because Congress had already transferred all of the AHRQ Director’s functions to the HHS Secretary in 1984,¹⁸³ that convening, and thus appointing, authority

172. *Id.* at 764.

173. *Free Enterprise Fund*, 561 U.S. at 510.

174. *Kennedy*, 606 U.S. at 749.

175. *United States v. Arthrex*, 594 U.S. 1, 1 (2021); see generally Sue Ganske, *Arthrex and Minerva Surgical: The U.S. Supreme Court Issues Two Patent Decisions in 2021*, 32 ALB. L.J. SCI. & TECH. 1 (2022).

176. *Arthrex*, 594 U.S. at 1.

177. *Kennedy*, 606 U.S. at 769 (rejecting *Braidwood Management*’s arguments that PSTF members were insulated from at-will removal and therefore not inferior officers; holding that no statute restricts the Secretary’s removal authority, that the Secretary may prevent Task Force recommendations from taking effect, and that members who refuse to act may be removed and replaced).

178. *Id.* at 778.

179. U.S. CONST. art. II, §2, cl. 2.

180. *Kennedy*, 606 U.S. at 779.

181. *Id.*; see 42 U.S.C. §299b-4(a)(1).

182. *Kennedy*, 606 U.S. at 781.

183. 42 U.S.C. §299b-4(a)(1).

resided in the Secretary.¹⁸⁴ Then, in 2023 when the HHS Secretary reappointed and appointed PSTF members, they were inferior officers properly appointed, according to the Court in *Braidwood Management*.¹⁸⁵

In reaching the conclusion that the statutory term “convene” includes “appoint, the majority stated that “to be sure, the statute does not use the term appoint.”¹⁸⁶ But, according to the majority, “no magic words are necessary.”¹⁸⁷ The majority could not conclude that Congress, in 1999 and 2010, was “indifferent” about who would make the appointments, so the “sensible” reading of the statute is that the AHRQ director is both the convener and the appointer.¹⁸⁸

Taking it a step further, the majority explained that the HHS Secretary not only has the authority to appoint these inferior officers but, starting in 2023, has in fact exercised the authority.¹⁸⁹ Thus, the Appointments Clause has been satisfied, and the case was reversed and remanded.¹⁹⁰

Justice Thomas, joined by Justices Alito and Gorsuch, dissented.¹⁹¹

The dissent observed that everyone agrees that the PSTF was improperly appointed from 2010, the time of the ACA, to 2023, when the HHS Secretary appointed and reappointed Task Force members.¹⁹² First, the dissent begins its analysis by agreeing with the majority’s opinion that they would have remanded for the Fifth Circuit to consider the new argument by the government on appeal, versus arguing in the lower court.¹⁹³ The dissent further argues that on remand, the Fifth Circuit should have considered the threshold statutory issue of whether the HHS Secretary has the power to appoint PSTF members, as such statutory issues precede the Constitutional issues.¹⁹⁴ But if “forced to decide,” the dissent would have affirmed, reasoning that the HHS Secretary has not expressly been vested with the power to appoint PSTF members, and that convening the Task Force is not equivalent to appointing its members.¹⁹⁵ Thus, the Task Force is improperly appointed under the Constitution, according to the dissent.¹⁹⁶

V. CONCLUSION

The U.S. Supreme Court on June 27, 2025, decided a landmark ACA case, *Kennedy v. Braidwood Management, Inc.*,¹⁹⁷ holding that Preventive Services

184. *Id.* at 779–80.

185. *Id.*

186. *Id.* at 780.

187. *Id.*

188. *Id.* at 787.

189. *Id.* at 780.

190. *Id.* at 752.

191. *Id.*

192. *Id.* at 794–95 (Thomas, J., dissenting).

193. *Id.* at 795, 801 (Thomas, J., dissenting).

194. *Id.* at 803 (Thomas, J., dissenting).

195. *Id.* at 800, 804 (Thomas, J., dissenting).

196. *Id.* at 808 (Thomas, J., dissenting).

197. *Id.*

Task Force members, who recommend preventive services which must be covered by health insurance companies without cost sharing, were inferior officers properly appointed by the Secretary of the Department of Health and Human Services. According to the dissent and *Braidwood Management*, the Court majority may have stretched the Appointments Clause definition of “congressional vesting” by extending the appointment power given to a department head and correlating the AHQR Director’s statutory power derived from “convening” the Task Force to “appointing” the Task Force by the HHS Secretary.¹⁹⁸ The outcome remains that there is now Supreme Court precedent holding that the HHS Secretary has properly and constitutionally appointed the Task Force, at least since 2023, and its recommendations stand. It would have been cleaner if Congress had clearly stated in the ACA in 2010 that these PSTF members were inferior officers and directly statutorily vested their appointment with the HHS Secretary. The majority concluded that Congress wasn’t “indifferent” about who should appoint the PSTF; the majority interpreted two statutes to find that Congress meant the PSTF appointer to be the HHS Secretary.¹⁹⁹ But if Congress was not “indifferent,” it may have acted hastily when enacting the ACA. That possibility underscores the need for care and precision when drafting of such magnitude to avoid future litigation and interpretive disputes. A similar dynamic appeared in *King v. Burwell*, where the Court interpreted the ACA’s reference to an “exchange established by a State” to include both state and federal exchanges.²⁰⁰ Justice Scalia, joined by Justices Thomas and Alito, dissented, arguing that the majority effectively rewrote the statute. In his view, the statutory text could not reasonably be stretched to treat federal exchange as one “established by a State.”²⁰¹ Nonetheless, the Court upheld the availability of tax credits on both state and federal exchanges.²⁰² The point here is that both in *King* and in *Braidwood Management*, careful, clear drafting of this lengthy and important legislation by Congress could have deterred claims from being raised in subsequent litigation regarding questions as to whether state exchanges do not include federal exchanges and whether PSTF members were principal officers not constitutionally appointed.

As a consequence of *Braidwood Management*, the recommendations of the PSTF stand, for now. But *Braidwood Management* has set the precedent that these Task Force members are inferior officers, who may be both removed and appointed by the HHS Secretary, and they, in fact, have been appointed by the HHS Secretary since 2023. The HHS Secretary in June of 2025 replaced all inferior officer members of the Advisory Committee for Immunization Practices, all of whom had been appointed by the HHS Secretary in the prior administration, and most of whom were appointed in the last year of that prior

198. See Kennedy, 606 U.S. at 748.

199. Kennedy, 606 U.S. at 787.

200. King, 576 U.S. at 475 (2015); see *supra* notes 36–42 and accompanying text.

201. King, 576 U.S. at 498 (Scalia, J., dissenting).

202. King, 576 U.S. at 475.

administration.²⁰³ The HHS Secretary now has the ability to do the same with the PSTF members if the HHS Secretary so chooses. If the PSTF members were instead deemed principal officers, then either Congress would have to explicitly vest appointment power in the HHS Secretary or Task Force members would have had to be appointed by the President and confirmed by the Senate.

Further, as the majority observed, the HHS Secretary has the ability to never implement any Task Force recommendations by blocking them and never setting a time when they become effective.²⁰⁴ Statutorily, all PSTF members and any recommendations were to be independent and whenever practicable, free from politics.²⁰⁵ The PSTF's final recommendation on August 23, 2023 concerning Prevention of Acquisition of HIV: Preexposure Prophylaxis in fact starts with, "Recommendations made by the USPSTF are independent of the U.S. government. They should not be construed as an official position of the Agency for Healthcare Research and Quality or the U.S. Department of Health and Human Services."²⁰⁶ This author has a difficult time reconciling the statutory independence and the stated independence of the PSTF with the holding in *Braidwood Management* that the Task Force members are inferior officers subject to, and appointed by, the HHS Secretary. Nonetheless, the majority of the Court has held so on July 27, 2025, and the HHS Secretary has thus appointed members since 2023 and may continue to appoint members in accordance with the Appointments Clause of the U.S. Constitution. Thus, this challenge to the ACA on the Appointments Clause issue with the PSTF fails.²⁰⁷

203. Press Release, Dep't of Health & Hum. Servs., HHS Takes Bold Step to Restore Public Trust in Vaccines by Reconstituting ACIP (June 9, 2025), <https://www.hhs.gov/press-room/hhs-restore-public-trust-vaccines-acip.html> [<https://perma.cc/Y3VT-77KN>].

204. Kennedy, 606 U.S. at 764.

205. 42 U.S.C. 299b-4(a)(6).

206. U.S. PREVENTIVE SERV. TASK FORCE, *supra* note 69.

207. Kennedy, 606 U.S. at 794.