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Braidwood v. Becerra Threatens Access to Preventive Care Services

Through the ACA's preventive care mandate, most private insurance policies must cover a wide range of preventive services without cost-sharing for beneficiaries. These services include important interventions such as screenings for lung and colorectal cancer, pharmacotherapy to support tobacco cessation, statins to prevent cardiovascular disease, aspirin to prevent preeclampsia, Pre-Exposure Prophylaxis (PrEP) for HIV prevention, and behavioral counseling for sexually transmitted infections (STIs). By ensuring coverage of these services, the ACA has played a crucial role in improving both individual and public health outcomes, especially for marginalized communities that have historically faced significant barriers to health care services and that are disproportionately impacted by many preventable conditions. But a case argued this week at the U.S. Court of Appeals for the Fifth Circuit, *Braidwood Management v. Becerra*, threatens to undermine these key provisions. Read on for updates about the case, including takeaways from the recent oral argument, and what could happen next.

The ACA's Preventive Care Mandate

To accomplish the goal of catching diseases before they become worse and preventing other diseases from occurring, the ACA included a simple but broadly sweeping provision that requires most private health insurers to cover certain preventive services without cost-sharing. The provision known as the ACA preventive care mandate, or [Section 2713 of the ACA](#), requires that private, non-grandfathered insurers cover,

without co-pays or cost-sharing, four sets of recommended preventive services: services with an A or B grade from the [United States Preventive Services Task Force \(USPSTF\)](#), vaccines recommended by the federal [Advisory Committee for Immunization Practices \(ACIP\)](#) and adopted by the CDC, women's preventive health services recommended by the federal [Health Resources and Services Administration \(HRSA\)](#), and preventive services recommended by HRSA for children and youth.

For more details regarding the ACA Preventive Care Mandate and *Braidwood*, see [CHLPI's FAQ on Braidwood](#) for health care advocates, consumers, and providers.

Braidwood Management v. Becerra Overview

The plaintiffs in *Braidwood* filed their case in a Texas federal court, raising constitutional and statutory arguments challenging the federal government’s power to enforce the ACA’s preventive care mandate. They argued that this mandate is unconstitutional because it violates the Appointments and Vesting Clauses of the U.S. constitution, and a theory developed through caselaw known as the nondelegation doctrine. The plaintiffs also argued that because USPSTF had given a grade A to PrEP, requiring it to be covered without cost-sharing, the mandate violated their rights under the Religious Freedom Restoration Act (RFRA). Specifically, they argued—with no scientific evidence—that providing coverage for PrEP promotes behaviors, such as homosexuality or other sexual activities outside marriage between a man and a woman, that conflict with the plaintiffs’ religious beliefs. Therefore, the plaintiffs argued, requiring coverage for these preventive services imposes a substantial burden on their beliefs.

In September 2022, a single conservative judge in a federal district court in Texas, Judge Reed O’Connor, [ruled](#) that the preventive care mandate as it pertains to services recommended by the USPSTF violates the Appointments Clause because USPSTF members are not appointed as required under the Clause, and are not accountable to a federal officer who meets that requirement, such as the Secretary of the U.S. Department of Health and Human Services or another Cabinet-level official. Judge O’Connor also ruled that mandating coverage for PrEP infringed upon the religious freedom rights under RFRA of the lead plaintiff, a for-profit, self-insured company led by conservative activist Stephen Hotze. Judge O’Connor’s subsequent [ruling](#) in March 2023 blocked the federal government from enforcing the preventive care mandate for any services recommended by the USPSTF since 2010. This ruling would not affect services recommended by ACIP and HRSA. Judge O’Connor also ruled in the plaintiffs’ favor on the RFRA argument, but the practical impact of this ruling was subsumed under the Appointments Clause ruling.

In response to the ruling, the U.S. departments of Labor, Health and Human Services, and the Treasury issued [clarifying guidance](#) in April 2023, urging health plans to continue covering the full scope of recommended preventive services.

Appeal to the Fifth Circuit

Both the federal government and the plaintiffs appealed Judge O’Connor’s decision. Because the case was filed in Texas, the appeal goes to the U.S. Court of Appeals for the Fifth Circuit, one of the most conservative federal appellate courts in the country. In the appeal, the federal government is seeking to reverse the lower court’s ruling on the Appointments Clause issue—that is, the ruling that the ACA’s preventive care mandate is unenforceable as to services recommended by the USPSTF since 2010. The federal government did not appeal the RFRA ruling, likely due to a combination of factors, including a desire to avoid a federal appellate decision that could further expand RFRA and recognition that the remedy for the RFRA ruling is subsumed under the remedy for the Appointments Clause ruling. For their part, the plaintiffs appealed to seek an even broader ruling in their favor, such as that the Appointments Clause renders the preventive care mandate unconstitutional as it applies to all three federal agencies—USPSTF, ACIP, and HRSA—not just the USPSTF.

In June 2023, the Fifth Circuit issued an order that stays enforcement of Judge O’Connor’s ruling as to everyone except the plaintiffs themselves while the Fifth Circuit considers the appeal. This means that while

the appeal is ongoing, the federal government can continue to enforce the preventive care mandate in full for everyone other than the plaintiffs.

On March 4, 2024, three judges of the Fifth Circuit—Judge Don R. Willett, Judge Cory T. Wilson, and Judge Irma Carrillo Ramirez—heard oral arguments in the appeal. All are relatively recent appointees to the Fifth Circuit, with Judges Willet and Wilson having been appointed by President Trump, and Ramirez having been appointed by President Biden. The oral arguments focused primarily on whether the members of USPSTF are constitutionally appointed to their positions, such that their recommendations can be enforced if ratified by the Secretary of Health and Human Services, and on the proper scope of the remedy for the plaintiffs if all or part of ACA Section 2713 is unconstitutional. The Court’s conservative leaning and the narrow scope of the issues it focused on during the arguments do not bode well for the enforceability of USPSTF’s recommendations, but only time will tell how the Fifth Circuit will rule. Watch this space for updates.

Braidwood’s Potential Impact and What Could Happen Next

Given the threat that this case poses to an important and [popular](#) provision of the ACA, and both sides’ commitment to these issues, this case will likely be appealed from the Fifth Circuit to the Supreme Court.

If the *Braidwood* plaintiffs ultimately succeed, and Judge O’Connor’s ruling is affirmed or expanded, the case’s influence on cost-sharing for preventive services will likely manifest gradually as insurance plan rules and contracts are reviewed annually. Huge numbers of people could be impacted, since the ACA preventive care mandate ensures coverage for evidence-based preventive services without cost-sharing for over [150 million people](#) each year. Coverage of [many services](#) could be impacted, including: lung cancer screenings, anxiety and depression screening in children and adolescents, aspirin to prevent preeclampsia, fall prevention in older adults, gestational diabetes screening, healthy weight and pregnancy counseling, hepatitis B and C screening, intimate partner violence screening, perinatal depression preventive interventions, PrEP to prevent HIV, skin cancer prevention behavioral counseling, statins to prevent cardiovascular disease, unhealthy drug use screening, prescription drugs to reduce the risk of breast cancer in people with elevated genetic risk, colorectal screening, and dental cavities prevention for children.

Spotlight on Cancer

Cancer screenings recommended by the USPSTF and HRSA help save lives by detecting cancers before they have a chance to grow and spread. Imposing cost sharing on these screenings could create a [significant barrier to their use](#), particularly among marginalized groups, resulting in later diagnoses of cancer and increased suffering and loss of life.

Spotlight on PrEP

Growth in PrEP use has contributed to [declining rates of HIV transmission](#), but allowing insurers to impose costs on PrEP threatens to reverse this trend. One recent study found that as people were charged more for PrEP, their likelihood of abandoning PrEP [increased significantly](#).

What's more, many of the conditions that the above services seek to prevent disproportionately impact marginalized communities, including women, people of color, sexual and gender minorities, and low-income individuals. People with lower income are also more likely to forgo recommended health care based on cost and more likely to experience chronic illnesses and other health challenges. If cost-sharing is reimposed for these services, the impact could fall especially hard on systemically marginalized groups.

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