

Federal Judge in Texas Strikes Down ACA's Preventive Services Coverage Mandate

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The Final Judgment

On March 30, 2023, the U.S. District Court for the Northern District of Texas issued a final judgment in *Braidwood Management Inc. v. Becerra*, invalidating a requirement in the Patient Protection and Affordable Care Act (ACA) that insurers cover all clinical preventive services granted an “A” or “B” rating by the U.S. Preventive Services Task Force (“USPSTF” or “Task Force”) without cost sharing.

The ruling takes effect immediately across the country, subject to a potential stay by Judge Reed O’Connor (the judge presiding over this case) or the U.S. Court of Appeals for the Fifth Circuit.

The ACA requirement under Section 2713 of the Public Health Service Act (“Section 2713”) applies to all commercial or private health coverage and Medicaid expansion programs in the 40 states that have expanded Medicaid (42 U.S. Code § 300gg-13). Thus, as of March 30, 2023, payors in these markets are no longer required to provide first-dollar coverage for certain preventive services.

While all preventive services recommended by the Task Force are affected by this ruling, perhaps most notably, plans will no longer be required to provide this coverage for pre-exposure prophylaxis (PrEP) for HIV, which was the specific requirement challenged under the Religious Freedom and Restoration Act (RFRA) (42 U.S. Code Chapter 21B).

However, the opinion did *not* displace coverage of preventive services recommended by the Health Resources and Services Administration (HRSA) (women’s preventive health services and

People



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contraceptives) or immunizations recommended by the Advisory Committee on Immunization Practices (ACIP).

This final judgment was issued about six months after Judge O'Connor's September 7, 2022, interim summary judgment [decision](#), in which he held that it was unconstitutional for the USPSTF to make legally significant decisions about preventive services coverage and that the coverage mandate of PrEP for HIV violated the plaintiffs' religious rights under RFRA. While his earlier opinion signaled an existential threat to both the Task Force and mandatory PrEP coverage, at the time of the interim summary judgment, Judge O'Connor did not rule on the scope of relief but instead called for additional briefing on the various plaintiffs' standing in addition to the scope of relief. However, in his final ruling, Judge O'Connor dismantled a major, and [overwhelmingly popular](#), component of the ACA. The nullification of the USPSTF's role in ensuring coverage of preventive services will have widespread impacts on health care expenditures in the United States.

INVALIDATED USPSTF RECOMMENDATIONS

In addition to PrEP for HIV, all of the USPSTF's "[A & B Recommendations](#)" below have been invalidated by Judge O'Connor's March 30, 2023, ruling, meaning insurers are no longer required to cover them and may require patients to pay out of pocket for these services:

Mental health screenings:

- Screening for anxiety in adolescents aged 8–18 years
- Depression screening for adolescents aged 12–18 years
- Depression screening for adults
- Screening for unhealthy alcohol use in adults over 18 years
- Screening for drug use in adults over 18 years

Preventive care services to support healthy pregnancies:

- Low dose aspirin after 12 weeks gestation for pregnant people with a high risk of preeclampsia
- Urinary infection screening for pregnant people
- Gestational diabetes screening for pregnant people
- Behavioral interventions to promote healthy weight gain during pregnancy

- Hepatitis B screening during a prenatal visit
- Screening for pregnant and postpartum persons at risk for depression
- Screening for preeclampsia during pregnancy
- Screening pregnant women for syphilis infections
- Counseling a pregnant person on smoking risks, tobacco cessation for pregnant persons

Cancer screenings and prevention:

- Breast cancer screening for women with BRCA1/2 gene mutations
- Breast cancer screenings for women aged 50–74 years
- Medications to reduce breast cancer risk, such as tamoxifen, raloxifene, or aromatase inhibitors
- Cervical cancer screening for women aged 21–65 years
- Colorectal cancer screening for adults aged 50–75 years
- Screening for lung cancer for former/current smokers in adults aged 50–80 years
- Counseling to prevent children and young adults from developing skin cancer

Interventions to support healthy infants:

- Interventions to support breastfeeding after birth
- Ocular medication for newborns to prevent eye infections

Sexually transmitted infection (STI) prevention:

- STI screening for women who are at increased risk of infection

Reducing obesity:

- Behavioral counseling for adults with cardiovascular risk to promote a healthy diet and physical activity
- Screening for child and adolescent obesity
- Behavioral interventions for obese adults

Cardiovascular disease prevention:

- Hypertension screening for adults over 18 years old

- Prescription statins for adults aged 40–75 to prevent cardiovascular disease

Chronic and infectious disease prevention and detection:

- Hepatitis C screening for adults aged 18–79 years
- HIV screening for adults aged 15–65 years, pregnant people
- Screening for latent tuberculosis infection
- PrEP for adults at risk of HIV acquisition
- Behavioral counseling for those at risk of acquiring STIs
- Screening for abdominal aortic aneurysm for men aged 65–75 who smoked

Protecting elderly adults, preventing abuse:

- Osteoporosis screening for younger women who are at increased risk, and screening for those over 65 years old
- Screening for intimate partner violence and elder abuse
- Fall prevention for adults aged 65 and over

Diabetes prevention and detection:

- Screening for type 2 diabetes for adults aged 35–70 years old with increased risk

Promoting healthy children:

- Cavity prevention for children under five years old
- Tobacco use prevention for children
- Vision screening for children

Case Background

The ACA incorporated the recommendations of three existing governmental entities—the USPSTF, HRSA, and ACIP—into its health insurance benefit requirements. This meant that these bodies, previously charged with making evidence-based recommendations, assumed the heightened responsibility of determining those preventive services that plans must cover.

The plaintiffs in the *Braidwood* case are employer-purchasers of health insurance coverage that sued the Department of Health and Human Services in 2022, alleging that the ACA's requirement was unconstitutional and violative of RFRA because they are unable to purchase insurance that

does not include coverage for preventive services. The plaintiffs made two legal arguments: (1) that Section 2713, as enacted by the ACA, violates the Appointments and the Vesting Clauses of the U.S. Constitution and (2) the mandated coverage of PrEP, which protects individuals against HIV transmission, substantially burdens the plaintiffs' religious beliefs under RFRA.

To advance their constitutional claims, the plaintiffs argued that Congress's delegation of authority to the Task Force violates the Appointments and Vesting Clauses of the U.S. Constitution because the Task Force is [an independent agency that wields substantial executive power](#) while being insulated from presidential control. Because USPSTF members are appointed solely by the non-confirmed director of the Agency for Healthcare Research and Quality, the plaintiffs argued that the powers conferred on the Task Force are unconstitutional under the Vesting Clause. Moreover, because Task Force members are not appointed and confirmed as federal officers but rather are independent experts, the plaintiffs argue that they cannot make certain consequential decisions, including mandating first-dollar coverage of certain preventive services.

The plaintiffs further argued that Section 2713 violates RFRA because the Task Force recommendation requiring coverage of PrEP for HIV prevention encourages "homosexual behavior, intravenous drug use, and sexual activity outside of marriage between one man and one woman," all of which the plaintiffs religiously oppose. The federal government is prohibited by RFRA from "substantially burdening" an individual's exercise of religion unless there is a compelling governmental interest and the burden is the least restrictive means of furthering that interest.

The Practical Effects of the March 30 Ruling

The extent to which a consumer is directly and immediately impacted by the March 30 ruling (which the Biden administration intends to appeal to the Fifth Circuit) will likely depend on the market through which that consumer receives health insurance coverage and the preventive services the particular consumer uses. For the individual market, open enrollment will begin on November 1, 2023, and for those currently receiving coverage through this market, their health insurance provider could choose to provide continuous coverage of these services through the end of the plan year. For those in the small group market, open enrollment does not necessarily coincide with open enrollment for the individual market. Many small employers that offer coverage through a health insurance marketplace may have a midyear open enrollment and plan year beginning. For these individuals, health insurers may have the opportunity to examine previously required preventive services and restrict full coverage of some. While Judge O'Connor's ruling is in effect, those in the small group with midyear open enrollment periods will need to examine their specific plan's benefit offerings.

Many plans allow for the unilateral modification of plan benefits during the year, but plans that choose to change their benefits are required by the ACA to provide notice of these changes to their enrollees at least 60 days before they become effective. While the March 30 ruling means that commercial insurers are no longer required to provide coverage for preventive services, unless the opinion is stayed during appeal, many might not change their coverage offerings simply because coverage of those preventive services is so popular and saves plans money in the long term. The consumers with the most significant loss of coverage at stake are those who seek PrEP for the prevention of HIV. Judge O'Connor's ruling specifically acknowledges religious opposition to PrEP while broadly permitting non-coverage regardless of whether a particular plan or employer has religious objections.

What's Next?

As stated above, the district court's *Braidwood* decision will be appealed to the Fifth Circuit. In the meantime, defendants may seek to stay the final judgment from taking effect while the case is appealed. In December 2018, when Judge O'Connor invalidated the entire ACA in the case *Texas v. U.S.* (later *California v. Texas*), he also [stayed his decision pending appeal](#), citing uncertainty Americans might experience in determining their health insurance needs while the case was under consideration.

It is unclear whether Judge O'Connor or the Fifth Circuit will do the same for the preventive services coverage mandate. Judge O'Connor's ruling in *Braidwood v. Becerra*, eliminating the preventive services coverage mandate, is far narrower in scope than his ruling in *Texas v. U.S.* Further, in *Texas*, Judge O'Connor relied on statutory interpretation of the effect of Congress's elimination of the ACA's tax penalty for not purchasing insurance coverage, whereas *Braidwood* involves significant administrative law questions and allegations of burdens on religious liberty where the plaintiffs allege an ongoing harm. In the meantime, Americans who rely on preventive services coverage to cover the cost of PrEP, cancer screenings, pregnancy and infant-related care, cardiovascular disease prevention, and youth mental health screenings will be left with an uncertain future.

Even if not raised by the plaintiffs on appeal, the Fifth Circuit could take the opportunity to strike down the coverage mandate in its entirety. The plaintiffs are likely to cross-appeal Judge O'Connor's decision to exclude HRSA and ACIP from his enjoinder.

Regardless of how the Fifth Circuit might rule, this case is almost certain to reach the Supreme Court of the United States, marking the fourth time the ACA will be at issue in the nation's highest court. This time, however, the ACA's preventive services provisions will face a Supreme Court with a 6-3 conservative majority.

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*This Insight was authored by **Richard Hughes IV, Helaine I. Fingold, Devon Minnick, Erin Sutton, and William Walters**. For additional information about the issues discussed in this Insight, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.*