



**NATIONAL  
WOMEN'S  
LAW CENTER**

Justice for Her. Justice for All.

**JULY 2024 | FACT SHEET**

## **Braidwood Management Inc. v. Becerra: The latest Affordable Care Act attack threatens access to preventive health care services for over 150 million people<sup>i</sup>**

*Braidwood Management Inc. v. Becerra is a lawsuit challenging the requirements in the Affordable Care Act that insurance plans cover preventive services at no cost, including the provision requiring coverage of women's preventive services. This case poses a grave threat to over 150 million people across the country. Loss of no-cost preventive care will mean loss of health care and reversal of the progress our country has made to improve health outcomes and health equity, particularly for women and women of color.*

### **This case was brought by extremists who want to deny people care and invalidate the Affordable Care Act.**

*Braidwood* is the latest in a string of attacks against the Affordable Care Act (ACA). After failing in their attempts to repeal the ACA in Congress, and to invalidate it through weaponizing the courts, extremists are using this case to target a crucial element of the ACA – the requirement that insurers cover preventive services without cost sharing.

Jonathan Mitchell is the lawyer in this case; he is a strategist pushing extreme legal theories to take away longstanding rights and protections, including as the architect of the Texas anti-abortion vigilante law that allows anyone to bring a costly and harassing lawsuit against someone who provides abortion care or helps a patient seek it.<sup>ii</sup> Some of the employers and individuals Mitchell represents in *Braidwood* are repeat plaintiffs in cases attacking the ACA.<sup>iii</sup> They purposely brought this case in front of Judge O'Connor in the Eastern District of Texas, a judge who has issued decisions against the ACA in numerous cases and has been willing to block its provisions nationwide.<sup>iv</sup> In 2018, Judge O'Connor ruled that the entire ACA was unconstitutional, a decision later overruled by the U.S. Supreme Court.<sup>v</sup>

### ***Braidwood* challenges lawful provisions that have been critical to addressing barriers to preventive care.**

The ACA challengers brought numerous claims against the preventive services provision.<sup>1</sup> One was

<sup>1</sup> In their original complaint, plaintiffs brought claims under the Appointments Clause, the Non-Delegation Doctrine, the Vesting Clause, and the Administrative Procedure Act; claimed the preventive services requirement violated the Supreme Court's equal protection jurisprudence; and asserted violations of the Religious Freedom Restoration Act as to coverage for PrEP, contraception, and various reproductive health screenings. Complaint at 12-31, *Braidwood Mgmt. v. Becerra*, 627 F. Supp. 3d 624 (N.D. Tex. 2022) (No. 1), *aff'd in part, rev'd in part*, No. 23-10326 (5th Circ. 2024).

under the Appointments Clause of Article II of the Constitution,<sup>2</sup> arguing that the expert members of the agencies who develop the preventive services coverage recommendations – the United States Preventive Services Task Force (Task Force), the Advisory Committee on Immunization Practices (ACIP), and the Health Resources and Services Administration (HRSA) – were not validly appointed.<sup>3</sup> This argument ignores the fact that the Secretary of Health and Human Services, who is appointed by the president, supervises these officers and ratifies their recommendations before they become legal requirements.

The lawful requirement that preventive services be covered without cost-sharing is an important part of the ACA,<sup>vi</sup> meant to address cost as a barrier to preventive care in order to improve long-term health, reduce overall health care spending, and reduce disparities in health outcomes. It is a response to a wealth of evidence demonstrating that prior to the ACA, insurance companies imposed cost-sharing, such as co-payments or co-insurance, on crucial preventive health services.<sup>vii</sup> This caused individuals, and especially women, to forgo needed preventive services<sup>viii</sup> – particularly women with low-incomes, and those already facing systemic barriers to care like women of color and LGBTQ+ individuals. That is one of the reasons that, in crafting this requirement, Congress explicitly acknowledged health care disparities faced by women and enacted a provision specifically requiring coverage for women’s preventive healthcare needs.<sup>ix</sup> The women’s preventive services requirement now includes services such as breast and cervical cancer screenings, pregnancy and postpartum diabetes screenings, well-woman visits, contraceptives, screenings for postpartum depression, and breastfeeding services and supplies.<sup>x</sup> The other ACA preventive services provisions require coverage with no cost-sharing for a broad range of services like vaccinations, well-child visits, screenings for diabetes, cancer, and depression, and patient counseling.<sup>xi</sup>

The ACA challengers also brought a claim under the Religious Freedom Restoration Act (RFRA), challenging the specific requirement that insurers cover preexposure prophylaxis drugs (PrEP) – HIV prevention medication – claiming that requiring insurers to cover PrEP substantially burdens the rights of employers to free exercise of religion. This claim, however, does not meet the requirements for RFRA. The government has a compelling interest in stopping the spread of HIV and these ACA challengers have not shown that their religious beliefs are burdened or that there is an increase in their cost for health care associated with PrEP coverage. This challenge is extremely dangerous, as PrEP is a powerful tool in HIV prevention, key to ending the HIV epidemic, and there is evidence that high cost is a barrier to use.<sup>xii</sup>

### **Extremist judges are allowing these challenges to go forward, jeopardizing preventive services – including women’s preventive services.**

In September 2022, Judge O’Connor ruled that the Task Force preventive services coverage requirement violates the Appointments Clause and is unconstitutional.<sup>xiii</sup> He also ruled that the requirement that insurers and plans cover PrEP violated one plaintiff’s rights under RFRA.<sup>xiv</sup> Judge O’Connor rejected the Appointments Clause challenges to ACIP and HRSA—leaving the women’s preventive services requirement intact for the time being.<sup>xv</sup>

Judge O’Connor then took the extreme step of blocking the recommendations from the Task Force, nationwide<sup>xvi</sup>—effectively denying over 150 million Americans access to vital preventive care, including such services as immunizations and screenings for cancer, diabetes, mental health, and substance use disorders.

2 The Appointments Clause requires, in relevant part, that “principal” officers of the United States be appointed directly by the president. Congress, however, is permitted to vest the role of appointing officers to the head of a department if that officer is “inferior.” Inferior officers are those “officers whose work is directed and supervised at some level by others who were appointed by” the President. *Edmond v. United States*, 520 U.S. 651, 663 (1997).

3 Plaintiffs argue that the members of the Task Force, ACIP, and HRSA are “principal” officers and must be nominated by the president.

Because this decision threw people's access to preventive health care into complete disarray, the government appealed the case to the Fifth Circuit Court of Appeals.<sup>xvii</sup> As part of an agreement between the parties, the court paused Judge O'Connor's ruling, allowing people to continue having coverage of preventive services.<sup>xviii</sup> The ACA challengers also appealed to the Fifth Circuit, asking the court to reconsider their Appointments Clause challenges to ACIP and HRSA, with the goal of invalidating the entire preventive services provision, including the women's preventive services requirement.<sup>xix</sup>

On June 21, 2024, a Fifth Circuit panel made up of two Trump-nominated judges issued its decision.<sup>xx</sup> It affirmed the district court's incorrect holding that the preventive services requirements provided by the Task Force are unconstitutional under the Appointments Clause.<sup>xxi</sup> But the court said "it was error" for Judge O'Connor to block those requirements nationwide.<sup>xxii</sup> Instead, the court said the government could not enforce the requirement only as to the ACA challengers in this case.<sup>xxiii</sup>

In response to the ACA challengers' request to block the recommendations from ACHIP and HRSA, including the women's preventive services recommendations, the Fifth Circuit did not take the opportunity to stop this challenge once and for all. Instead, the court sent the issue back to the district court for further consideration, giving the claims new life.<sup>xxiv</sup>

The Fifth Circuit Court of Appeals decision means that this case will continue, with potentially dire outcomes. The ACA challengers now have another opportunity to make a case against the women's preventive services provision before Judge O'Connor, to deny women's access to crucial preventive care. If Judge O'Connor decides that HRSA recommendations are unconstitutional, insurers could be free to impose costs to access this needed care, and women's health and wellbeing will suffer as a result.

This case also creates confusion about what health care people are entitled to receive without cost-sharing, and what insurers are required to cover. This confusion is worsened by the attorneys representing the ACA challengers in this case, who stated, following the decision, that "all preventive-care coverage mandates imposed by the Task Force since March 23, 2010, are unenforceable in the Fifth Circuit."<sup>xxv</sup> This statement is false—for the time being, only the plaintiffs in *Braidwood* are affected by the ruling.

Finally, the Fifth Circuit decision sets the stage for future litigation against all of the preventive services recommendations which could result in a much broader future decision that would gut the crucial preventive services protections established in the ACA.

## **Invalidating the preventive services provisions would harm individuals nationwide, especially women, women of color, and those who face multiple and intersecting forms of discrimination.**

Preventive care is key to achieving health equity. As a result of decades-long inequities, structural racism, disinvestment, and bias in the health care system, women of color and low-income women face higher rates of preventable disease and worse health outcomes.<sup>xxvi</sup>

The preventive services requirement has been a crucial tool in the fight to achieve health equity. Since its passage, use of these preventive services among women has increased. Women report receiving more cancer screenings, earlier-stage cancer diagnoses, and improvements in mental health symptoms from higher depression screening rates.<sup>xxvii</sup> Affordability of contraception has improved significantly<sup>xxviii</sup>—women are able to use the type of birth control they prefer, rather than just what they can afford, and contraceptive use – and its many benefits to individuals' and families' health, economic security, and wellbeing – has increased as a result. And since the ACA required plans to cover comprehensive breastfeeding support services, the percentage of women who have ever breastfed has increased,<sup>xxix</sup> helping to close the significant socioeconomic disparities in breastfeeding rates.<sup>xxx</sup>

For populations facing multiple and intersecting forms of discrimination—data shows that there have been larger increases in preventive services uptake among women of color compared to white women since the ACA's passage.<sup>xxxi</sup> For example, since the passage of the ACA, there has been a significant increase in the rate of Black women getting mammograms<sup>xxxii</sup>—a crucial intervention given that despite getting breast cancer at the same rate as white women, they are more likely to die from the disease.<sup>xxxiii</sup>

The data clearly demonstrates the advances in health care and health equity that have resulted from the ACA's requirement of no-cost coverage of preventive services. That is why a range of stakeholders have weighed in to the court on *Braidwood* – including the Blue Cross Blue Shield Association, the American Cancer Society, the American

Hospital Association, the AIDS Healthcare Foundation, and the American Public Health Association.<sup>xxxiv</sup> They have taken positions against the original district court decision as disruptive and harmful to the industry and to patients, and in support of ensuring patients receive no-cost preventive services coverage.<sup>4</sup>

\*\*\*\*\*

The arguments put forward in *Braidwood* aim to deny access to crucial preventive care services. If the preventive services provisions as recommended by the Task Force, ACIP, or HRSA are ultimately struck down, it will be a huge reversal of progress for equitable health care access, particularly for women and women of color. Extremist courts and litigants must stop their shameful and unlawful attempts to erode the crucial protections established in the ACA.

---

<sup>4</sup> NWLC filed an amicus brief to the Fifth Circuit when it was considering *Braidwood*, focused on the substantial harm that would result, particularly to those who face multiple and intersecting forms of discrimination, if the court were to find the HRSA recommendations unconstitutional and strike down the women’s preventive services requirement. Brief for The National Women’s Law Center as Amicus Curiae In Support Of Defendants-Appellants/Cross-Appellees, *Braidwood Mgmt. v. Becerra*, No. 23-10326 (5th Circ. 2024).

## ENDNOTES

- i** *Access to Preventive Services Without Cost-Sharing: Evidence from the Affordable Care Act*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION 1 (Jan. 11, 2022), <https://aspe.hhs.gov/sites/default/files/documents/786fa55a84e7e3833961933124d70dd2/preventive-services-ib-2022.pdf>.
- ii** See *FACT SHEET: Braidwood v. Becerra Judge Moves To End Guaranteed Free Preventive Health Care For More Than 150 Million Americans*, PROTECT OUR CARE (March 31, 2023), <https://www.protectourcare.org/braidwood-v-becerra-judge-moves-to-end-guaranteed-free-preventive-health-care-for-more-than-150-million-americans/> (“The lead attorney for the plaintiffs is Jonathan Mitchell, ‘who helped craft the Texas abortion law that was designed to evade judicial review by leaving enforcement to private citizens instead of government officials.’”).
- iii** See *id.* (explaining that multiple of the plaintiffs in *Braidwood* have been involved in prior lawsuits aiming to overturn parts of the ACA).
- iv** See *id.* (“Judge O’Connor has previously ruled to strike down the entire ACA, to overturn contraceptive coverage requirements, to invalidate vaccine mandates, and limit LGBTQ+ rights.”)
- v** *California v. Texas*, 593 U.S. 659 (2021).
- vi** See 42 U.S.C. § 300gg-13.
- vii** See Benjamin D. Sommers & Lee Wilson, *Fifty-four million additional Americans are receiving preventive services coverage without cost-sharing under the Affordable Care Act*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION 1 (Feb. 15, 2012), <https://aspe.hhs.gov/sites/default/files/private/pdf/76396/ib.pdf>.
- viii** Samantha Artiga et al., *The Effects of Premiums & Cost Sharing on Low-Income Populations: Updated Review of Research Findings 1*, KFF (2017), <https://www.kff.org/medicaid/issue-brief/the-effects-of-premiums-and-cost-sharing-on-low-income-populations-updated-review-of-research-findings/> (“even relatively small levels of cost sharing in the range of \$1 to \$5 are associated with reduced use of care, including necessary services”).
- ix** 42 U.S.C. § 300gg-13(a)(4).
- x** *Women’s Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN. (Mar. 2024), <https://www.hrsa.gov/womens-guidelines>.
- xi** *Preventive Services Access on the Docket in Braidwood v. Becerra*, CONG. RSCH. SERV. 2 (Sept. 12, 2023), <https://crsreports.congress.gov/product/pdf/LSB/LSB11040>.
- xii** Katie Keith, *USPSTF Recommends Access Without Cost Sharing To HIV Prevention*, HEALTHAFFAIRS (June 13, 2019), <https://www.healthaffairs.org/content/forefront/uspstf-recommends-access-without-cost-sharing-hiv-prevention>.
- xiii** *Memorandum Opinion & Order, Braidwood Mgmt. v. Becerra*, 627 F. Supp. 3d 624 (N.D. Tex. 2022) (No. 92), *aff’d in part, rev’d in part*, No. 23-10326 (5th Circ. 2024).
- xiv** *Id.*
- xv** *Id.*
- xvi** Second Memorandum Opinion & Order on Remedies, *Braidwood Mgmt. v. Becerra*, 627 F. Supp. 3d 624 (N.D. Tex. 2022) (No.113), *aff’d in part, rev’d in part*, No. 23-10326 (5th Circ. 2024).
- xvii** Notice of Appeal, *Braidwood Mgmt. v. Becerra*, No. 23-10326 (No. 115) (5th Circ. 2024).
- xviii** Unpublished Order, *Braidwood Mgmt. v. Becerra*, No. 23-10326 (No. 153) (5th Circ. 2024).
- xix** Notice of Cross Appeal, *Braidwood Mgmt. v. Becerra*, No. 23-10326 (No. 118) (5th Circ. 2024).
- xx** *Braidwood Mgmt. v. Becerra*, No. 23-10326 (5th Circ. 2024).
- xxi** *Id.*
- xxii** *Id.* at 2.
- xxiii** *Id.* at 41.
- xxiv** *Id.* at 39-40.
- xxv** *America First Legal Secures Major Win Against the Affordable Care Act*, AMERICA FIRST LEGAL (June 21, 2024), <https://aflegal.org/america-first-legal-secures-major-win-against-the-affordable-care-act/>.
- xxvi** See e.g. James N. Weinstein et al. eds., *Communities in Action: Pathways to Health Equity*, NAT’L ACADS. OF SCIS., ENG’G, & MED., 59 (Jan. 11, 2017), <https://pubmed.ncbi.nlm.nih.gov/28418632/> (“For racial and ethnic minorities in the United States, health disparities take on many forms, including higher rates of chronic disease and premature death compared to the rates among whites”); Nambi Ndugga & Samantha Artiga, *Disparities in Health and Health Care: 5 Key Questions and Answers*, KFF (Apr. 21, 2023), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/disparities-in-health-and-health-care-5-key-question-and-answers/> (“people living in areas with high concentrations of poverty are at increased risk of poorer health outcomes over the course of their life”); Latoya Hill et al., *Key Data on Health and Health Care by Race and Ethnicity*, KFF (Mar. 15, 2023), <https://www.kff.org/racial-equity-and-health-policy/report/key-data-on-health-and-health-care-by-race-and-ethnicity/> (“Black people fared worse than White people across the across the majority of 30 examined measures of health, and AIAN people fared worse on half of the health measures for which they had data available”).
- xxvii** Lois K. Lee et al., *Women’s Coverage, Utilization, Affordability, and Health After the ACA: A Review of the Literature*, 39 HEALTH AFFS. 387, 390–91 (Mar. 2020), [https://www.healthaffairs.org/doi/10.1377/hlthaff.2019.01361?url\\_ver=Z39.88-2003&rfr\\_id=ori%3Arid%3Acrsref.org&rfr\\_dat=cr\\_pub++0pubmed](https://www.healthaffairs.org/doi/10.1377/hlthaff.2019.01361?url_ver=Z39.88-2003&rfr_id=ori%3Arid%3Acrsref.org&rfr_dat=cr_pub++0pubmed).
- xxviii** *Id.* at 391 (“the elimination of contraceptive cost sharing is associated with increased use of and adherence to contraception, including increased use of the most effective methods among women”).
- xxix** Tami Gurley Calvez et al., *Effect of the Affordable Care Act on Breastfeeding Outcomes*, 108 AM. J. OF PUBLIC HEALTH 277, 280 tbl.1 (Feb. 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5846575/#:~:text=The%20ACA%20policy%20change%20was,age%20at%20first%20formula%20feeding>.
- xxx** See Summer S. Hawkins et al., *Breastfeeding and the Affordable Care Act*, 62 PEDIATRIC CLINIC N. AM. 1071 (Oct. 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4555840/>.
- xxxi** Kenneth E. Thorpe, *Racial Trends in Clinical Preventive Services Use, Chronic Disease Prevalence, and Lack of Insurance Before and After the Affordable Care Act*, 28 AM. J. OF MANAGED CARE 126, 131 (Apr. 2022), <https://www.ajmc.com/view/racial-trends-in-clinical-preventive-services-use-chronic-disease-prevalence-and-lack-of-insurance-before-and-after-the-affordable-care-act>.
- xxxii** Hope C. Norris et al., *Utilization Impact of Cost-Sharing Elimination for Preventive Care Services: A Rapid Review 9*, MED CARE RES REV. (2021), <https://vbicenter.org/wp-content/uploads/2021/09/Utilization-Impact-of-Cost-Sharing-Elimination-for-Preventive-Care-Services.pdf>.
- xxxiii** *Supra* note xiii.
- xxxiv** *Braidwood Management, Inc. et al. v. Xavier Becerra et al.*, O’NEILL INSTITUTE, HEALTH CARE LITIGATION TRACKER (Last Updated: June 21, 2024), <https://litigationtracker.law.georgetown.edu/litigation/braidwood-management-inc-et-al-v-xavier-becerra-et-al-2/>.