

Kennedy v. Braidwood Management Inc.: The latest Affordable Care Act attack before the U.S. Supreme Court threatens access to preventive health care services for over 150 million people

Kennedy v. Braidwood Management Inc. is a lawsuit challenging the requirements in the Affordable Care Act that insurance plans cover expert-recommended preventive services at no cost. The U.S. Supreme Court is hearing Braidwood this term. This case poses a grave threat to over 150 million people across the country.¹ 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.

Kennedy v. Braidwood Management Inc. 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 the courts, extremists are using this case to target a crucial element of the ACA – the requirement that insurers cover expert-recommended 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.² Some of the employers and individuals Mitchell represents in *Braidwood* are repeat plaintiffs in cases attacking the ACA.³ They purposely brought this case in front of Judge Reed O'Connor in the Northern District of Texas, the judge who has issued decisions against the ACA in numerous cases and has been willing to block temporarily many of its provisions nationwide.⁴ For example, in 2018, Judge O'Connor ruled that the entire ACA was unconstitutional, a decision later overruled by the U.S. Supreme Court.⁵

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

The ACA challengers in this case brought numerous claims intended to undermine the preventive services provision.⁶ The one that has gained traction is under the Appointments Clause of Article II of the U.S. Constitution,⁷ arguing that the expert members of the agencies that 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) – are not validly appointed.⁸ This argument ignores the fact that the Secretary of Health and Human Services, who is appointed by the president, supervises these experts and ratifies their recommendations before they become legal requirements.

The lawful requirement that expert-recommended preventive services be covered without cost-sharing is an important part of the ACA,⁹ 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.¹⁰ This caused individuals, and especially women, to forgo needed preventive services¹¹—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 that experts recommend coverage for women's preventive healthcare needs.¹² 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.¹³ 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.¹⁴

Extremist judges allowed these challenges to go forward, jeopardizing preventive services – including women's preventive services.

In September 2022, Judge O'Connor ruled that the Task Force's structure violates the Appointments Clause and is unconstitutional.¹⁵ He rejected the Appointments Clause challenges to ACIP and HRSA—leaving the women's preventive services requirement intact.¹⁶

Judge O'Connor then took the extreme step of blocking the federal government from requiring insurance plans to provide no-cost preventive services coverage in line with any recommendations made by the Task Force after 2010, when the ACA was enacted, and he determined that the scope of his order would be nationwide¹⁷—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.

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.¹⁸ 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.¹⁹ 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 all recommendations for coverage of preventive services, including for women's preventive services.²⁰

On June 21, 2024, a Fifth Circuit panel—which included two Trump-nominated judges—issued its decision.²¹ It affirmed the district court's incorrect holding that the Task Force's structure is unconstitutional under the Appointments Clause.²² But the court said “it was error” for Judge O'Connor to block the Task Force's prior recommendations because the plaintiffs in the case had failed to bring a claim under the Administrative Procedures Act.²³ Instead, the court barred enforcement of the post-2010 preventive-services coverage recommendations only as to the plaintiffs in the case, but laid out a roadmap for future challengers to follow to properly seek the order that Judge O'Connor had initially granted.²⁴

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.²⁵

In September 2024, the government requested that the U.S. Supreme Court take up the case, and on January 10, 2025, the U.S. Supreme Court announced that it will hear arguments in *Braidwood*.²⁶ Proceedings at the district court are on hold while the Supreme Court hears the case.

The Supreme Court case presents a narrow question with enormous ramifications.

The Supreme Court agreed to consider only one question in hearing the case: whether the Fifth Circuit erred in finding that the structure of the U.S. Preventive Services Task Force violates the Appointments Clause of the U.S. Constitution. In practical terms, this means that the Supreme Court will determine whether insurers will continue to be required by the ACA to cover many essential preventive services without cost-sharing.

NWLC joined an amicus brief to the Court alongside 47 other state and national organizations dedicated to health care access on February 25, 2025.²⁷ Our brief explained that an outcome in line with the District Court's and Court of Appeals' decisions in this case would not only increase costs for health care consumers and providers but would also put our nation's health at risk. The Supreme Court's decision could directly affect the over 150 million people across the country who benefit from cost-free coverage of more than 100 different life-saving services under the preventive services provision. And the Supreme Court's decision could set the stage for a much broader future decision that would gut other crucial preventive services protections – including the women's preventive services provision – 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.

If the Supreme Court agrees that the preventive services provision of the ACA is invalid, the impact will be devastating. 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.²⁸

The preventive services requirement of the ACA provides for coverage of a broad range of preventive services without cost-sharing.²⁹ It 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.³⁰ 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.³¹ For example, since the passage of the ACA, there has been a significant increase in the rate of Black women getting mammograms³²—a crucial intervention given that despite getting breast cancer at the same rate as white women, Black women are more likely to die from the disease.³³

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 with lower courts 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.³⁴ 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.³⁵

A bad decision from the Supreme Court in *Braidwood* could pave the way for decreased coverage of essential women's preventive services.

If the Court agrees that the Task Force is unconstitutionally structured, it could pave the way for continued litigation that will undermine the women's preventive services provision. Any decision limiting or invalidating expert recommendations made under the women's preventive services provision would further devastate women's health and economic security. For example, since the women's preventive services provision went into effect, the affordability of contraception has improved significantly³⁶—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.³⁷ And since HRSA recommended that plans cover comprehensive breastfeeding support services, the percentage of women who have ever breastfed has increased,³⁸ helping to close the significant socioeconomic disparities in breastfeeding rates.³⁹

The arguments put forward in *Braidwood* aim to deny access to crucial preventive care services. If coverage for the expert-recommended preventive services is ultimately blocked, it will be a huge reversal of progress for equitable health care access, particularly for women and women of color. The Supreme Court must take this opportunity to reject these extremists’ arguments and uphold crucial coverage for preventive care, protecting people’s health and wellbeing across the country.

- 1 Access to Preventive Services Without Cost-Sharing: Evidence from the Affordable Care Act, U.S. DEP'T OF HEALTH & HUM. SERV., 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>.
- 2 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.'").
- 3 See *id.* (explaining that multiple of the plaintiffs in *Braidwood* have been involved in prior lawsuits aiming to overturn parts of the ACA).
- 4 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.").
- 5 *California v. Texas*, 593 U.S. 659 (2021).
- 6 In their original complaint, plaintiffs challenged the structure of the federal agencies that recommend preventive services under the Appointments Clause, the Non-Delegation Doctrine, and the Vesting Clause of the U.S. Constitution, as well as 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 (RFRA) as to agency's recommendations for coverage of preexposure prophylaxis drugs (PrEP), contraception, and various reproductive health screenings. Compl. 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). In their amended complaint, plaintiffs dropped all claims under RFRA except the challenge to PrEP. 1st Am. Compl. at 25, *id.*
- 7 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).
- 8 Plaintiffs argue that the members of the Task Force, ACIP, and HRSA are "principal" officers and must be nominated by the president.
- 9 See 42 U.S.C. § 300gg-13.
- 10 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. SERV., 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>.
- 11 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").
- 12 42 U.S.C. § 300gg-13(a)(4).
- 13 *Women's Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN. (Mar. 2024), <https://www.hrsa.gov/womens-guidelines>.
- 14 *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>.
- 15 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).
- 16 *Id.* Judge O'Connor also determined that none of the targeted agencies violated the nondelegation doctrine or Article II's Vesting Clause, but found that requiring health plans to provide coverage for PrEP violated RFRA. *Id.* This decision is extremely dangerous because 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. See 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>.
- 17 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).
- 18 Notice of Appeal, *Braidwood Mgmt. v. Becerra*, No. 23-10326 (No. 115) (5th Circ. 2024).
- 19 Unpublished Order, *Braidwood Mgmt. v. Becerra*, No. 23-10326 (No. 153) (5th Circ. 2024).
- 20 Notice of Cross Appeal, *Braidwood Mgmt. v. Becerra*, No. 23-10326 (No. 118) (5th Circ. 2024).
- 21 *Braidwood Mgmt. v. Becerra*, No. 23-10326 (5th Circ. 2024).
- 22 *Id.*
- 23 *Id.* at 2.
- 24 *Id.* at 41.
- 25 *Id.* at 39-40.
- 26 *Braidwood Mgmt. v. Becerra*, No. 23-10326 (5th Circ. 2024), *cert. granted* 2025 WL 65913 (U.S. Jan. 10, 2025) (No. 24-316).
- 27 Brief of United States of Care and 47 Other Organizations as *Amici Curiae* in Support of Petitioners, *Kennedy v. Braidwood Management Inc.*, 2025 WL 65913 (U.S. Jan. 10, 2025) (No. 24-316), https://nwlc.org/wp-content/uploads/2025/02/2025.02.25-Braidwood-Amicus-Brief_Final.pdf.
- 28 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 majority of 30 examined measures of health, and AIAN people fared worse on half of the health measures for which they had data available").
- 29 Anu Dairkee, *USPSTF A & B Recommendations as of January 2025*, CTR. FOR HEALTH LAW & POLICY INNOVATION, <https://chlp.org/wp-content/uploads/2025/01/USPSTF-A-B-Recommendations-V3.pdf>.
- 30 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%3Acrossref.org&rfr_dat=cr_pub++0pubmed.
- 31 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>.

- 32 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://vbidcenter.org/wp-content/uploads/2021/09/Utilization-Impact-of-Cost-Sharing-Elimination-for-Preventive-Care-Services.pdf>.
- 33 *Supra* note 13.
- 34 *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/>.
- 35 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), <https://nwlc.org/wp-content/uploads/2023/10/Braidwood-Management-Incorporated-v.-Xavier-Becerra.pdf>.
- 36 *Id.* at 391 (“the elimination of contraceptive cost sharing is associated with increased use of and adherence to contraception, including in-creased use of the most effective methods among women”).
- 37 *The Affordable Care Act’s Contraceptive Coverage Requirement: Importance and Impact*, NAT’L WOMEN’S LAW CTR. (Nov. 2024), <https://nwlc.org/resource/the-affordable-care-acts-contraceptive-coverage-requirement-importance-and-impact/>.
- 38 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>.
- 39 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/>.