



FAQ on *Braidwood v. Becerra* Preventive Services Case

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SECTIONS:

- [Background](#)
- [Implications of the Ruling](#)
- [What Should States Be Doing?](#)
- [What Can We Expect Next?](#)

Background

What is the *Braidwood Management v. Becerra* case?

The *Braidwood Management v. Becerra* case challenged the Affordable Care Act's (ACA) requirement that most private insurance plans cover recommended evidence-based preventive care services with no out of pocket costs for people.

What was the ruling?

U.S. District Judge Reed O'Connor issued a ruling that deemed a portion of the preventive services mandate under the ACA unconstitutional, but *the Fifth Circuit Court of Appeals has since issued a stay, meaning the lower court's ruling is not in effect as the court process plays out.*

The lower court's ruling blocked the federal government from requiring health plans to provide free preventive services recommended by the United States Preventive Task Force (USPSTF), the entity responsible for making recommendations on the types of preventive screenings and services people need, with an A or B rating *on or after March 23, 2010*. The judge also found the requirement that health insurance plans cover pre-exposure prophylaxis, or PrEP, an HIV prevention medication, violated the Religious Freedom Restoration Act.

- The ruling did not affect coverage requirements for USPSTF services recommended prior to March 23, 2010 and also did not affect the requirement for plans to provide free preventive services for women and children as recommended by Health Resources and Services Administration (HRSA) or free vaccines recommended by the CDC's Advisory Committee on Immunization Practices (ACIP).
- Because the USPSTF's members were not appointed by the President, nor confirmed by the Senate, the judge ruled that the requirement to cover the services USPSTF recommends with no cost sharing violated the appointment clause. The judge ruled that, because the ACIP and HRSA are overseen by the HHS Secretary (a Senate confirmed position), the same logic did not apply for services required by those agencies.

How does the decision affect other parts of the ACA?

Aside from the preventive services mandate, the ACA remains unaffected by this ruling. The ACA's essential health benefit (EHB) requirements, which include preventive services, are still in effect.

Resources:

- [3/30/23: Braidwood Management v. Becerra Opinion and Order](#)

Implications of the Ruling:

Who will this ruling impact?

This ruling impacts those on private health plans, including plans offered through the individual, small and large group markets. Nearly half of Americans, over [151 million](#) people, who have private health insurance coverage may lose access to free preventive services, such as cancer screenings, mental health interventions and PrEP. This includes nearly 37 million children.

- The ruling may also impact the more than [21 million](#) people who qualify for Medicaid as a part of the expansion. Similar to private insurance, states must cover ten categories of [Essential Health Benefits \(EHBs\)](#), which include preventive services, for people who qualify for Medicaid as part of the expansion population. If the *Braidwood* decision stands, the decision of what preventive services are covered would be left up to the state and its state private insurance benchmark plan, which may or may not include all services currently covered.
- The Secretary of Health and Human Services determines coverage for preventive services for Medicare beneficiaries, therefore Medicare beneficiaries would likely not be affected by any ruling on the current litigation.

Are preventive services still covered without cost sharing?

Because the Fifth Circuit granted a partial stay as the case moves through the appeals process, *preventive services are still required to be covered in the same way they were before this ruling.*

- It is important to note that, while Judge O'Connor's ruling, which is on hold, deemed it unconstitutional for the vast majority of the country's private health plans to be required to provide no-cost preventive services recommended by the USPSTF, the ruling did not extend to preventive services recommended by HRSA or ACIP for women, infants, and kids. However, the plaintiffs have filed a [cross appeal](#) to eliminate the requirement for plans to provide no-cost coverage for preventive services recommended by HRSA and ACIP preventive services, in addition to those recommended by the USPSTF, so this case [effectively puts ALL preventive services at risk.](#)

Which preventive services *could* be impacted by the lower court's ruling long-term?

As noted above, access to *all* free preventive services is ultimately at risk. We are waiting on a ruling from the Fifth Circuit Court of Appeals to see if Judge O'Connor's ruling stands. If it does, insurers would no longer be required to provide free coverage for any A or B grade services recommended by the USPSTF *after* the passage of the ACA in March 2010, but it is possible the Fifth Circuit rules to include more services, as the plaintiffs have sought in their [cross-appeal](#).

- This includes things like anxiety screenings for children, perinatal depression preventive interventions for pregnant people, screenings for intimate partner violence and elder abuse, and more. United States of Care created a [chart](#) listing which preventive services could be affected by the Braidwood decision.
- Judge O'Connor's ruling also allowed for employers to cite religious objections as grounds for not covering PrEP in their plans despite it being a recommended service by the USPSTF. Given that over [80%](#) of PrEP users are covered by commercial insurers, this could have devastating ramifications for cost and access.
- While other services, such as contraception and other forms of birth control, are not included in the lower court's ruling, this case could open the door to employers objecting to offering these services on the grounds of religious freedom.
- All recommendations that received an A or B grade from the USPSTF *prior* to March 23, 2010 would be required to be covered. These services would be required to be covered at no cost to enrollees, but may be outdated or no longer considered a best practice.

Why Does This Matter?

No-cost preventive services are one of the [most popular](#) aspects of health care coverage, and are [scientifically proven](#) to improve health outcomes and lower costs. The ruling could reverse important progress on screening rates.

- In the years following the ACA, [more](#) Americans received blood pressure, cholesterol, and colon cancer screenings compared to before the ACA. Moreover, [more](#) adults and children received recommended vaccinations, such as the flu and HPV vaccines.
- Concerns about possible costs can keep people from getting preventive services – nearly [half of all people](#) would not be willing to pay for some of the most common preventive services, such as HIV screenings or tobacco cessation, if there were a cost. For example, [research](#) shows that introducing some form of cost sharing for PrEP could increase HIV infections by 2000 a year.
- These changes to coverage will likely have a disproportionate impact on communities of color, low income people, and the LGBTQ community, [further limiting](#) these populations' access to essential preventive services and reversing progress in [reducing health disparities](#).

When will people feel the impact of this decision?

People's coverage will not change while the Fifth Circuit's stay is in place. While we expect the 5th Circuit to rule on the appeal around mid-2024 and for the case to move to the Supreme Court, people can feel assured that the coverage they have now will not change.

Resources:

- [FACT SHEET: Braidwood Management Inc. v. Becerra Challenges Preventive Services Requirement Under the Affordable Care Act](#)
- [AHIP Statement on the Braidwood v. Becerra Decision](#)
- [FACT SHEET: No-Cost Preventive Services Affected by Braidwood Decision](#)

What Should States Be Doing?

Is there any harm in states acting to protect free preventive services?

While litigation continues, states should take action now to protect access to preventive services at no-cost – these efforts would not interfere with any future federal action.

- 14 states already require individual market insurers to cover, without cost sharing, the same categories of preventive services as Section 2713 of the Affordable Care Act (ACA).

What can and should states do to protect free access to preventive services?

While awaiting the appeals process, and absent Congressional action, it is important that state policymakers take action now to ensure these critical services remain available to people free of charge. Among the action states could take:

- **Analyze state statutes.** A majority of states have not taken action to codify the ACA’s preventive services requirement. States should identify whether these services are already protected under state law and required to be covered without cost-sharing.
- **Update state regulations.** If the court’s decision invalidating the ACA’s preventive services requirement is upheld, states can update their own regulations to ensure people have continued access to these services free of charge to the insured. Many states already require insurers to cover some preventive services, although most do not have the no cost-sharing requirement.
- **Pass legislation.** States have jurisdiction over health plans on the individual and small group markets, as well as over state employee health plans. States looking to establish state-level protections should act sooner rather than later to help to prevent or mitigate any gaps in coverage.

Resources:

[FACT SHEET: Solutions States Can Take to Preserve Access to Free Preventive Services](#)

What Can We Expect Next?

Should Congress take action?

- Congress should continue to monitor this case closely and be prepared to restore access to no-cost preventive services if Courts do not reverse this decision.

How is the federal government responding?

- The Department of Justice (DoJ) has been actively involved in defending this case, and filed an [appeal](#) to the US Court of Appeals for the Fifth Circuit following Judge O’Connor’s ruling. The last scheduled part of the 5th circuit’s [briefing schedule](#) is slated for November 3, 2023, which is then followed by a ruling on the appeal, which we can likely expect sometime in early-mid 2024.
- DoJ asked for and was granted a “partial stay” by the Fifth Circuit, which effectively means Judge O’Connor’s ruling finding no-cost coverage of preventive services unconstitutional would not take effect as the Fifth Circuit hears the appeal case.

- As noted, the plaintiffs have filed a [cross-appeal](#) to eliminate the requirement for plans to cover services recommended by HRSA and ACIP, in addition to USPSTF recommended services, which DOJ must respond to by September 29, 2023. We fully expect that DOJ will respond by reiterating the constitutionality of these important requirements.

Will this case go to the Supreme Court?

- We expect that this case will move to the Supreme Court following the Fifth appellate court's ruling, which is when either party may petition to have the case heard by them. This entire process will likely be lengthy, and it could be several years before a final verdict is reached.

While the final decision in this ruling will have a significant impact on access to affordable health care, state policymakers can take action now to ensure these preventive care services remain available without cost-sharing for people. We've compiled a list of resources to help our partners navigate the decision as we await further action from the courts. You can find a complete list of those resources [here](#).