Agenda

- Introduction & Brief Overview
- Legal Developments of the Case
- What’s At Stake: Clinical & Equity Implications
- State Response to *Braidwood v. Becerra* Ruling
- Case Example: Massachusetts Moves to Protect Cost-Free Preventive Services
- Community Engagement on *Braidwood v. Becerra*
- Q&A
- Resources & Closing

*Questions can be submitted throughout the webinar by using the Q&A function found in the bottom toolbar of your Zoom screen.*
Panelists

- **Lisa Hunter**, Senior Director for Policy & External Affairs, United States of Care
- **Tim Jost**, Emeritus Professor, Washington and Lee University School of Law
- **A. Mark Fendrick, M.D.**, Director, University of Michigan Center on Value-Based Insurance Design
- **Kelsey Wulfkuhle**, State External Affairs Manager, United States of Care
- **Ashley Blackburn**, Director of Policy & Government Relations, Massachusetts Health Care for All
- **Colin Reusch**, Director of Policy, Community Catalyst
Overview: Preventive Services Under the ACA

★ The Affordable Care Act (ACA) mandates that most individual and group health plans must **cover preventive services** (such as screenings & vaccines) **without copayments, coinsurance, or deductibles**.

★ Congress uses 3 already functioning expert bodies to identify & list preventive services:

**ACIP**
- Advisory Committee on Immunization Practices
- Vaccines & immunizations

**USPSTF**
- US Preventive Services Task Force
- General adult preventive services

**HRSA**
- Health Resources and Services Administration
- Preventive services & screenings for women & children

★ USPSTF is the body primarily tied up in the *Braidwood* case.
The Case: Braidwood v. Becerra

★ The Plaintiffs: Several individual and employer plaintiffs sued to eliminate the ACA’s preventive services requirement, claiming it was unconstitutional.
  ○ Some also claimed that it would violate their religious freedom by making them complicit in encouraging behavior they believed immoral (like PrEP).
  ○ Others claimed that it forced them to pay for services that they or their employees do not personally need.

★ The Defendants: The federal government, specifically the Department of Health & Human Services (including HHS Secretary Xavier Becerra).

★ The Court: U.S. District Court for the Northern District of Texas, Fort Worth

★ The Judge: Judge Reed O’Connor
  ○ Judge O’Connor held the entire ACA invalid in 2018, only to be reversed by the Supreme Court.

★ The Timing: O’Connor issued his first ruling in September 2022 and ruled on additional issues in the case in March 2023
Legal Developments in
Braidwood v. Becerra

Tim Jost
Professor Emeritus
Washington and Lee University School of Law
## The Decision: September 2022

<table>
<thead>
<tr>
<th>Plaintiff Claims</th>
<th>O’Connor’s Ruling</th>
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<tr>
<td>USPSTF, ACIP, &amp; HRSA members are not confirmed by the appropriate constitutional authority, which violates</td>
<td>USPSTF violates the Appointments Clause; ACIP and HRSA do not.</td>
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<tr>
<td>the <strong>Appointments Clause</strong> of the Constitution.</td>
<td></td>
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<tr>
<td>USPSTF members cannot be dismissed by the President, which violates the <strong>Vesting Clause</strong> of the Constitution.</td>
<td>Rejected this claim as the plaintiffs had not shown that it is true.</td>
</tr>
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<td>Congress cannot delegate responsibilities to USPSTF, ACIP, &amp; HRSA without giving them sufficient direction,</td>
<td>Under previous rulings, the ACA’s requirements <strong>do not violate the Nondelegation Doctrine</strong>. O’Connor</td>
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<td>which violates the Constitution’s <strong>Nondelegation Doctrine</strong>.</td>
<td>encouraged higher courts to reconsider delegation laws and hold USPSTF, ACIP, &amp; HRSA to be unconstitutional.</td>
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<td>The requirement that self-funded plans and insurers cover PrEP violated the plaintiff’s rights under the</td>
<td>Held this claim, as PrEP coverage was not the “least restrictive” means.</td>
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<td><strong>Religious Freedom Restoration Act</strong>, requiring the government to use the “least restrictive” means of</td>
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<td>promoting a compelling governmental interest when it burdens religious freedom.</td>
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**Notes:**
- O’Connor encouraged higher courts to reconsider delegation laws and hold USPSTF, ACIP, & HRSA to be unconstitutional.
The Decision: March 2023

O’Connor’s initial ruling did not include an order blocking enforcement of the coverage requirements or issue the scale to which his ruling would be applied.

On March 31, 2023, O’Connor formally clarified that the scope of the ruling would apply nationwide, effective immediately.

Some harmful impacts to be aware of:

- Threatened free access to approximately 50 covered preventive services for more than 150 million people with private health insurance coverage.
  - Includes cancer screenings, blood pressure screenings, and some pregnancy-related care.
- Insurers may not have to cover PrEP, as it could be considered a violation of their religious freedom.
Recent Developments

Almost immediately, the Department of Justice (DOJ), on behalf of the government, appealed O’Connor’s ruling to the Fifth Circuit Court of Appeals.

In April 2023, O’Connor rejected DOJ’s request that he stay his own ruling, citing a WSJ article that most major insurers plan to continue to cover preventive services with no cost-sharing in the immediate future.

- Amicus Briefs: Patient Groups & Providers

On May 15, 2023, the Fifth Circuit granted DOJ’s request for a stay.

- This decision is temporary and may be lifted as soon as June 6, when oral arguments are heard by the Fifth Circuit.

Regardless of the Fifth Circuit’s decision on the case, Braidwood is likely to be appealed to the Supreme Court.
The Fifth Circuit will review Judge O’Connor’s decision. The plaintiffs will ask the court to hold the preventive services requirement unconstitutional as it applies to vaccines and women’s and children’s preventive services as well, including contraceptives. The loser will likely request Supreme Court review. Individual and small group insurers may still be required to cover preventive services under state law regardless of decision, but group health plans will not be.
What’s At Stake: Clinical & Equity Considerations of Braidwood v. Becerra

A. Mark Fendrick, M.D.
Director
Center for Value-Based Insurance Design
Implications of Braidwood Ruling Necessitating the Use of Pre-ACA USPSTF Recommendations

★ 15 of 46 A/B Services would no longer require coverage without cost-sharing
★ 5 services receiving A/B recommendation after March 2010 (PrEP)
★ 10 services graded not A/B before 2010, but upgraded to A/B after 2010 (HCV Screening)
★ 31 services receiving an A/B recommendation before 2010 and that would require coverage without cost-Sharing using pre-2010 recommendations
★ 14 services remained A/B with no significant updates after 2010 (AAA screening)
★ 17 services receiving an A/B recommendation before 2010 and remained A/B, but with significant updates after 2010 (Colorectal Cancer Screening)
★ In addition, 6 services receiving a “DRAFT” A/B Rating that would not require coverage without cost-sharing (Anxiety Screening in adults)

Source: Braidwood Forefront Tables
State Response to *Braidwood v. Becerra* Ruling

Kelsey Wulfkuhle  
State External Affairs Manager  
United States of Care
States Protecting No-Cost Access to Preventive Services
## Actions by States

<table>
<thead>
<tr>
<th>State</th>
<th>Bill</th>
<th>Status</th>
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<tr>
<td>Arizona</td>
<td>SB 1292</td>
<td>Dead - Legislature adjourned 5/19/23</td>
</tr>
<tr>
<td>California</td>
<td>AB 1645</td>
<td>Passed out of Assembly Health Care Committee on 4/27/23, awaiting a hearing in Assembly Appropriations Committee</td>
</tr>
<tr>
<td>Colorado</td>
<td>SB-189</td>
<td>Signed by the Governor.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>HB1180</td>
<td>Dead - Legislature adjourned 5/4/23</td>
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<tr>
<td></td>
<td>SB893</td>
<td></td>
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<tr>
<td>Illinois</td>
<td>HB 2847</td>
<td>Awaiting Governor’s signature.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>H-1081</td>
<td>Heard in Joint Committee on Financial Services on 4/28/23</td>
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<tr>
<td></td>
<td>S-647</td>
<td><em>Amended into state budget</em></td>
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<tr>
<td></td>
<td>*Amended</td>
<td></td>
</tr>
<tr>
<td>Minnesota</td>
<td>SF 2995</td>
<td>Signed by the Governor</td>
</tr>
<tr>
<td></td>
<td>*Amended</td>
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</tr>
<tr>
<td>New York</td>
<td>S 825</td>
<td>Signed by the Governor</td>
</tr>
<tr>
<td>Oregon</td>
<td>HB 2282</td>
<td>Signed by the Governor</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>HB 1050</td>
<td>Referred to House Insurance Committee on 4/28/23</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>S 23</td>
<td>Passed out of Senate, referred to House Health and Human Services Committee on 5/10/23</td>
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From the States: Massachusetts Moves to Protect Cost-Free Preventive Services

Ashley Blackburn
Director of Policy & Government Relations
Health Care for All
The Commonwealth of Massachusetts

PRESENTED BY:

John J. Lawn, Jr.

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to preserving preventative services without cost sharing.

PETITION OF:

NAME: | DISTRICT/ADDRESS:
---|---
John J. Lawn, Jr. | 10th Middlesex
Smitty Pignatelli | 3rd Berkshire
Brian W. Murray | 10th Worcester
Lindsay N. Sabadosa | 1st Hampshire
Vanna Howard | 17th Middlesex

Cindy F. Friedman

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to preserving preventative services without cost sharing.

PETITION OF:

NAME: | DISTRICT/ADDRESS: | DATE
---|---|---
Cindy F. Friedman | Fourth Middlesex | 3/30/2023
Julian Cyr | Cape and Islands |
Massachusetts Legislative Language

★ Creates a new term, “federally-defined preventive services,” defined as the services recommended by USPSTF, ACIP and HRSA.

★ Prohibits cost sharing for “federally-defined preventive services.”

★ Requires the Division of Insurance to:
  ○ Issue guidance within 90 days of passage, and
  ○ As necessary, issue guidance to update the scope of preventive services based on recommendations and guidelines issued by USPSTF, ACIP or HRSA.
MA has had an individual mandate in place since 2006
State law defines minimum creditable coverage (MCC) at a high level and authorizes the Health Connector Board to further determine the minimum standards of the plans that individual residents are required to have.
Under current regulations, a resident’s coverage can be considered MCC even if forms of cost sharing, other than deductibles, apply to preventive health services.
Health Connector staff recommended, and the board voted to approve, amending MCC regulations to prohibit any cost sharing (beyond just deductibles) for all preventive services.
Community Engagement on *Braidwood v. Becerra*

Colin Reusch
Director of Policy
Community Catalyst
Key Asks (audience/organization dependent):
  - Encourage people to continue seeking no-cost preventive care
  - Pressure insurers to commit to preserving coverage
  - Join advocacy for state-based protections (a la Massachusetts)
  - Tell individual stories / empower patients & families to speak up

Identify trusted messengers & key influencers
  - Community orgs already focused on protecting coverage & encouraging screenings, vaccines, etc.
  - Large employers & employers with self-funded health plans in your state (e.g., unions)
  - Organizations already engaging in patient/individual storytelling

Lean into life-saving benefits of no-cost preventive services but be prepared to activate people around what they might lose
Q&A
Resources to Support Your Advocacy

★ USofCare Preventive Services Resource Hub
  ○ Template State Legislation to Protect Free Preventive Services
  ○ Chart on USPSTF Services Impacted by the Decision
  ○ FAQs on Braidwood v. Becerra
  ○ Talking Points for Partners
  ○ Amicus Brief Sign-On (by June 16 at 3:00pm ET)

★ Community Catalyst Advocate Fact Sheet & Petition to Insurers

★ O’Neill Center Litigation Tracker
  ○ Contains all court documents related to the case

★ V-BID Center Braidwood Resources
Thank you for your advocacy!