

Braidwood v. Becerra: An Update and Overview to Support State Advocacy

June 6, 2023
1:00pm ET / 10:00am PT



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 ★

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



★ 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



★ What's Next ★

- ★ 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](#)

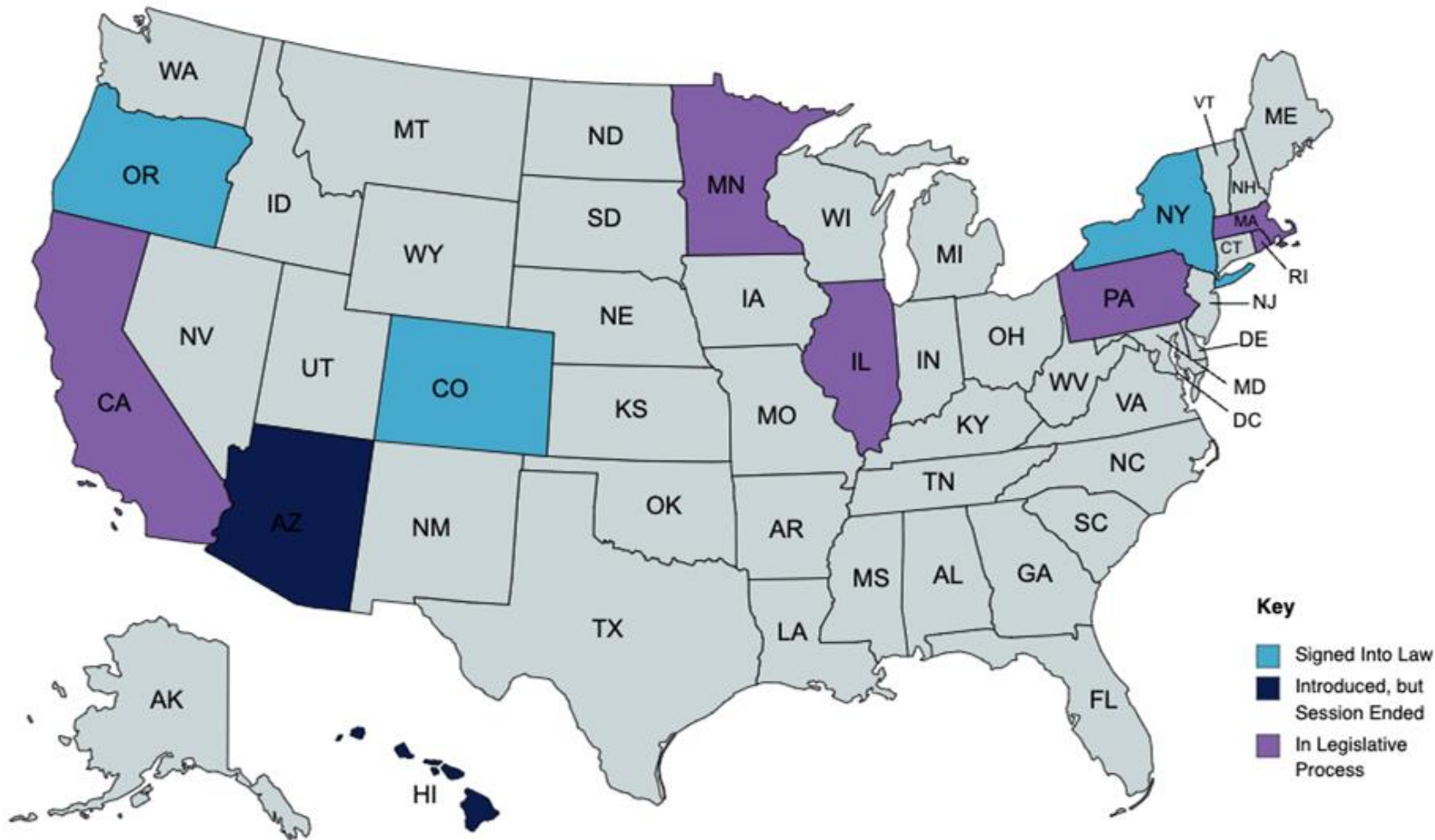


State Response to *Braidwood v. Becerra* Ruling

Kelsey Wulfkuhle
State External Affairs Manager
United States of Care



States Protecting No-Cost Access to Preventive Services



Actions by States

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



From the States: Massachusetts Moves to Protect Cost-Free Preventive Services

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



HOUSE No. 1081

The Commonwealth of Massachusetts

PRESENTED BY:

John J. Lawn, Jr.

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

The undersigned legislators and/or citizens respectfully petition for the adoption of
An Act relative to preserving preventative services without cost sharing.

PETITION OF:

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

SENATE No. 647

The Commonwealth of Massachusetts

PRESENTED BY:

Cindy F. Friedman

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:	
<i>Cindy F. Friedman</i>	<i>Fourth Middlesex</i>	
<i>Julian Cyr</i>	<i>Cape and Islands</i>	<i>3/30/2023</i>



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.



Massachusetts Health Connector Board

- ★ 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!

