



Case Explainer: *Braidwood Management v. Becerra*

By Jane Perkins

This case explainer concerns the district court opinion in *Braidwood Management v. Becerra*. The case could have tremendous repercussions on people's access to hundreds of evidence-based preventive health services in the United States, from diabetes, high blood pressure, and cancer screening to HIV prevention medications, mammograms, and childhood vaccines. While focusing on coverage requirements for private health insurance plans, the case could ultimately affect public insurance coverage, including Medicaid.

Statement of the Case

The "Braidwood" plaintiffs—individual and business purchasers of private health insurance—have sued the U.S. Department of Health and Human Services Secretary Xavier Becerra and other federal officials claiming that the preventive services coverage mandates of the Affordable Care Act are unconstitutional. Some of the plaintiffs also challenge requirements to cover pre-exposure prophylaxis (PrEP) medications for people at risk of HIV as violating the Religious Freedom Restoration Act (RFRA).¹

ACA by the Numbers:

- ACA references to preventive coverage = >330
- ACA court challenges = >2000
- ACA trips to the Supreme Court = 8

Sources: JAMA, Apr. 10, 2023; WestLaw, Apr. 17, 2023

¹ The original Complaint also asserted RFRA claims against compulsory coverage of other services the plaintiffs found objectionable—contraceptives, the HPV vaccine, and screenings and behavioral counseling for STDs and drug use. The Amended Complaint dropped these RFRA claims, and at the district court oral argument, plaintiffs conceded that their RFRA challenge is limited to the PrEP mandate. See 2022 WL 4091215 at *5 n.3.

Judge Reed O'Connor, who hears cases in the Northern District of Texas, decided the case in two opinions, one dated September 9, 2022 and the other March 30, 2023. Both parties filed notices of appeal to the Fifth Circuit Court of Appeals (Case No. 23-10326). This means all aspects of the district court's ruling are subject to review and, thus, reversal or affirmance.

Notable Players:

Judge O'Connor previously held the entirety of the ACA unconstitutional, a decision the Supreme Court reversed. He has also enjoined ACA provisions on religious freedom grounds in cases involving contraceptive, abortion, and gender affirming care coverage.

The owner of Braidwood Management, Steven Hotze, has been involved in numerous lawsuits challenging, among other things, voting by mail, COVID-related executive orders, a city equal rights ordinance, and family ownership of a business.

Source: WestLaw (last visited Apr. 17, 2023)

The District Court Decision

In addition to deciding that plaintiffs had legal standing to bring their claims, the judge announced significant merits-based holdings:

1. The ACA requirements that health plans cover, with no cost sharing (*e.g.*, copayments), services that have "a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force" (PSTF) is unconstitutional. 42 U.S.C. § 300gg-13(a)(1).

The judge's rationale: The PSTF is an independent body of experts that is not supervised by the Secretary or any other federal agency. The ACA provides that private insurance plans must cover preventive services that receive an "A" and "B" rating from the PSTF. Thus, members of the PSTF are exercising significant, independent legal authority. Under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, the members of the PSTF are "officers" of the United States whose selection must be made by the President and confirmed by the Senate. The PSTF members were not appointed in this way.

2. The ACA requirement that plans cover, with no cost sharing, immunizations that are recommended by the Advisory Committee on Immunization Practices (ACIP) is *not* unconstitutional. *See* 42 U.S.C. § 300gg-13a(2).

The judge's rationale: ACIP is under the supervision of the Secretary and does not act independently. At the Secretary's direction, ACIP reports to the Director of the CDC. The Secretary, acting through the Director, either accepts, rejects, or alters ACIP recommendations and has ratified the ACIP recommendations. The Appointments Clause is not violated.

3. The ACA requirement that health plans cover, at no cost to infants, children, and adolescents and to women, preventive care and screening provided for in guidelines supported by the Health Resources and Services Administration (HRSA) are *not* unconstitutional. *See* 42 U.S.C. § 300gg-13(a)(3)-(4).

The judge's rationale: See 2, above.

4. Congress did *not* violate the nondelegation doctrine when establishing the PSTF, ACIP, and HRSA services coverage provisions. *See* U.S. Const. art.1, § 1 (vesting all legislative powers in Congress).

The judge's rationale: When Congress confers decision-making authority on federal agencies, it must do so using intelligible principles to guide them. It has done so here in statutory text and context that delineates the desired congressional policies, namely expanded access to evidence-based preventive services. Judge O'Connor based his decision on "binding Fifth Circuit precedent" but observed that the Supreme Court may agree with the Braidwood plaintiffs. *See* 2022 WL 4091215, at *15 (quoting *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020) (noting ACA, § 300gg-13, "grants sweeping authority to HRSA . . . but is completely silent as to what those 'comprehensive guidelines' must contain, or how HRSA must go about creating them").

5. Compulsory coverage of PrEP medication violates the RFRA rights of the religiously motivated plaintiffs.

The judge's rationale: The PrEP mandate substantially burdens the religious exercise of Braidwood's owner, Steven Hotze. The Defendants inappropriately contested the *correctness* of Hotze's beliefs, when courts can only test the *sincerity* of those beliefs. Moreover, the Defendants did not, as RFRA requires, establish that the mandate furthers a compelling government interest and, even if they had, the mandate is not the least restrictive means of furthering that interest.

The Expert Entities:

Congress relied on three, well-established expert entities to designate evidence-based, high benefit preventive services:

- PSTF – created in 1984
- ACIP – created in 1964
- HRSA -- making recommendations since 1990

Source: JAMA, Apr. 10, 2023

The Relief

The judge vacated all actions by the Defendants to implement the ACA's requirement that health plans cover PSTF preventive services requirements with an "A" or "B" rating taken on or after March 23, 2010 (the effective date of the ACA). The judge also enjoined the Defendants from enforcing the provision in the future. This injunction has nationwide effect. The judge also ruled that the religiously motivated plaintiffs cannot be required to provide coverage of PrEP medication to their employees.

Some Major Take Aways

1. The March 23, 2010 effective date: The PSTF rating recommendations that were in effect on March 23, 2010 continue in effect. Judge O'Connor read the statutory requirement for coverage of the "current" A and B ratings to mean current as of the ACA's effective date. See 2023 WL 2703229 (Mar. 30, 2023); Am. Compl. ¶¶ 77-80 (ECF No.14) (stating this reading avoided constitutional problems).

However, PSTF recommendations after March 23, 2010 cannot be made compulsory (plans/insurers can choose to continue to cover the full scope of current evidence-based practices).

In addition to issuing new recommendations over the years, the PSTF has updated recommendations that existed on March 23d. It has extended some recommendations to include different populations or age groups (as is the case with screening for colorectal cancer). It has rescinded others altogether. The status of such recommendations is unclear. The federal government has stated that it anticipates providing additional guidance on this point. See Joint Departmental FAQs about ACA and Coronavirus Relief Act Part 59, FAQ #1 (Apr. 13, 2023).

2. Fixing the problem: The PSTF problem can be fixed, but it will not be easy. The judge decided that the members of the Task Force are not inferior officers who can be appointed by an agency head; rather, their appointment must come from the President

with the advice and consent of the Senate. See 2022 WL 4091215, *13 (“[A]s for PSTF, the Secretary’s ratification is meaningless.”). It may be quite difficult to either amend the statute or get Presidential appointments through the Senate process.

3. Potential for an expansive ruling: Because both parties have appealed, all of the judge’s rulings are potentially in play. This means, for example, that the Fifth Circuit could be asked to decide—and could decide—that the ACIP and HRSA recommendations are also unconstitutional.
4. The effects on Medicaid: Our analysis of the opinion’s repercussions on Medicaid coverage is ongoing; however, at this time we believe the decision should *not* affect coverage of the approximately 20 percent of Medicaid enrollees who are eligible as a result of the ACA’s expansion of coverage to low-income, non-disabled adults. The ACA requires states to cover most of these adults through alternative benefit plans that, at minimum, cover essential health benefits (EHBs). In contrast to the private insurance provision at issue in *Braidwood*, Congress gave the Secretary express authority to define the EHBs in Medicaid. See 42 U.S.C. § 18022(b)(1). That the Secretary chose to define EHBs by adopting the PSTF (and ACIP and HRSA) preventive services recommendations, see 42 C.F.R. §§ 147.130, 156.115, does not negate the fact that it is the Secretary that has made the ultimate decision, not the PSTF.

However, coverage of other Medicaid enrollees could be affected in the future. *First*, while *Braidwood* concerns private insurance, if upheld on appeal, its reasoning could affect Medicaid coverage. For example, as part of the ACA, Congress amended Medicaid’s definition of “other diagnostic, screening, preventive, and rehabilitative services” to include “any clinical preventive services that are assigned a grade of A or B by the United States Preventive Services Task Force[.]” 42 U.S.C. § 1396d(a)(13)(A) (added by ACA, § 4106, which also amended the provision to include ACIP vaccines for adults). This provision is worded quite like the provision Judge O’Connor struck down. *Compare* 42 U.S.C. § 300gg-13(a)(1), quoted above. Under the Medicaid Act, coverage of preventive services is mandatory for children and youth under age 21. See 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a), 1396d(r)(1). States must cover ACIP vaccines for adults but have the option to cover other preventive services. See *Id.* §§ 1396a(a)(10)(A), 1396d(a); see also Inflation Reduction Act, Pub. L. No. 117-169, § 11405 (Aug. 16, 2022) (amending 42 U.S.C. § 1396a(a)(10)(A) to require coverage of ACIP-recommended vaccines for adults). Thus, the coverage (to the extent that it is not required elsewhere by the Medicaid Act) is at risk of future legal challenge should the *Braidwood* decision stand.

Second, a broad Fifth Circuit ruling holding all three of the expert panels’ recommendations to be unconstitutional would affect Medicaid coverage. For example, the Medicaid Act Early and Periodic Screening, Diagnostic and Treatment provisions

require states to cover all age-appropriate immunizations for children and youth under age 21, in accordance with the schedule for pediatric vaccines established by the ACIP, 42 U.S.C. §§ 1396d(r)((1)(B), and to inform all Medicaid-eligible persons in the state who are under age 21 of the need for and coverage of these immunizations, *Id.* § 1396a(a)(43)(A).

Conclusion

This case creates confusion as to current and future requirements for coverage of PSTF recommendations. The case involves a number of complex legal arguments. And, the case is moving quickly. Federal defendants filed a Notice of Appeal on April 3, 2023. The Braidwood plaintiffs cross-appealed on April 6. The US Department of Justice filed a motion for stay of the opinion pending appeal. As of April 24, 2023, the judge was deciding whether or not to grant the motion. The National Health Law Program will continue to provide updates. For information contact: Wayne Turner, turner@healthlaw.org or Jane Perkins, perkins@healthlaw.org.