

RECENT CASE DEVELOPMENTS

Braidwood Mgmt. v. Becerra & a Texas District Court's Decision to Stop Enforcement of Preventive Care Coverage Requirements under the ACA

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Abstract

This article discusses how in March of 2023 a District Court in Texas enjoined the U.S. government from enforcing certain preventive care requirements under the ACA for private health insurers. The current order by the Court enjoined enforcement of the ACA preventive care requirements based on those recommendations made on or after the date of March 23, 2010, by the U.S. Preventive Services Task Force. This article discusses the Court's analysis and the remedy the Court decided on after finding violations under the RFRA and Appointments Clause. The article also discusses the implications and effects of this decision on whether previously covered services that the ACA didn't allow cost sharing for will now have cost sharing by private health insurers and how that will affect consumers. The article concludes that despite lack of enforcement, private health insurers should not require cost sharing for previously covered services that the ACA didn't allow cost sharing for before this most recent decision. Cost sharing for previously covered services would increase costs for those enrolled in private health insurance plans and could lead to a reduction in access to preventive services and healthcare.

Keywords: Affordable Care Act (ACA); Religious Freedom Restoration Act (RFRA); Appointments Clause; Preventive Care; U.S. Preventive Services Task Force; Cost Sharing

Introduction

On March 30, 2023, the United States District Court of the Northern District of Texas (“the Court”), enjoined the U.S. government¹ from enforcing preventive care coverage requirements for private insurers under the ACA in relation to recommendations from the U.S. Preventive Services Task Force.² This most recent 2023 decision of *Braidwood Mgmt. v. Becerra* is the subsequent decision following the original holding in the case by Judge O'Connor on September 7, 2022.³ In 2022, the Court held that the Preventive Services Task Force violates the Appointments Clause of the U.S. Constitution, and the mandated coverage of PrEP for private health insurers violated the Plaintiff in the case *Braidwood's* rights under the Religious Freedom Restoration Act (“RFRA”).⁴ However, that decision left many issues still undecided. The issues left for the Court to decide included the remedy for the violations found under

¹While in this article I refer to the “U.S. government,” the specific defendants in the case are the “Secretary of HHS, Xavier Becerra; the Secretary of Treasury, Janet Yellen; the Secretary of Labor, Martin Walsh; and the United States.” *Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *3 (N.D. Tex. Mar. 30, 2023).

²*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *14 (N.D. Tex. Mar. 30, 2023).

³*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2022 WL 4091215, at *20 (N.D. Tex. Sept. 7, 2022).

⁴*Id.* at *20 (referencing U.S. Const. art. II, §2, cl. 2; 42 U.S.C. §2000bb-1(a)).

the Appointments Clause and the RFRA,⁵ standing for the rest of the Plaintiffs, and the RFRA claim for the other Plaintiffs objecting on religious grounds.⁶

Legal Background and Procedural History

In this most recent decision in 2023, the Court held that Plaintiffs with objections that were not religious did not have standing, but that the additional Plaintiffs with religious objections did have standing,⁷ and further held that the required coverage of PrEP violated the rights of the additional Plaintiffs with religious objections under the RFRA.⁸ Most notably, the remedy decided on by the Court for the Appointments Clause violation could affect millions of people and their healthcare coverage.⁹ The Court decided that the remedy should be vacatur for the Appointments Clause violation, and vacated “all agency action taken to implement or enforce the preventive care coverage requirements in response to an “A” or “B” recommendation by the U.S. Preventative Services Task Force on or after March 23, 2010, and made compulsory under 42 U.S.C. §300gg-13(a)(1).”¹⁰ The Court further enjoined the U.S. government from in the future “implementing or enforcing” these provisions found in these requirements in relation to the U.S. Preventative Services Task Force ratings.¹¹ This means that any recommendation regarding preventive services issued on or after the date of March 23, 2010 by the U.S. Preventive Services Task Force is not enforceable and there could be cost sharing as the provision of the ACA is not enforceable based on that ruling.¹²

Care Coverage Requirements Under the ACA

This case is about the preventative care coverage requirements for private health insurers under the Patient Protection and Affordable Care Act (“ACA”).¹³ Under the ACA, the U.S. Preventative Services Task Force, the Health Resources and Services Administration (“HRSA”), and the Advisory Committee on Immunization Practices (“ACIP”) “determine what kinds of preventive care fall within each category of mandatory coverage by issuing guidelines or recommendations that, by the operation of the statute, carry the force of law.”¹⁴ Private health insurance companies under the ACA must “at a minimum provide coverage for and shall not impose any cost sharing requirements”¹⁵ for the different categories of mandatory preventive coverage in the ACA.¹⁶ The U.S. Preventive Services Task Force is in charge of releasing recommendations that have either an “A” or “B” grade.¹⁷ Once a preventive service has been designated as having either an “A” or “B” grade by the U.S. Preventive Services Task Force, private health

⁵See *id.*

⁶*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *1 (N.D. Tex. Mar. 30, 2023). In the 2022 case, the Court decided the RFRA claim and found there was a violation of the Plaintiff Braidwood’s rights but did not decide yet in regard to the other Plaintiffs. *Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2022 WL 4091215, at *18, 20 (N.D. Tex. Sept. 7, 2022).

⁷*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *8 (N.D. Tex. Mar. 30, 2023).

⁸*Id.* at *9.

⁹See Sarah Kliff, *Health Plans No Longer Have to Cover all Preventative Care at No Cost. Here’s What to Know.*, N.Y. TIMES (Mar. 31, 2023), <https://www.nytimes.com/2023/03/31/health/obamacare-coverage-preventive-care-aca.html> [<https://perma.cc/RN6B-9A5W>] (stating “[t]he Affordable Care Act’s preventive services mandate potentially affect all Americans with private health coverage [and] [t]hat is roughly 150 million people.”).

¹⁰*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *14 (N.D. Tex. Mar. 30, 2023).

¹¹*Id.*

¹²*Id.*; see 42 U.S.C. §300gg-13(a).

¹³*Id.* at *1; see 42 U.S.C. §300gg-13.

¹⁴*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *1 (N.D. Tex. Mar. 30, 2023).

¹⁵42 U.S.C. §300gg-13(a).

¹⁶*Id.* (citing 42 U.S.C. §300gg-13(a)); See 42 U.S.C. §300gg-13(a)(1)-(4) for the different categories of preventative health required coverage).

¹⁷*Id.*

insurance companies then under the ACA are required to cover without cost sharing these services.¹⁸ As stated in the ACA, required coverage without cost sharing applies to “evidence-based items or services that have in effect a rating of “A” or “B” in the current recommendations of the United States Preventive Services Task Force.”¹⁹ Examples of A and B recommendations issued by the U.S. Preventive Services Task Force include anxiety screening in children from ages 8 to 18, STI screening, screening for certain types of cancer, depression screening for children ages 12-18, and other recommendations.²⁰

The Recommendation of the U.S. Preventive Services Task Force

Plaintiffs brought suit in relation to the 2019 recommendation made by the U.S. Preventive Services Task Force that private insurers should cover preexposure prophylaxis (PrEP), “with effective antiretroviral therapy to persons who are at high risk of HIV acquisition.”²¹ The plaintiffs in the case also challenged the HRSA guidance from 2011 which “compel[ed] insurance companies to cover all FDA-approved contraceptive methods.”²² However, unlike the U.S. Preventive Services Task Force,²³ the Court in the previous 2022 decision of *Braidwood Mgmt. v. Becerra* found that the HRSA did not violate the Appointments Clause and also dismissed the Plaintiffs’ claim about the required contraceptive coverage violating their religious beliefs.²⁴ While in the 2022 decision the Court did allow the parties to file more briefing in relation to the required contraceptive coverage claim,²⁵ in the 2023 decision the Court dismissed the Plaintiffs’ claims in relation to the contraceptive coverage requirement.²⁶

Court Opinion

The main plaintiff in this case, Braidwood Management Inc. (“Braidwood”) objected to the coverage of contraception and PrEP on religious grounds as “a Christian for-profit corporation.”²⁷ The owner, Steven Hotze, wanted to provide health insurance to the corporation’s employees that “excludes coverage of preventive care such as contraceptives and PrEP drugs ... [and has] the option to impose copays or deductibles for preventive care.”²⁸ The other Plaintiffs in the case also rejected the preventive care requirements on religious as well as personal grounds.²⁹ One of the Plaintiffs that rejected on personal grounds said that “neither he nor his family members require such preventive care ... [and that he] and his business partners also do not want to cover preventive care for their employees.”³⁰

In the previous case, the two claims that the Court upheld were: (1) that the required coverage of PrEP violated the plaintiff Braidwood’s religious rights under RFRA; and (2) that the U.S. Preventive Services Task Force violated the Constitution and specifically the Appointments Clause.³¹ This court opinion discusses and rules on the remedy for the violation of the Appointments Clause and RFRA,

¹⁸*Id.* at *1 (N.D. Tex. Mar. 30, 2023); 42 U.S.C. §300gg-13(a) & (a)(1).

¹⁹42 U.S.C. §300gg-13(a)(1).

²⁰U.S. Preventive Services Task Force, A&B Recommendations, <https://www.uspreventiveservicestaskforce.org/uspstf/recommendation-topics/uspstf-a-and-b-recommendations> [<https://perma.cc/TJ4N-K33M>] (last visited Apr. 8, 2023).

²¹U.S. Preventive Services Task Force, A&B Recommendations, <https://www.uspreventiveservicestaskforce.org/uspstf/recommendation-topics/uspstf-a-and-b-recommendations> [<https://perma.cc/DE3C-29EX>] (last visited Apr. 8, 2023); *Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *2 (N.D. Tex. Mar. 30, 2023).

²²*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *2 (N.D. Tex. Mar. 30, 2023).

²³*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2022 WL 4091215, at *20 (N.D. Tex. Sept. 7, 2022).

²⁴*Id.* at *3.

²⁵*Id.* at *20.

²⁶*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *14 (N.D. Tex. Mar. 30, 2023).

²⁷*Id.* at *3.

²⁸*Id.*

²⁹*Id.* at *2.

³⁰*Id.* at *3.

³¹*Id.*

whether the other Plaintiffs' rights besides Braidwood are also violated under the RFRA with the required coverage of PrEP, and if those Plaintiffs have standing.³²

Standing of Other Plaintiffs

The first issue covered in the 2023 opinion was whether the other Plaintiffs excluding Braidwood, have standing to bring their claims.³³ The analysis on this issue by the Court focused on the doctrine of the “purchaser standing doctrine.”³⁴ This doctrine is defined as “recogniz[ing] Article III injury-in-fact when a plaintiff has been deprived of the opportunity to purchase a desired product due to government action.”³⁵ The main argument of the Plaintiffs under this doctrine for standing centers around the Plaintiffs having not been able to purchase health insurance that “excludes services the would-be consumers find religiously objectionable, unnecessary, or otherwise undesirable.”³⁶ The Plaintiffs objecting on religious grounds argued that the preventive care requirements violate their religious beliefs for having to purchase health insurance that covers these services.³⁷ The Plaintiffs objecting on both religious and personal grounds argued that can show “injury based on their inability to purchase insurance that excludes or impose copays or deductibles for preventive care services they do not want or need, resulting in higher monthly premiums.”³⁸

Additionally, the Plaintiffs argue that there is economic harm in not being able to purchase a different plan.³⁹ The Court ultimately found that the Plaintiffs who are against the preventive service requirements and are objecting on religious grounds have standing, but that “non-religious objector Plaintiffs Joel Miller and Gregory Scheideman have not made this showing.”⁴⁰ The reason why the Plaintiffs who were objecting on religious grounds were found to have standing was because those Plaintiffs “find those services objectionable enough to forgo health insurance altogether.”⁴¹ The Court said this objection to purchasing health insurance based on religious grounds is considered to meet the criteria of a “core feature.”⁴² Under the purchaser-standing doctrine, the feature of the product has to be a “core” criteria, rather than “ancillary.”⁴³ The Court found that since “the non-religious objector Plaintiffs may still—and indeed do—purchase conventional health insurance despite its inclusion of preventive care coverage suggests the features are merely ancillary.”⁴⁴ The Court found that the other elements of Article III standing were met as well for the Plaintiffs objecting on religious grounds.⁴⁵

The RFRA

The next issue the Court examines is whether the rights of Plaintiffs who have religious objections to the preventive care requirement to cover PrEP are violated under the RFRA.⁴⁶ The Court has already decided that Braidwood's rights were specifically violated under the RFRA, but also found in this decision

³²*Id.*

³³*Id.* at *4 (referencing *Town of Chester v. Laroe Ests., Inc.* 137 S.Ct. 1645, 1650 (2017)).

³⁴*Id.*

³⁵*Id.* (citing *Weissman v. Nat'l R.R. Passenger Corp.*, 21 F.4th 854, 857-58 (D.C. Cir. 2021); *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1077-78 (D.C. Cir. 2017); *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113-14 (D.C. Cir. 1990)).

³⁶*Id.* *4.

³⁷*Id.* at *4-5.

³⁸*Id.* at *5.

³⁹*Id.*

⁴⁰*Id.* at *8.

⁴¹*Id.* at *7.

⁴²*Id.*

⁴³*Id.* (citing *Weissman v. Nat'l R.R. Passenger Corp.*, 21 F.4th 854, 859-860 (D.C. Cir. 2021)).

⁴⁴*Id.*

⁴⁵*Id.* at *7-8.

⁴⁶*Id.* at *8.

that the other Plaintiffs' rights with religious objections were also violated under the RFRA by the preventive care requirements.⁴⁷ The RFRA states that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”⁴⁸ The Court stated that in order to show a violation of rights under the RFRA, the Plaintiffs “must show that (1) the relevant religious exercise is grounded in a sincerely held religious belief and (2) the government’s action or policy substantially burdens that exercise.”⁴⁹ However, as an exception the “Government may substantially burden a person’s exercise of religion only if demonstrates that application of the burden to the person ... (1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling governmental interest.”⁵⁰ The Court found that the Plaintiffs having to choose whether to purchase insurance that required coverage of PrEP or not purchasing health insurance at all violated the Plaintiffs religious beliefs, and that “putting individuals to this choice imposes a substantial burden on religious exercise.”⁵¹ However, the Court did not find the mandated coverage of PrEP to fit into the exception of a “compelling government interest” for the required coverage and that it “is the least restrictive means of furthering” that interest.⁵² The Court defined the compelling governmental interest as whether “the government has a compelling interest in requiring all private insurers to cover PrEP ... in every one of their insurance policies.”⁵³ The Court found that the U.S. government did not meet the burden of showing of showing the compelling interest because there were “exemptions for grandfathered plans and small businesses” in the ACA which challenged the argument of having all private insurers cover PrEP.⁵⁴ The Court also found the U.S. government did not show that the required coverage of PrEP meets the “least-restrictive-means test.”⁵⁵ Because the Court found the U.S. government did not meet the burden in showing this exception or meeting the least-restrictive means test, the Court found that the other Plaintiffs’ rights were violated as well under the RFRA,⁵⁶ in addition to the finding the RFRA violated Braidwood’s rights in the previous 2022 decision.⁵⁷

The Remedy

On the final issue of determining an appropriate remedy, the court vacated the agency action related to the “A” an “B” recommendations that were made on the date of March 23, 2010, and after, and enjoined the enforcement of the preventive care requirements under the ACA.⁵⁸ The Court vacated all agency action predominantly because “the elements necessary to justify vacatur under the APA [were] proven.”⁵⁹ Because the Court had found previously in the 2022 decision of *Braidwood Mgmt. Inc. v. Becerra* that the U.S. Preventive Services Task Force violated the Appointments Clause,⁶⁰ under the APA the Court found that those mandates could be “set aside” as they were found to be “not in

⁴⁷*Id.* at *8-9.

⁴⁸42 U.S.C. § 2000bb-1(a); *id.* at 8.

⁴⁹*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *8 (N.D. Tex. Mar. 30, 2023) (quoting *Ali v. Stephens*, 822 F.3d 776, 782-83 (5th Cir. 2016)).

⁵⁰42 U.S.C. § 2000bb-1(b)(1) & (2); *Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *8-9 (N.D. Tex. Mar. 30, 2023).

⁵¹*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *8-9 (N.D. Tex. Mar. 30, 2023) (citing *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. 682, 725-26 (2014)).

⁵²42 U.S.C. § 2000bb-1(b)(1) & (2); *id.* at *9 (N.D. Tex. Mar. 30, 2023) (citing *Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2022 WL 4091215, at *19-20 (N.D. Tex. Sept. 7, 2022).

⁵³*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *9 (N.D. Tex. Mar. 30, 2023).

⁵⁴*Id.*

⁵⁵*Id.* (citing *Hobby Lobby Stores*, 573 U.S. at 728).

⁵⁶*Id.*

⁵⁷*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2022 WL 4091215, at *19-20 (N.D. Tex. Sept. 7, 2022).

⁵⁸*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *14 (N.D. Tex. Mar. 30, 2023).

⁵⁹*Id.* at *12.

⁶⁰*Id.*; *Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2022 WL 4091215, at *10-14 (N.D. Tex. Sept. 7, 2022).

accordance with law.”⁶¹ The U.S. government proposed to sever the ACA portion which gave the U.S. Preventive Services Task Force independence, and allow the “Secretary of HHS to review and approve the Task Force recommendations”, which was part of the basis for the claim of the provision being a violation of the Appointments Clause.⁶² The Court’s first issue with the argument is that the U.S. Preventive Services Task Force “is not part of HHS or any federal agency” and because of that is not “subject to the Secretary’s ‘supervision and direction.’”⁶³ However, the Court said severance of that provision would not be appropriate as because even if there was oversight it “might permit the Secretary to authorize or reject PSTF’s recommendations post hoc but it would not compel him to take such action.”⁶⁴ Because the severance wouldn’t require action by the Secretary, and that the provision of the ACA requiring coverage of preventive services based on the PTSTF’s A and B ratings “would still operate to give PTSTF’s ratings the force and effect of law unless and until the Secretary decided to ratify or veto a particular recommendation,” the Court found that severance would not be appropriate as the remedy.⁶⁵ The Court decided the remedy was a vacatur as to agency action taken “on or after March 23, 2010” in response to the U.S. Preventive Services Task Force recommendations and to enjoin the U.S. government from enforcing the provision with the preventive care requirements mandate for private health insurers.⁶⁶

Discussion

After this decision, the Department of Justice appealed on March 31, 2023 to the Fifth Circuit.⁶⁷ They also filed a motion for a stay on April 12, 2023.⁶⁸ Also following the decision, the Department of Labor, Health and Human Services (“HHS”), the U.S. Department of the Treasury, and the Office of Personnel Management put together an FAQ document (“the FAQ document”) following the decision in *Braidwood Mgmt. v. Becerra*.⁶⁹ The FAQ document discusses *Braidwood Mgmt. v. Becerra* and its appeal, and states that “[t]he Departments disagree with the District Court’s ruling and are considering all available options in consultation with the Department of Justice.”⁷⁰ The FAQ document also mentioned plans to issue more guidance in the future on preventive care service requirements because of the decision in *Braidwood Mgmt. v. Becerra*.⁷¹ The Departments who wrote the FAQ said even though they are enjoined

⁶¹*Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *12 (N.D. Tex. Mar. 30, 2023) (quoting the APA, 5 U.S.C. § 706 & 706(2)(A)-(B)) (stating “the review court shall... hold unlawful and set aside agency action, findings, and conclusions found to be ... (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law... [and] (B) contrary to constitutional right, power, privilege, or immunity.”).

⁶²*Id.* at *13; see 42 U.S.C. §299b-4(a)(6) (stating “all members of the Task Force convened under this subsection, and any recommendations made by such members, shall be independent and, to the extent practicable, not subject to political pressure.”).

⁶³*Id.* (citing 42 U.S.C. §§202, 243, 247b).

⁶⁴*Id.*

⁶⁵*Id.* (citing 42 U.S.C. §300gg-13(a)(1)).

⁶⁶*Id.* at *14.

⁶⁷Defendants’ Notice of Appeal, *Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O (N.D. Tex. Mar. 31, 2023); see also Mary Anne Pazanowski & Courtney Rozen, *U.S. Appeals Decision Striking Free Access to Key Health Services*, BLOOMBERG L. (Mar. 31, 2023), <https://news.bloomberglaw.com/litigation/feds-appeal-decision-striking-free-access-to-key-health-services> [<https://perma.cc/F9VQ-WRLU>].

⁶⁸U.S. DEP’T OF LABOR, *FAQs about Affordable Care Act and Coronavirus Aid, Relief and Economic Security Act Implementation Part 59 2* (Apr. 13, 2023), <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-59.pdf> [<https://perma.cc/3ZCH-X8LU>].

⁶⁹U.S. DEP’T OF LABOR, *FAQs about Affordable Care Act and Coronavirus Aid, Relief and Economic Security Act Implementation Part 59 1* (Apr. 13, 2023).

⁷⁰U.S. DEP’T OF LABOR, *FAQs about Affordable Care Act and Coronavirus Aid, Relief and Economic Security Act Implementation Part 59 2* (Apr. 13, 2023).

⁷¹U.S. DEP’T OF LABOR, *FAQs about Affordable Care Act and Coronavirus Aid, Relief and Economic Security Act Implementation Part 59 2* (Apr. 13, 2023).

from enforcing the preventive care requirements for private insurers for items and services given an A or B rating by the U.S. Preventive Services Task Force on or after the date of March 23, 2010, they still “strongly encourage plans and issuers to continue to cover such items and services without cost sharing.”⁷² Prior to the *Braidwood Mgmt. v. Becerra* decision, private insurance companies were prohibited from “impos[ing] any cost sharing requirements” for items and services that the U.S. Preventive Services Task Force had given an A or B rating.⁷³ This is significant because additional required costs to pay can be a burden and expensive for many people enrolled in private health plans. A data analysis done by the *Kaiser Family Foundation* found that “45% of single-person non-elderly households could not pay over \$2,000 from current liquid assets, and 63% could not pay over 6,000” for cost sharing.⁷⁴ Additionally, “lower-income households were much less likely to have the liquid assets to meet typical cost sharing.”⁷⁵

If certain services and items that were previously covered without any cost sharing now have cost sharing following the *Braidwood Mgmt. v. Becerra* decision, already high costs for individuals enrolled in health insurance private plans could increase further. In 2021, the average out-of-pocket maximum cost for individual coverage was \$4,272.⁷⁶ In addition to costs, the percentage of people who use preventive services is also high, as “analysis suggests that 60% of participants, beneficiaries, and enrollees use a preventive service each year and have come to rely on receiving coverage without cost sharing.”⁷⁷ Additionally, another Preventive Service Task Force recommendation affected by the decision is the June 2019 recommendation which required coverage of PrEP without cost sharing.⁷⁸ At the time the recommendation came out, high costs had been a barrier to access to PrEP.⁷⁹ Other services and items that could face cost increases with cost sharing include items and services such as lung cancer screening and medications that reduce the risk of breast cancer.⁸⁰

While the FAQ document mentions how private health insurers have certain notice requirements that must be followed for changes to the health insurance plan,⁸¹ it is unknown yet whether insurance companies will change coverage or require cost sharing where they haven’t before. However, while this remains uncertain, the immediate impact of the decision is that recommendations by the U.S. Preventive

⁷²U.S. DEP’T OF LABOR, *FAQs about Affordable Care Act and Coronavirus Aid, Relief and Economic Security Act Implementation Part 59 3* (Apr. 13, 2023).

⁷³See 42 U.S.C. § 300gg-13(a)(1).

⁷⁴GREGORY YOUNG ET AL., PETERSON-KFF HEALTH SYSTEM TRACKER, *How Many People Have Enough Money to Afford Private Insurance Cost Sharing?* (Mar. 10, 2022), <https://www.healthsystemtracker.org/brief/many-households-do-not-have-enough-money-to-pay-cost-sharing-in-typical-private-health-plans/#Median%20liquid%20assets%20of%20households%20and%20maximum%20out-of-pocket%20limit%20allowed%20in%20private%20plans%20for%20in-network%20services,%20by%20household%20size,%202019> [https://perma.cc/6L77-XR34].

⁷⁵GREGORY YOUNG ET AL., PETERSON-KFF HEALTH SYSTEM TRACKER, *How Many People Have Enough Money to Afford Private Insurance Cost Sharing?* (Mar. 10, 2022).

⁷⁶GREGORY YOUNG ET AL., PETERSON-KFF HEALTH SYSTEM TRACKER, *How Many People Have Enough Money to Afford Private Insurance Cost Sharing?* (Mar. 10, 2022).

⁷⁷U.S. DEP’T OF LABOR, *FAQs about Affordable Care Act and Coronavirus Aid, Relief and Economic Security Act Implementation Part 59 3* (Apr. 13, 2023) (citing Amin, K. et al., Peterson-KFF Health System Tracker, *Preventive Services Use Among People with Private Insurance Coverage*, (Mar. 20., 2023), <https://www.healthsystemtracker.org/brief/preventive-services-use-among-people-with-private-insurance-coverage/> [https://perma.cc/W6AA-VMS5]).

⁷⁸U.S. PREVENTIVE SERVICES TASK FORCE, *Final Recommendation Statement: Prevention of Human Immunodeficiency Virus (HIV) Infection: Preexposure Prophylaxis* (June 11, 2019), <https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/prevention-of-human-immunodeficiency-virus-hiv-infection-pre-exposure-prophylaxis> [https://perma.cc/4HR9-L8X5]; 42 U.S.C. §300gg-13(a)-(b).

⁷⁹See Katie Keith, *USPSTF Recommends Access Without Cost Sharing to HIV Prevention*, HEALTH AFFS. (June 13, 2019), <https://www.healthaffairs.org/doi/10.1377/forefront.20190613.596797/full/> [https://perma.cc/2C66-7XY5].

⁸⁰See LARRY LEVITT ET AL., KFF, *Q&A: Implications of the Ruling on the ACA’s Preventive Services Requirement* (Apr. 4, 2023), <https://www.kff.org/policy-watch/qa-implications-of-the-ruling-on-the-acas-preventive-services-requirement/> [https://perma.cc/B9YK-K3PL].

⁸¹U.S. DEP’T OF LABOR, *FAQs about Affordable Care Act and Coronavirus Aid, Relief and Economic Security Act Implementation Part 59 5* (Apr. 13, 2023).

Services Task Force that were issued on or after the date of March 23, 2010, will no longer be in effect and won't be enforced.⁸² This is significant because if there starts to be a requirement of cost sharing by private insurers and as a result increased costs, this could lead to a reduction in access to healthcare services.⁸³ Additionally, previous studies have found that cost sharing even “in the range of \$1 to 5, are associated with the reduced use of care, including necessary services.”⁸⁴ While the impact of the ruling is unknown, the increase in costs could particularly have a negative effect on those with lower incomes who are enrolled in a health insurance plan through their employer but don't meet the requirements for Medicaid or a Marketplace plan.⁸⁵ Furthermore, given the importance of preventive care in reducing the risk of illness and health problems,⁸⁶ cost sharing should still not be required despite the current lack of enforceability of the recommendations made on or after the date of March 23, 2010 of the preventive care requirements for private health insurers.⁸⁷

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⁸²Braidwood Mgmt. Inc. v. Becerra, No. 4:20-CV-00283-O, 2023 WL 2703229, at *14 (N.D. Tex. Mar. 30, 2023).

⁸³See Kim Keck, *How to Save Three-quarters of a Trillion Dollars in Healthcare Costs*, STAT (Feb. 24, 2023), <https://www.statnews.com/2023/02/14/save-767billion-in-health-care-costs/> [<https://perma.cc/UA5C-BDEW>] (stating that “the reason for the affordability crisis is clear... rising costs result in higher premiums and out-of-pocket costs. According to the Health Care Cost Institute, health prices increased at roughly double the rate of general inflation between 2016 and 2020.”); see also Shameek Rakshit et al., *How Does Cost affect Access to Healthcare?*, PETERSON-KFF HEALTH SYSTEM TRACKER (Jan. 30, 2023), [https://www.healthsystemtracker.org/chart-collection/cost-affect-access-care/#Percent%20of%20adults%20\(age%2018%20years%20and%20older\)%20who%20reported%20delaying%20or%20going%20without%20medical%20care%20due%20to%20costs,%202021](https://www.healthsystemtracker.org/chart-collection/cost-affect-access-care/#Percent%20of%20adults%20(age%2018%20years%20and%20older)%20who%20reported%20delaying%20or%20going%20without%20medical%20care%20due%20to%20costs,%202021) [<https://perma.cc/BB6K-UZKH>] (stating “in the 2021 NHIS, 1 in 11 adults reported delaying or not getting medical care due to cost reasons.”).

⁸⁴Samantha Artiga, *The Effects of Premiums and Cost Sharing on Low-Income Populations; Updated Review of Research Findings*; KFF (Jun. 1, 2017), <https://www.kff.org/medicaid/issue-brief/the-effects-of-premiums-and-cost-sharing-on-low-income-populations-updated-review-of-research-findings/> [<https://perma.cc/U99W-YFGT>].

⁸⁵Gregory Young et al., *How Many People Have Enough Money to Afford Private Insurance Cost Sharing?*, PETERSON-KFF HEALTH SYSTEM TRACKER, (Mar. 10, 2022), <https://www.healthsystemtracker.org/brief/many-households-do-not-have-enough-money-to-pay-cost-sharing-in-typical-private-health-plans/#Median%20liquid%20assets%20of%20households%20and%20maximum%20out-of-pocket%20limit%20allowed%20in%20private%20plans%20for%20in-network%20services,%20by%20household%20size,%202019> [<https://perma.cc/389Q-NYYQ>].

⁸⁶See U.S. DEP'T OF HEALTH & HUM. SERVS., *Preventive Care*, <https://health.gov/healthypeople/objectives-and-data/browse-objectives/preventive-care#:~:text=Getting%20preventive%20care%20reduces%20the,recommended%20preventive%20health%20care%20services.&text=Healthy%20People%202030%20focuses%20on,for%20people%20of%20all%20ages> [<https://perma.cc/HM9Y-3MKS>] (last visited May 2, 2023); see Faith Crittenden & Calvin Fang, *Preventive Medicine*, YALE J. BIOLOGY & MED. 1, 1-3 (2021).

⁸⁷See *supra* discussion Part III; Braidwood Mgmt. Inc. v. Becerra, No. 4:20-CV-00283-O, 2023 WL 2703229, at *14 (N.D. Tex. Mar. 30, 2023).

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