

PROTECT OUR CARE

***Kelley v. Becerra* Would End Guaranteed Free Preventive Health Care For More Than 150 Million Americans**

The Affordable Care Act guarantees access to over 100 preventive health services completely free of charge. This lifesaving care has become a bedrock of the American health care system, improving health outcomes, reducing disparities in care, and cutting consumer health care costs. In 2020 alone, more than [150 million](#) Americans used these services.

The *Kelley v. Becerra* lawsuit – initiated and driven by longtime foes of the ACA, abortion rights, marriage equality, vaccination mandates, and diversity policies – and being argued before the same Federal District Court judge whose decision invalidating the entire ACA was reversed by the Supreme Court in 2021 – would end every one of these guaranteed no-cost benefits. If successful, Americans will once again be at the mercy of insurance companies and employers, who could eliminate the benefits entirely or start charging for them, forcing patients to spend thousands of dollars a year for essential care they now get for free. Here are just some of the preventative services at risk:

- **GONE - Free, Guaranteed Vaccinations.** The ACA requires that over a dozen [vaccinations](#) for both adults and children be covered free of charge.
- **GONE - Free, Guaranteed Prenatal Screenings & Treatments.** The ACA [requires](#) pregnant women have access to free preeclampsia screenings and folic acid, to support healthy pregnancies and fight the maternal mortality crisis.
- **GONE - Free, Guaranteed Cancer & Health Screenings.** The ACA requires plans to cover [screenings](#) for a wide array of health issues, ranging from cancer and high blood pressure, to mental health and substance use.
- **GONE - Free, Guaranteed Routine Infant & Child Health Care.** Under the ACA, all newborns have access to free, universal newborn [screenings](#). As children grow, they have access to baby well visits, routine childhood vaccinations, and other essential preventative services.
- **GONE - Free, Guaranteed PrEP.** The ACA guarantees access to pre-exposure prophylaxis (PrEP), a drug that has been proven to prevent/reduce HIV transmission.
- **GONE - Free, Guaranteed Contraception.** The ACA [guarantees](#) women access to contraception without cost sharing. [63 million](#) women have free birth control because of the ACA.

And a lot more...

Who Is Behind It?

The *Kelley v. Becerra* Plaintiffs Have Repeatedly Sued To Overturn Parts Of The ACA. John Kelley, his wife, and his company, Kelley Orthodontics filed an earlier and similar class action lawsuit against the ACA's contraceptive mandate known as [DeOtte v. Azar](#). Another plaintiff, Braidwood Management, owned by [Dr. Steven Hotze](#), is also a plaintiff in *DeOtte* and in *Kelley* and has previously [brought and lost challenges](#) to other parts of the ACA. In addition to being a plaintiff in previous efforts to overturn the ACA, Hotze is a vocal advocate for multiple far-right conspiracy theories, [claiming](#) COVID-19 was an invention of the "deep state," [suggesting](#) equal rights for LGBTQ+ individuals would lead to child molestation, and [bankrolling](#) election fraud vigilantism after making false claims regarding voter fraud in the 2020 election.

The Lead Attorney For The Plaintiffs In *Kelley V. Becerra* Is One of the Key Authors SB8, Texas' Vigilante Anti-Abortion Law. The lead attorney for the plaintiffs is [Jonathan Mitchell](#), "who helped craft the Texas abortion law that was designed to evade judicial review by leaving enforcement to private citizens instead of government officials."

- **Mitchell Filed Briefs Arguing the Supreme Court should Overrule its Decisions Protecting Marriage Equality and Invalidating Antisodomy Laws.** Mitchell [filed a brief](#) in the *Dobbs* case urging the Supreme Court to overturn *Roe v. Wade*—and criticized Mississippi for suggesting that the Court could leave in place its 2015 ruling in *Obergefell v. Hodges*, holding that same-sex couples have the right to marry in all states. He said that *Obergefell* and *Lawrence v. Texas*, the 2003 ruling that invalidated all remaining state antisodomy laws, "are judicial concoctions, and there is no other source of law that can be invoked to salvage their existence." Mitchell has also [referred](#) to PrEP, a life-saving medication that prevents HIV infection as a drug that would "facilitate and encourage homosexual behavior, prostitution, sexual promiscuity, and intravenous drug use."

The Plaintiffs In *Kelley v. Becerra* Are Also Represented By The Trump-Aligned America First Legal Foundation. The [plaintiffs](#) are "represented by America First Legal Foundation, a nonprofit led by senior members of President Donald Trump's administration, including Trump senior adviser Stephen Miller." Former President Trump is slated to [deliver](#) the closing address at the America First Agenda Summit on July 26, 2022.

- **America First Legal Has Supported Suits To Overturn Vaccine Mandates And Block "Critical Race Theory."** America First Legal is involved in numerous hot button conservative legal actions. AFL has supported suits seeking to overturn [vaccine mandates](#), and [sued companies](#) that have policies to increase diversity in their workforces. The group has also filed suits alleging that pandemic aid for [minority](#)

[farmers](#) is “racist” and trying to force the Biden administration to stop allowing [immigrant children](#) into the country.

- **America First Legal Was Established By Former Trump Aide Stephen Miller “To Make Joe Biden’s Life Miserable.”** America First Legal was founded by former Trump aide and immigration hardliner [Stephen Miller](#) who was “looking to use it to make Joe Biden’s life miserable.”

The Judge Hearing *Kelley v. Becerra* Is Well-Known For His Anti-Obamacare Rulings. According to [CNN](#), U.S. District Judge Reed O’Connor is, “a Texas-based judge who has become notorious for his rulings against the Affordable Care Act under the Trump and Obama administrations.” O’Connor – an appointee of President George W. Bush and a [former advisor](#) to Sen. John Cornyn on the Senate Judiciary Committee – has issued opinions spanning over a decade that would [dismantle](#) key Obamacare provisions and now he is about to rule on *Kelley v. Becerra*.

- **Judge O’Connor Has Previously Ruled To Strike Down The Entire ACA, To Overturn Contraceptive Coverage Requirements, To Invalidate Vaccine Mandates, And To Limit LGBTQ+ Rights.** [O’Connor](#) presided over the last major Obamacare challenge to land on the Supreme Court’s doorstep. In that case, O’Connor invalidated the entire ACA – and his decision was overturned by a 7-2 majority that included four of the Supreme Court’s conservative Justices. In addition to the individual mandate case, O’Connor also sided with Obamacare challengers who took aim at the law’s non-discrimination provisions, its contraceptive coverage requirement, and at insurance provider fees imposed on states through the law. He also recently ruled against the military’s Covid-19 vaccine mandate and has in the past issued decisions against policies that expanded LGBT rights.
- **For Opponents Of The ACA, Judge O’Connor Is “Their Guy.”** Describing Judge O’Connor’s string of anti-ACA rulings, [John Cogan](#), a health law professor at University of Connecticut School of Law said, “There are plaintiffs who simply will not give up, despite years of defeats. They’ve had some successes, but years of defeats, and there’s just no lack of an appetite for continuing litigation. [...] The whole approach to challenging the ACA ... he’s their guy.”

What’s At Stake

The ACA’s guaranteed coverage requirement applies not just to Marketplace coverage – it applies to all non-grandfathered health plans offered by individual, small group, large group and self funded group plans.

Some additional background on what services would be lost:

- **Contraception.** The ACA [guarantees](#) women access to at least one type of birth control from all FDA-approved methods of contraception without cost sharing. Today, [63 million](#) women have free birth control because of the ACA. In the ACA's first year alone, women saved [\\$1.4 billion](#) on their birth control. Before the ACA's contraception benefit, women paid an average of [30-44 percent](#) of their total out-of-pocket costs towards birth control. No-cost contraception is a key way to [prevent](#) unintended pregnancies and reduce abortion rates.
- **Vaccinations.** The ACA requires that over a dozen [vaccinations](#) for both adults and children be covered without cost sharing. These vaccinations protect against a range of dangerous and preventable illnesses including polio, measles, flu, COVID, and more.
- **Screenings.** Early detection is key to successfully treating many illnesses. The ACA requires plans to cover [screenings](#) for breast, lung, cervical, and colorectal cancers, hepatitis B and C, heart disease, hypertension, osteoporosis, in addition to others. Additional screenings for mental health and substance use disorders provide holistic preventive care.
- **Prenatal Care.** The United States' maternal mortality rate is [more than double](#) that of other industrialized countries. Access to prenatal screenings and treatment is essential to lowering maternal and infant mortality across the nation. Millions of women depend on the ACA's [requirement](#) that pregnant women have access to recommended prenatal care, including no-cost preeclampsia screenings and folic acid, to support healthy pregnancies.
- **Routine Infant & Child Health Care.** The benefits of required preventive coverage for children under the ACA cannot be overstated. Many well known services are covered, such as vaccinations – the average cost to vaccinate a child up to the age of 18 was [\\$2,192](#) before the ACA mandated free coverage. Other essential services include well baby visits, and screenings for vision, hearing, autism, lead poisoning, and mental health disorders, among others.
- **HIV/AIDS Prevention.** Today in the U.S., more than one million Americans live with HIV/AIDS, with about [38,000 new infections annually](#). The ACA guarantees access to pre-exposure prophylaxis (PrEP), a drug that is proven to prevent the spread of HIV. When taken as directed, PrEP can reduce the risk of contracting HIV by [99 percent](#).

See the Complete List of preventive Services here: [Adults](#) | [Women](#) | [Children](#) | [Pregnancy](#) | [Contraception](#)

What Kelley Gets Wrong

The plaintiffs make three primary legal arguments – all are wrong.

The Plaintiffs' First Argument: The law violates the Appointments and Vesting Clauses of the Constitution because members of the United States Preventive Services Task Force (USPSTF), Advisory Committee on Immunization Practices (ACIP), and Health Resources and Services

Administration (HRSA) have not been nominated by the President or confirmed by the Senate and, according to the plaintiffs, can “unilaterally determine” the preventive care that must be covered by insurers and plans.

Why The Plaintiffs Are Wrong: Congress made a conscious decision to require coverage of preventive services – specifying bodies that utilized well-established standards to guide their decisions – and ensured each entity in question (USPSTF, ACIP, and HRSA) is overseen by federal agencies whose heads have been appointed by the President and who all report to a senior official appointed by the President and confirmed by the Senate (the Secretary of Health and Human Services [HHS]). USPSTF members are appointed by the head of the Agency for Healthcare Research and Quality, who reports to the Secretary of HHS. The HRSA Administrator reports to the Secretary of HHS. The members of ACIP are appointed by the CDC Director who reports to the Secretary of HHS. HRSA is a component of HHS.

The Plaintiffs’ Second Argument: The preventive services provision violates the nondelegation doctrine, because it delegates legislative power to the USPSTF, ACIP, and HRSA without providing an “intelligible principle” to guide their exercise of discretion.

Why The Plaintiffs Are Wrong: Congress required the coverage of evidence-based and preventive services, and it specified bodies that applied well-established standards to guide their decisions. By specifying those bodies, Congress plainly endorsed and incorporated the standards that they utilized, and those standards provide a sufficient “intelligible principle” to limit discretion and govern the recommendations and guidelines that must be covered under the ACA.

The Plaintiffs’ Third Argument: The plaintiffs claim they have religious objections to paying for one of the preventive services mandated by the ACA – PrEP, a drug essential to HIV prevention – and that requiring coverage of this medication is a violation of the Religious Freedom Restoration Act (RFRA).

Why The Plaintiffs Are Wrong: As the Department of Justice explains in its court filings, the plaintiffs have not shown that their religious beliefs are burdened because they failed to prove that the availability of PrEP medications encourages behavior inconsistent with their beliefs or that the PrEP requirement causes an increase in their cost for health insurance. In addition, preventing the spread of HIV, a potentially fatal, infectious disease, is a compelling government interest—which is a separate basis for rejecting the RFRA claim.

What Comes Next

Judge O’Connor will hear oral arguments in *Kelley v. Becerra* on July 26. He has previously [issued a decision](#) upholding the legal validity of the plaintiffs’ arguments, and therefore seems likely to side with them again in ruling the preventive services requirement unconstitutional. That

ruling would likely kick off a multi-year process where O'Connor's ruling would be appealed to the U.S. Court of Appeals for the Fifth Circuit, then potentially to the U.S. Supreme Court.

In the past, Judge O'Connor has put a hold on his ACA related rulings, until the appeals in the cases were completed. However, if O'Connor were to allow a ruling deeming the preventive services requirement unconstitutional to go into effect immediately, it would set off a massive disruption in the American health care system, with millions losing access to no cost preventive care at the end of this year or when they renew their insurance.