

PROTECT OUR CARE

***Braidwood v. Becerra* Appeal Aims To Rip Away Guaranteed Free Preventive and Reproductive Health Services From More Than 150 Million Americans**

MAGA Judges on the Fifth Circuit Court of Appeals to Decide Braidwood Case

Extremists aiming to strike down a key portion of the Affordable Care Act (ACA) that requires insurers to cover lifesaving preventive services for free are appealing their case, *Braidwood v. Becerra*, before a panel of judges at the Fifth Circuit Court of Appeals. Dissatisfied with a lower court's disastrous ruling last year that overturned a critical set of services recommended by the [U.S. Preventive Services Task Force](#) (USPSTF) after the passage of the ACA, blocked required coverage of USPSTF's future recommendations, and allowed employers to refuse to cover certain preventive services on religious grounds, they now want the appeals court to go further by eliminating even more benefits, including guaranteed free coverage of vaccines and women's preventive services like cancer screenings, prenatal care, and contraception.

Eliminating costs for these lifesaving screenings and services has [transformed](#) how preventive care is delivered, saved countless lives, improved health outcomes, reduced disparities in care, and cut consumer health care costs. A full reversal of the preventive services requirement would set off a massive disruption in the American health care system, revoking protections for hundreds of no-cost services currently available to approximately [150 million](#) Americans – [nearly half](#) of the U.S. population – like routine screenings for cancer, diabetes, mental health, and heart disease, recommended vaccinations, contraception and pregnancy-related care, and more.

The plaintiffs deliberately filed their case in a favorable jurisdiction, and sure enough: two of the three judges on the panel are Trump-appointed MAGA judges with a long record of extreme rulings based on radical, arch-conservative legal theories. These judges could strike down coverage for these essential preventive services, including removing the current stay on the lower court's ruling and putting free preventive services on the chopping block immediately. The panel heard oral arguments last week, and the case will almost certainly end up at the Supreme Court regardless of the outcome.

If the MAGA-backed plaintiffs get their way, it will put Americans at the mercy of insurance companies and employers once again, empowering them to charge high out-of-pocket costs and refuse to cover certain preventive benefits entirely. As a result, more Americans will suffer because their cancers will be detected too late or they won't receive the mental health or prenatal care they need.

Background

Last March, District Judge Reed O'Connor – the same Federal District Court judge whose decision [invalidating](#) the entire ACA was [reversed](#) by the Supreme Court in 2021 – [struck down](#) a portion of the ACA's preventive health services mandate, invalidating key, no-cost services recommended by the USPSTF after the ACA's enactment. The government immediately appealed the decision, and the Fifth Circuit [paused](#) the ruling and temporarily reinstated the requirement that insurers cover those preventive services, but the Fifth Circuit could choose to revoke the stay at any time.

The ACA's elimination of out-of-pocket costs for these lifesaving screenings and services has [transformed](#) how preventive care is delivered, saved countless lives, improved health outcomes, reduced disparities in care, and cut consumer health care costs. Guaranteed no-cost coverage of preventive services, including screenings for chronic disease, is a [key factor](#) in expanding access to these services – which together with actions to address other social and structural determinants of health – are advancing health equity.

The *Braidwood* case is driven by extremist, [longtime foes](#) of the ACA, abortion rights and reproductive freedom, marriage equality, vaccination mandates, and diversity policies – but the stakes are even higher than before. The case, which was originally decided by the same judge whose decision [invalidating](#) the entire ACA was [reversed](#) by the Supreme Court in 2021, will now be decided by two extreme Trump appointees. These radical judges could strike down coverage for these essential preventive services at any time, removing the current stay on the lower court's ruling and putting free preventive services on the chopping block for more than 150 million [Americans](#) covered through [private health insurance](#).

Here are just some of the lifesaving, no-cost benefits that could be invalidated by MAGA judges on the Fifth Circuit if the panel lifts the stay and allows the district court ruling to stand:

- **GONE - Free, Guaranteed Cancer & Health Screenings.** O'Connor's ruling struck down ACA provisions requiring insurers to cover screenings for serious health issues including [breast cancer](#), [colorectal cancer](#), [lung cancer](#), [Hepatitis C](#), and [HIV](#).
- **GONE - Free, Guaranteed Preventive Medication For Cardiovascular Disease.** O'Connor's ruling struck down ACA provisions requiring insurers to cover [drugs that can lower cholesterol](#) for certain adults at risk of developing cardiovascular disease.
- **GONE - Free, Guaranteed Substance Use Screenings.** O'Connor's ruling struck down the ACA requirements that insurers cover [screenings for unhealthy drug use](#).
- **GONE - Free, Guaranteed Preventive Treatment for Pregnancy Complications.** O'Connor's ruling struck down the ACA requirements that insurers cover medications

used to prevent [life-threatening complications in pregnancy](#) like preeclampsia as well as mental health interventions for [pregnancy-related depression](#).

- **GONE - Free, Guaranteed PrEP.** O'Connor's ruling struck down the ACA requirements that [guarantee](#) access to pre-exposure prophylaxis (PrEP), a drug proven to substantially reduce the risk of contracting HIV. PrEP has been associated with a [significant decrease](#) in the number of new HIV diagnoses.

If the Fifth Circuit agrees with the plaintiffs, they will eliminate the following additional services:

- **GONE - Free, Guaranteed Vaccinations.** The ACA requires that over a dozen [vaccinations](#), ranging from meningitis and pneumonia to flu shots, be covered free of charge for adults and children.
- **GONE - Free, Guaranteed Contraception & STI Counseling.** The ACA guarantees women access to [contraception](#) without cost sharing, screenings for [HIV](#), and counseling for [sexually transmitted infections \(STIs\)](#). Over [58 million](#) women have benefited from free access to contraceptives, saving billions of dollars in out-of-pocket spending.
- **GONE - Free, Guaranteed Pregnancy Screenings & Treatments.** The ACA [requires](#) free access to a variety of preventive services related to pregnancy, including preeclampsia screenings, [breastfeeding](#) equipment like pumps and bottles, folic acid, and screenings for perinatal [diabetes](#), in order, to support healthy pregnancies and fight the maternal mortality crisis.
- **GONE - Free, Guaranteed Routine Infant & Child Health Care.** Under the ACA, all newborns have access to free, universal newborn [screening](#) and young children. As they grow, children are required to have free access to essential health screenings, behavioral assessments, growth measurements, behavioral assessments, routine childhood vaccinations, vision and dental screenings, and other essential preventive services.
- **GONE - More Free, Guaranteed Health Screenings.** The ACA requires plans to cover screenings and counseling for a wide array of health issues, including risk factors for heart disease – the [leading cause of death](#) in the U.S. – like high [blood pressure](#), high [cholesterol](#), [diabetes](#), and [obesity](#).
- **GONE - Free, Guaranteed Mental Health & Substance Use Screenings.** Under the ACA, insurers are required to cover a wide range of preventive assessments and treatments related to mental health and substance use, including [depression](#), [anxiety](#) in adolescent and adult women, [alcohol misuse](#), [tobacco use](#), and adolescent [drug use](#).

What Happens Next

The [appeal](#) is being made before the Fifth Circuit Court of Appeals, a circuit “[where law goes to die](#)” packed with MAGA appointees and ultra-conservative judges that have [relentlessly](#) chased an [extreme agenda](#) threatening health care access. If the Fifth Circuit approves a full reversal of the preventive services requirement, it would set off a massive disruption in the American health care system putting more than 150 million Americans at risk of losing access to no-cost preventive care when their insurance renews.

Two of the three judges deciding the case, Cory Wilson and Don Willett, are extreme Trump appointees with long records of opposition to affordable health care, green-lighting abortion bans, medical misinformation campaigns, and anti-vaccine cases. Plaintiffs presented oral arguments before the MAGA judges on March 7. Regardless of the outcome, the case will almost certainly end up at the Supreme Court.

Who Is Behind It

Fifth Circuit Judge Cory Wilson Opposed the Affordable Care Act (ACA), Calling It “Perverse,” and “Illegitimate.” For over a decade, Wilson has been a staunch opponent of the ACA and its protections for hundreds of millions of Americans. He [suggested](#) the ACA was unconstitutional and [supported](#) an effort to overturn the ACA in the Supreme Court, calling the act “[perverse](#)” and “[illegitimate](#).” He also wrote a series of op-eds and statements in opposition to the ACA. In one op-ed, he [called](#) the ACA, “a massive, unworkable intrusion by the federal government into one-sixth of our economy.” Wilson has even opposed Medicaid expansion under the ACA, denouncing expanded eligibility as “[liberal-utopia-dictated healthcare](#).”

- **“Far-Right Firebrand”: Wilson Is A Former Republican Lawmaker & Trump Appointee.** Wilson has established himself as a deeply conservative jurist, with the Leadership Conference on Civil and Human Rights labeling him a “[far-right firebrand](#)” whose record shows he is more suited to serve as a Fox News commentator than federal judge.” A member of the right-wing Federalist Society since 1992, Wilson is an ex-legislator who [served](#) in the Mississippi legislature as a Republican during Trump’s presidency until 2019. He has [worked](#) on dozens of Republican political campaigns and [contributed](#) thousands of dollars to Republican candidates. Even some Republicans opposed Wilson’s placement on the circuit, with Senator Susan Collins (R-ME) [voting against](#) his nomination.
- **Wilson Has A Record of Extreme and Anti-Choice Positions.** Wilson has been heavily involved in pushing an anti-choice agenda, reducing access to health care for women seeking abortions. Just last year, he [ruled](#) in support of limiting access to abortion pills, usurping FDA authority over drug authorization protocols. Wilson [supported](#) reversing *Roe v. Wade* long before it was overturned by the Supreme Court and supported numerous state-level anti-abortion efforts – including a “[heartbeat](#)” bill banning

abortions as early as six weeks after conception, a [15-week abortion ban](#) later struck down as unconstitutional, [fetal personhood](#) legislation, and a ban on [embryonic stem cell research](#). He also [supported](#) defunding Planned Parenthood and [opposed](#) marriage equality.

Fifth Circuit Judge Don Willett Is An “Ideologically Aggressive,” “Activist Conservative” Trump Appointee. A [Federalist Society](#) member described as “[ideologically aggressive](#),” and “in the front ranks of an [activist conservative legal revolution](#),” Willett is an arch-conservative with a record of handing down radical rulings. He made it onto President Trump’s [shortlist](#) of potential Supreme Court nominees and later rewarded Trump by voting to [expand](#) the power of his presidency by allowing him to fire the head of a (formerly) independent agency without cause. Willett has also written in support of striking down numerous laws and regulations [protecting health, safety, and social welfare](#).

- **Willett Allowed Medical Misinformation To Spread Rampantly, Ruling Against the FDA’s Campaign Against Ineffective COVID-19 Treatments Like Ivermectin.** In 2020, Willett wrote the majority opinion in a [ruling](#) upholding medical misinformation about COVID-19 treatments. His ruling [targeted](#) the FDA’s campaign against the off-label use of Ivermectin – a drug approved to treat parasitic diseases in humans often used for deworming livestock – for COVID-19 infections. The FDA began sounding the alarm after seeing a rise in hospitalizations due to people self-medicating with Ivermectin. Willett wrote, “Even tweet-sized doses of personalized medical advice are beyond FDA’s statutory authority.” [Study after study](#) has subsequently confirmed that safe doses of Ivermectin are ineffective in treating COVID-19 and a study initially cited as promising evidence was [withdrawn](#) due to ethical concerns.
- **Willett Supported Suspending A COVID-19 Vaccine Mandate For Federal Employees During the Pandemic.** In February 2022, Willett [refused](#) to block a lower court injunction against a mandate that all federal executive branch agency employees be vaccinated against COVID-19. Even though the executive order laid out religious and medical exemptions to the mandate, Willett [cast the deciding vote](#) in a “shadow docket” order without giving any rationale.
- **Willett Has A Record of Anti-Choice Rulings.** Throughout Willett’s tenure, he has consistently opposed access to health care for women seeking abortions. He voted to allow an [extreme Louisiana anti-abortion law](#) to take effect, even though the Supreme Court struck down a nearly identical law in 2015, and cast a deciding vote in a ruling putting into effect a restrictive [Texas abortion ban](#). Willett also cast a key vote in a ruling that Texas and Louisiana could [completely cut off Medicaid funding](#) from Planned Parenthood clinics chosen by patients to obtain health care. In 2021, he imposed a [permanent injunction](#) blocking the Biden administration from taking *future* steps to help protect access to abortions.

The *Braidwood v. Becerra* Plaintiffs Have Repeatedly Sued To Overturn Parts Of The ACA.

Plaintiff John Kelley filed an earlier and similar class action lawsuit against the ACA's contraceptive mandate in [DeOtte v. Azar](#). Kelley, his company Kelley Orthodontics, and Joel Starnes – all plaintiffs in *Braidwood v. Becerra* – brought a similar suit again in 2020 in [Kelley v. Azar](#). Another plaintiff, Braidwood Management, owned by [Dr. Steven Hotze](#), was also a plaintiff in *DeOtte* 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 *Braidwood v. Becerra* Is One of the Key Authors of 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 Anti-Sodomy 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 anti-sodomy 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 *Braidwood 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.”

- **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 white nationalist [Stephen Miller](#) who was “looking to use it to make Joe Biden’s life miserable.” He was also the architect of the Trump administration’s harshest immigration policies and a supporter of the forced sterilizations committed by ICE in Georgia.

Why The Plaintiffs’ Legal Arguments Are Wrong

The plaintiffs make three primary legal arguments – all are wrong. The plaintiffs will likely raise these arguments as the case is appealed.

The Plaintiffs’ First Argument: Plaintiffs argue that 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 Health Experts Are Saying About The Case

- **Over 100 Public Health Experts: If Successful, Plaintiffs’ Appeal “Would Result in Serious Illness and Deaths That Otherwise Would Have Been Prevented.”** A [coalition](#) of 107 public health deans and professors—led by the American Public Health Association—urged the court not to end guaranteed preventive coverage because it “would result in serious illnesses and deaths that otherwise would have been prevented,” and, “would eliminate guaranteed cost-free access to preventive services in the other three statutory categories—immunizations; preventive treatments for infants, children, and adolescents; and preventive services for women.”
- **American Medical Association et al.: Invalidating the Preventive Health Services Mandate “Will Result In Worse Health Outcomes And Impose Higher Costs On The Health System.”** A [coalition of 20 leading medical organizations](#)—led by the American Medical Association—warned that striking no-cost coverage of preventive services would threaten public health: “[A]pproximately 233 million people are currently enrolled in health plans that must cover preventive services without cost-sharing. That means that, in addition to the preventive services for adults covered by the USPSTF recommendations...millions of people now have access to no-copay vaccinations. And women and children have access to the specific preventive care recommended for their populations, allowing these individuals to avoid acute illness, identify and obtain treatment for chronic conditions, and improve their health. These recommendations have been critical to improving public health. [...] Deterring patients from receiving these vital services will result in worse health outcomes and impose higher costs on the health system.”
- **The National Women’s Law Center: Millions of Women Who Rely on the ACA’s No-Cost-Sharing Coverage To Access Preventive Care Will Be Harmed.** The National Women’s Law Center submitted an [amicus brief](#) in support of the government, writing, “[P]roviding these services without cost-sharing has helped to remedy discrimination in women’s health care and coverage and increased overall uptake of these services, improving women’s health and economic security and reducing racial disparities in both

the use of these services and in health outcomes for populations facing multiple and intersecting forms of discrimination [...] Further, the health and well-being of the millions of women who rely on the ACA's no-cost-sharing coverage to access preventive care and who benefit from the resulting improvements to their health and economic security will be harmed."

- **American Cancer Society et al.: Reducing Insurance Coverage For Preventable Services Will Lead To Worsening Patient Outcomes, Preventable Deaths, and Higher Medical Costs.** A [coalition](#) of 16 patient advocacy organizations—led by the American Cancer Society—urged the court not to end guaranteed preventive coverage because, "Detecting severe diseases early allows for less invasive, more effective, and lower-cost treatment options, and substantially improves patient outcomes. Reducing insurance coverage for preventive services will lead to the opposite result—worsening patient outcomes, leading to preventable deaths, and creating higher long-term medical costs."
- **American Lung Association et al.: Patients Could Discontinue Life-Saving Medications Despite Health Risks if Insurers Resume Cost-Sharing on Preventive Services.** A [coalition](#) of 12 patient advocacy organizations—led by the American Lung Association—warned the court of "the demonstrated, severe public health effects of cost barriers" that invalidating guaranteed preventive coverage would "ameliorate," writing: "If insurers impose cost-sharing requirements for patients to receive these life-saving medications, research suggests that patients could discontinue use despite the health risks."