

Publications

Supreme Court to Decide Legality of ACA's Preventive Services Mandate

ATTORNEYS & PROFESSIONALS

Kalena Ketteringkkettering@groom.com

202-861-0157

Tamara Killiontkillion@groom.com

202-861-6328

PUBLISHED

01/22/2025

SOURCE

Groom Publication

SERVICES

Employers & Sponsors

- Health & Welfare Programs

Health Services

- Federal Insurance Regulation
- State Insurance Regulation

On January 10, 2025, the Supreme Court agreed to hear an appeal in *Becerra v. Braidwood Management, Inc.* (“*Braidwood*”). The case (discussed in a prior [Groom alert](#)), on appeal from the Fifth Circuit, will determine if the ACA’s provision that group health plans and health insurance issuers cover certain United States Preventive Services Task Force (“USPSTF”) recommended preventive services without cost-sharing (“USPSTF Preventive Care Requirement”) violates the Appointments Clause of the Constitution.

Background

Under the USPSTF Preventive Care Requirement, plans and issuers must cover, without cost-sharing, certain [grade A or B services](#) recommended by the USPSTF. The recommended preventive services include cancer screenings, pregnancy care, and testing for sexually transmitted diseases. In particular contention is the USPSTF grade A recommendation to cover preexposure prophylaxis (“PrEP”) to prevent HIV.

In addition to the USPSTF Preventive Care Requirement, the ACA generally requires plans and issuers to cover, without cost-sharing, immunizations for routine use recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, and certain preventive care and screenings provided for in the guidelines supported by the Health Resources and Services Administration, including FDA-approved contraceptives (together, with the USPSTF Preventive Care Requirement, the “ACA Preventive Care Requirements”).

In 2023, a Texas district court [vacated](#) the rules implementing any USPSTF Preventive Care Requirement recommended after March 23, 2010 (the effective date of the ACA), because it found the appointment of the experts who make up the USPSTF violated the Constitution. Specifically, the court held that members of the USPSTF are officers of the United States and, therefore, must be appointed in accordance with the Appointments Clause. The court concluded that, because these members were unconstitutionally appointed, their recommendations cannot have the force of law. The court also universally enjoined federal agency enforcement of this

requirement. District Court Judge Reed O'Connor, whose previous invalidation of the ACA was overturned by the Supreme Court in 2018, also vacated the mandate for the plaintiffs to cover PrEP as violating the Religious Freedom Restoration Act ("RFRA").

On June 21, 2024, the Fifth Circuit affirmed that the members of the USPSTF were not constitutionally appointed. But, the Fifth Circuit narrowed the scope of the District Court's judgment, holding that the District Court erred in vacating all agency actions to implement and enforce the USPSTF's Preventive Care Requirement and erred by enjoining enforcement of the Preventive Care Requirement nationally. Instead, the Fifth Circuit limited the remedy to the particular plaintiffs in the case in lieu of the national injunction.

Supreme Court Grant of Certiorari

The Department of Justice appealed the case to the Supreme Court to answer whether (1) the USPSTF members are "inferior officers" of the United States, and therefore, their appointments are constitutional and (2) the District Court erred when it failed to sever the allegedly unconstitutional provision. Plaintiffs in *Braidwood* actually supported the petition for certiorari and cross-petitioned for certiorari, asking the Supreme Court to consider whether all of the ACA Preventive Care Requirements violated the non-delegation canon. Thus, under the cross-petition, all the ACA Preventive Care Requirements could be at risk, not simply the USPSTF Preventive Care Requirement recommended after March 23, 2010.

On January 10, 2025, the Supreme Court granted the Department of Justice's certiorari request, agreeing to consider whether the structure of the USPSTF is unconstitutional and whether any defective provision should have been severed. Three days later, the Supreme Court denied certiorari on the cross-petition, so the Supreme Court will not be considering whether the structure of the ACA Preventive Care Requirements more generally (*i.e.*, by referencing the USPSTF recommendations and by referencing recommendations from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, and screenings and guidelines supported by the Health Resources and Services Administration) violates the Constitution.

Impacts on Plans and Issuers

For group health plans and health insurance issuers, the challenge to the appointment of the USPSTF members has raised questions about what, if any, preventive services must be covered without cost-sharing. The Fifth Circuit's decision limited the immediate effect of the challenge to the parties to the lawsuit, so currently, group health plans and issuers outside of the Fifth Circuit should be following all applicable preventive services rules and guidance. We do not know how the Supreme Court will rule, but at least one possibility is that the Supreme Court will conclude that the USPSTF members are officers of the United States, were not properly appointed, and therefore, any updates to the USPSTF recommendations after March 10, 2010 do not have the force of law. But, the recommendations pre-March 10, 2010 continue in effect, because Congress adopted them in the statutory text.

In that case, can plans and issuers simply immediately stop offering the updated preventive services without cost-sharing? Likely not. For insured plans, those policies have been filed with their applicable states, and the policy provides the terms under which preventive services must be covered. Those contractual terms likely cannot be unilaterally and immediately changed, though depending on the state and the contractual language, it is possible that some changes to benefits mid-year may be possible. At the same time, states have their own mandates, and some states may have adopted preventive services as a state law requirement.

For self-funded group health plans, materially changing benefits—such as eliminating coverage without cost-sharing for certain benefits—may require advance notice to participants. Self-funded plans may also wish to consider the popularity of these benefits and weigh the possible employee abrasion of eliminating any of the updated recommendations. Both plans and issuers could balance the effectiveness of early intervention (and possible cost-savings in the future) with immediate costs of waiving cost-sharing for these services.

In sum, although the Supreme Court is considering the application of the Appointments Clause – a Constitutional provision that may seem removed from group health plans and health insurers – the Court's decision on the constitutionality of the appointment of the USPSTF could impact every group health plan and health insurance issuer's coverage of preventive care in the United States.