

# The Legal Challenge to the Federal Preventive Services Protection: Overview and Implications for States

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# The Federal Preventive Services Protection

- Requires coverage of a range of preventive services without cost-sharing
- **Applies to most kinds of private health coverage**
  - ERISA-regulated group health plans
  - Fully insured individual and group market coverage
- **Plans must cover:**
  - Items and services with an “A” or “B” rating from the U.S. Preventive Services Task Force (USPSTF)
  - Immunizations recommended by the Advisory Committee on Immunization Practices (ACIP)
  - Preventive care and screenings for infants, children, and adolescents, as specified in guidelines supported by the Health Resources and Services Administration (HRSA)
  - Preventive care and screenings for women, as specified in HRSA guidelines



# ***Braidwood Management:***

## **Legal Issues**

- **Primarily a federal constitutional challenge**
  - There is also a more narrow claim under federal law (RFRA)
  - Case is not about and does not implicate state authority to regulate insurance
- **Appointments Clause**
- **Nondelegation Doctrine**



# ***Braidwood Management:***

## **Status of the Case**

- **District court issued merits decision in September 2022**
  - Agreed with challengers:
    - Appointments Clause violation (as to USPSTF recommendations)
    - RFRA violation (as to PrEP)
  - Rejected Nondelegation claim based on Fifth Circuit precedent
- **Court has not yet ruled on what the remedy should be.**
  - That question is now fully briefed and a decision could come any time.
- **The case will be appealed to the Fifth Circuit and may eventually wind up in the Supreme Court.**



# ***Braidwood Management:***

## **Potential Impact on Patients**

- **District court's opinion applies to more than 50 preventive services**
  - For example: screenings for a range of cancers, for depression, for high blood pressure; preeclampsia screening and folic acid for pregnant women; interventions to address obesity; smoking cessation
- **On appeal, all legal issues remain on the table. Significant litigation risk re: coverage requirement for all (100+) preventive services.**
- **Affects access to care for about 152 million Americans**



# Braidwood Management: Potential Impact on Patients

Individuals with Private Coverage Subject to the  
Federal Preventive Services Protection (2020)

	Children (<19)	Women (19-64)	Men (19-64)	Total		Children (<19)	Women (19-64)	Men (19-64)	Total
<b>Alaska</b>	60,000	95,000	91,000	246,000	<b>Minnesota</b>	817,000	1.15m	1.14m	3.1m
<b>Arkansas</b>	274,000	480,000	460,000	1.21m	<b>Mississippi</b>	294,000	513,000	445,000	1.25m
<b>Georgia</b>	1.08m	1.87m	1.71m	4.66m	<b>New York</b>	2.07m	3.45m	3.07m	8.59m
<b>Illinois</b>	1.66m	2.43m	2.43m	6.52m	<b>North Dakota</b>	114,000	141,000	156,000	411,000
<b>Indiana</b>	946,000	1.24m	1.22m	3.41m	<b>Ohio</b>	1.3m	1.98m	1.95m	5.24m
<b>Kentucky</b>	414,000	712,000	713,000	1.84m	<b>Rhode Island</b>	127,000	206,000	191,000	524,000
<b>Louisiana</b>	417,000	663,000	644,000	1.72m	<b>Utah</b>	617,000	620,000	591,000	1.83m
<b>Michigan</b>	1.2m	1.76m	1.7m	4.66m	<b>Texas</b>	3.47m	4.88m	4.58m	12.94m



# What Can States Do?

- **Review existing state coverage protections**
  - While discrete requirements are relatively common in state law, there are gaps in the services that must be covered
  - These laws usually do not protect enrollees from cost-sharing



# What Can States Do?

- **Require individual and group market carriers to cover, *without cost-sharing*, the same categories of preventive services**
  - State law can be modeled on the federal provision
  - ~15 states do this for their individual markets (some for group, too)



# Thank you

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