No. 24-316

In the Supreme Court of the United States

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

BRAIDWOOD MANAGEMENT, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, PUBLIC HEALTH DEANS AND SCHOLARS, THE ROBERT WOOD JOHNSON FOUNDATION, AND PUBLIC HEALTH ADVOCATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The American Public Health Association (APHA), founded in 1872, is the leading professional organization for public health professionals in the United States. APHA shares the latest research and information, promotes best practices, and advocates for public health issues and policies grounded in scientific research. APHA represents more than 24,000 individual members and is the only organization that combines a 150-year perspective, a broad-based member community, and a focus on influencing federal policy to improve the public's health.

The individual *amici* are 120 distinguished deans and professors of public health and of health law and policy with deep expertise in policies that promote population health and alleviate barriers to care. They are identified in the Appendix.

The Robert Wood Johnson Foundation (RWJF) is a leading national philanthropy dedicated to taking bold leaps to transform health in our lifetime. A core feature of RWJF's philanthropic approach is funding research to identify evidence-based methods of improving health outcomes for all. As part of those efforts, RWJF has supported research demonstrating the benefits of comprehensive coverage for no-cost preventive health services.

Trust for America's Health (TFAH) is a nonpartisan, nonprofit organization focused on public health

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief.

research and policy. TFAH is committed to promoting optimal health for every person and community and making health equity foundational to policymaking at all levels. The organization's work is focused on the antecedents of poor health and on policies and programs to advance an evidence-based public health system that is ready to meet the challenges of the 21st century. TFAH develops reports and other resources and initiatives to educate the public and recommends policies to promote health and wellbeing and to make the prevention of illness and injury a national priority.

ChangeLab Solutions is an interdisciplinary team of lawyers, planners, policy analysts, public health practitioners, and other professionals who work across the nation to advance equitable laws and policies that ensure healthy lives for all. With more than two decades of experience in enacting policy, systems, and environmental changes at local and state levels, ChangeLab Solutions focuses on eliminating health disparities by addressing the social determinants of health. It envisions healthy, equitable communities where every person is economically secure and can attain their full health potential.

APHA has a strong interest in ensuring the continued availability of cost-free coverage for preventive healthcare, given its mission to promote public health through evidence-based policies. The individual *amici*, RWJF, TFAH, and ChangeLab Solutions all share that interest. *Amici* file this brief to explain the importance of the cost-free preventive services requirements and the significant harm to public health that will result if those requirements are invalidated.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals' decision effectively invalidates a critically important provision of the Affordable Care Act (ACA) that ensures more than 150 million Americans' access to essential life-saving tests and treatments. *Amici* submit this brief to explain that, if the ruling is permitted to stand, deadly diseases will not be detected and important treatments will be unavailable—resulting in serious illnesses, chronic medical conditions, and deaths that otherwise would have been prevented.

Prior to enactment of the ACA, a significant number of health insurance plans failed to cover preventive tests and other medical services for the detection and prevention of major diseases. Plans that did provide coverage often required patients to pay a share of the cost—out of pocket and at the time of service—which deterred many patients from obtaining these life-saving services.

To protect Americans' health, the ACA requires private insurance plans to cover, cost-free, four essential categories of preventive services. This requirement extends beyond ACA marketplace health insurance plans and includes virtually all employer-sponsored health insurance and other private insurance.

One of those preventive services categories is "evidence-based items or services" with an A or B recommendation from the U.S Preventive Services Task Force (USPSTF). See 42 U.S.C. § 300gg-13(a)(1). The USPSTF is a panel of experts that rigorously evaluates peer-reviewed scientific evidence and recommends especially valuable preventive services. See Pet. 3-5.

These services save, and dramatically improve, Americans' lives by identifying and addressing health risks early, so they can be treated more effectively—by preventing diseases from occurring at all and by protecting all Americans against the risk of transmission of communicable diseases. They are critical to reducing the incidence and severity of numerous diseases and life-threatening conditions, and are especially important to maternal and child health. The ACA's requirement of cost-free coverage has dramatically increased use of these vital services by all Americans.

The court of appeals' decision threatens this requirement for dozens of life-saving services recommended by the USPSTF—every preventive service given an A or B recommendation after the enactment of the ACA in 2010. Without the ACA's requirement, some companies and insurers will re-impose cost-sharing. Some may eliminate coverage completely.

Without cost-free coverage, many Americans will not use these services: studies consistently demonstrate that when people are required to pay part of the cost of preventive care, they often do not obtain it. That leads to more serious illnesses and even deaths among the individuals deprived of coverage. It also affects Americans more broadly, because many of the covered services prevent and treat illnesses that, if not detected and treated, can be spread among the population generally.

This brief discusses the particular preventive services affected, and the adverse public health consequences of the elimination of the cost-free coverage guarantee for those services.

The Court should grant review and reverse—and thereby preserve these critical benefits for more than 150 million Americans.

ARGUMENT

THE COURT OF APPEALS' RULING WILL CAUSE AMERICANS TO SUFFER PREVENTABLE ILLNESS AND EVEN DEATH.

Congress determined that to promote the public health—and prevent Americans from suffering from serious diseases, including diseases that can lead to death—it is necessary to remove barriers to Americans' use of preventive health services. Congress therefore included in the ACA provisions mandating that insurers cover many of those services cost-free. See 42 U.S.C. § 300gg-13(a).

The certiorari petition explains why Congress's reliance on the expertise of the USPSTF to identify one category of preventive services warranting cost-free coverage does not violate the Appointments Clause; and that if the Court concludes otherwise, any violation can be remedied by severing and invalidating the statutory provision that could limit secretarial authority. Pet. 13-27.

Amici write separately to explain the serious harm to Americans' health that will be the inevitable consequence of eliminating the preventive services requirement for all of the services rated A or B by USPSTF since 2010.

A. The court of appeals' decision jeopardizes guaranteed cost-free coverage for life-saving services.

The holding below jeopardizes guaranteed cost-free coverage for at least two dozen services with

USPSTF A or B recommendations published or updated after 2010. These life-saving services include:

- Lung cancer screening for high-risk persons:[2] Lung cancer is the second most common cancer and the leading cause of cancer death in the United States.[3] Studies demonstrate that this cancer is significantly more treatable when detected early,[4] which is why the USPSTF recommended screenings in 2013 and expanded that recommendation to apply to more persons in 2021.[5]
- Colorectal cancer screening for adults 45-49:[6] Colorectal cancer is the Nation's third leading cause of death from cancer, and its incidence has increased for adults 40-49 years old.[7] Colorectal cancer screening is especially beneficial because it involves removing precancerous growths.[8] Screening not only detects

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[2] U.S. Preventive Servs. Taskforce, *Screening for Lung Cancer: US Preventive Services Task Force Recommendation Statement*, 325 J. Am. Med. Ass'n 962 (2021), https://bit.ly/3n32Etg (*Screening for Lung Cancer*).

[3] Am. Cancer Soc'y, *Key Statistics for Lung Cancer* (Jan. 29, 2024), https://bit.ly/3oEF1Yo.

[4] *Screening for Lung Cancer* at 962.

[5] *Id.* at 965.

[6] U.S. Preventive Servs. Taskforce, *Screening for Colorectal Cancer: US Preventive Services Task Force Recommendation Statement*, 325 J. Am. Med. Ass'n 1965 (2021), https://bit.ly/3oy6oDA.

[7] *Id*. at 1965.

[8] Assistant Sec'y for Planning & Evaluation, U.S. Dep't of Health and Human Servs., *Access to Preventive Services Without Cost-*

cancer early, but keeps it from developing in the first place. The USPSTF's 2021 recommendation provides this benefit to 15-17.5 million additional people, by expanding to include adults 45-49 years old.[9]

- Statins to Prevent Cardiovascular Disease:[10] Cardiovascular disease is the leading cause of death in the United States.[11] For those at increased risk, statins effectively reduce both cardiovascular-disease events and mortality.[12] The USPTSF therefore recommended statins for at-risk adults 40-75 years old in 2016 and 2022, enabling cost-free access to this potentially life-saving drug.[13]
- Medication to Reduce Risk of Breast Cancer:[14] Breast cancer is the second leading cause of cancer death; and an estimated one in eight women will develop breast cancer at some point in their lifetime.[15] In 2018, an estimated

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Sharing: Evidence from the Affordable Care Act 8 (Jan. 11, 2022), https://bit.ly/41rGtfm (*Access to Preventive Services*).

[9] *Ibid.*

[10] U.S. Preventive Servs. Taskforce, *Statin Use for the Primary Prevention of Cardiovascular Disease in Adults: US Preventive Services Task Force Recommendation Statement*, 328 J. Am. Med. Ass'n 746 (2022), https://bit.ly/3N56mgW.

[11] *Id.* at 746.

[12] *Id.* at 748 tbl.

[13] *Id.* at 747, 750.

[14] U.S. Preventive Servs. Taskforce, *Medication Use to Reduce Risk of Breast Cancer*, 322 J. Am. Med. Ass'n 857 (2019), https://jamanetwork.com/journals/jama/fullarticle/2749221.

[15] *Id.* at 862.

266,120 new cases of breast cancer were diagnosed in women in the United States, and an estimated 40,920 women died of breast cancer—14% of all cancer deaths in women.[16] Multiple techniques exist for determining whether women over 35 face an increased risk of developing breast cancer.[17] Medications—such as tamoxifen, raloxifene, or aromatase inhibitors—can reduce that risk of developing cancer by approximately 40%.[18] The USPSTF recommendation covers the cost of the risk assessment and, if an increased risk is found, the cost of the risk-reducing medications.[19]

- Prediabetes and Type 2 Diabetes Screening:[20] Diabetes is the leading cause of kidney failure and of new cases of blindness among adults in the United States; is associated with increased risks of cardiovascular disease and liver disease; and was estimated to be the seventh leading cause of death in the United States in 2017.[21] Significant percentages of people with diabetes are not aware that they

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[16] *Ibid*.

[17] *Id*. at 860-61.

[18] American Cancer Society, *Tamoxifen and Raloxifene for Lowering Breast Cancer Risk* (Dec. 16, 2021), https://www.cancer.org/cancer/types/breast-cancer/risk-and-prevention/tamoxifen-and-raloxifene-for-breast-cancer-prevention.html.

[19] *Medication Use to Reduce Risk of Breast Cancer*, 322 J. Am. Med. Ass'n at 861-62.

[20] U.S. Preventive Servs. Taskforce, *Screening for Prediabetes and Type 2 Diabetes*, 326 J. Am. Med. Ass'n 736 (2021), https://jamanetwork.com/journals/jama/fullarticle/2783414.

[21] *Id*. at 736.

have the condition.[22] Providing treatment to individuals found to have diabetes reduces mortality; and providing preventive interventions to those found to be prediabetic reduces progression to diabetes and can address the risk of cardiovascular disease associated with prediabetes. The USPSTF-recommended screening of those with the greatest risk—all adults aged 35-70 who are overweight or obese—thus provides important health benefits.[23] And the current recommendation is a significant expansion from the recommendation at the time the ACA was enacted, which was limited to adults with high blood pressure, and provided screening only for type 2 diabetes, not for prediabetes.[24]

- Screening for Hepatitis B Infection in Adults:[25] 862,000 Americans are estimated to be living with chronic infection of the hepatitis B virus.[26] For 15-40% of these individuals, chronic infection will develop into cirrhosis, liver cancer, or liver failure, which can be

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[22] *Ibid.* ("[o]f persons with diabetes, 21.4% were not aware of or did not report having diabetes, and only 15.3% of persons with prediabetes reported being told by a health professional that they had this condition").

[23] *Id*. at 737-738.

[24] *Id*. at 739.

[25] U.S. Preventive Servs. Taskforce, *Screening for Hepatitis B Virus Infection in Adolescents and Adults: US Preventive Services Task Force Recommendation Statement*, 324 J. Am. Med. Ass'n 2415 (2020), https://bit.ly/3H4Zj3W.

[26] *Id.* at 2415.

deadly.[27] Crucially, it is estimated that 68% of people with chronic hepatitis B are not aware of their infection, and may not have symptoms until the onset of serious illness—this not only results in delayed treatment, but also increases the likelihood of unknowing transmission to others.[28] Screening of at-risk individuals, as recommended by the USPSTF in 2014 and 2020, addresses these problems.[29]

- Screening for Hepatitis C Infection in Adults:[30] As of March 2020, Hepatitis C virus was "associated with more deaths [in the United States] than the top 60 other reportable infectious diseases *combined*."[31] An estimated 4.1 million Americans have past or current Hepatitis C infection.[32] Nearly half of those with hepatitis C are unaware of their infection status, and approximately 75%–85% of people with hepatitis C do not have symptoms—which makes screening all the more important.[33] Early screening and treatment

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[27] *Ibid.*

[28] *Ibid.*

[29] *Id.* at 2416.

[30] U.S. Preventive Servs. Taskforce, *Screening for Hepatitis C Virus Infection in Adolescents and Adults: US Preventive Services Task Force Recommendation Statement*, 323 J. Am. Med. Ass'n 970 (2020), https://bit.ly/3KVwmIN (*Screening for Hepatitis C*).

[31] *Id.* at 970 (emphasis added).

[32] *Ibid.*

[33] Centers for Disease Control and Prevention, *Clinical Screening and Diagnosis for Hepatitis C* (Dec. 19, 2023), https://www.cdc.gov/hepatitis-c/hcp/diagnosis-testing/index.html.

can prevent serious complications like liver scarring, liver cancer, and death; and there are now treatments available that are curative for most people.[34]

- The USPSTF recommended screening in 2013 and then greatly broadened the scope of the recommendation to adults 18-79 years old, concluding that early detection and treatment leads to significantly improved health outcomes.[35]

- Preexposure Prophylaxis (PrEP) to Prevent HIV:[36] An estimated 1.2 million Americans are living with HIV.[37] By preventing HIV acquisition among those who are HIV-negative, PrEP protects the health of those who use the service and reduces further HIV transmission in the community.[38] One study found that if the number of individuals using PrEP increased by 25%, new HIV cases would decrease by 54%.[39] Conversely, a recent study suggests that there will be 1140 additional

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[34] *Ibid*.

[35] *Screening for Hepatitis C,* 323 J. Am. Med. Ass'n at 972.

[36] U.S. Preventive Servs. Taskforce, *Preexposure Prophylaxis to Prevent Acquisition of HIV: US Preventive Services Task Force Recommendation Statement*, 330 J. Am. Med. Ass'n 736 (2023), https://bit.ly/3UUF5Q7.

[37] *Id.* at 736.

[38] *Id.* at 741.

[39] Ruchita Balasubramanian et al., *Projected Impact of Expanded Long-Acting Injectable PrEP Use Among Men Who Have Sex With Men on Local HIV Epidemics*, 91 J. of Acquired Immune Deficiency Syndrome 144, 146 (2022), https://bit.ly/3H7bz3L.

HIV transmissions among men who have sex with men for every 10% reduction in PrEP coverage caused by the court of appeals' ruling.[40]

- Aspirin Use to Prevent Preeclampsia:[41] Preeclampsia is "one of the most serious health problems that affect pregnant persons."[42] It is a leading cause of maternal death in the United States,[43] and can also lead to preterm births.[44] Daily low-dose use of aspirin—recommended by the USPSTF in 2021—reduces the risk of preeclampsia, preterm birth, and maternal mortality, thus protecting both maternal and infant health.[45]

These are only a few of the services for which the court of appeals' analysis would eliminate guaranteed cost-free coverage. Others include expanded screening for genetic mutations that increase women's risk of

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[40] A. David Paltiel et al., *Increased HIV Transmissions With Reduced Insurance Coverage for HIV Preexposure Prophylaxis: Potential Consequences of* Braidwood Management v. Becerra, 10 Open Forum Infectious Diseases 1, 1 (2023), https://bit.ly/3H4nM9t.

[41] U.S. Preventive Servs. Taskforce, *Aspirin Use to Prevent Preeclampsia and Related Morbidity and Mortality: US Preventive Services Task Force Recommendation Statement*, 326 J. Am. Med. Ass'n 1186 (2021), https://bit.ly/3oD9oig (*Aspirin Use to Prevent Preeclampsia*).

[42] *Id.* at 1186.

[43] Sarosh Rana et al., *Preeclampsia: Pathophysiology, Challenges, and Perspectives*, 124 Circulation Res. 1094, 1094 (2019), https://bit.ly/3H4DVeV.

[44] *Aspirin Use to Prevent Preeclampsia* at 1186.

[45] *Id.* at 1187.

breast cancer by 45-65% by age 70;[46] and exercise interventions for at-risk adults 65 and older to prevent falls, which are the leading cause of injury-related morbidity and mortality among older American adults.[47]

Saving lives and preventing illness are the most important benefits of cost-free coverage for these services, which not only promote the health of the insured but in many cases also protect third parties and the broader population from further transmission of disease. In addition, the services also reduce healthcare costs.[48] Illnesses that are prevented need not be treated at all, saving significant health costs. As one Senator explained, preventing patients from developing colon cancer through a screening that costs "a couple hundred dollars" is much more cost-effective than spending "tens of thousands of dollars" having to treat it.[49]

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[46] U.S. Preventive Servs. Taskforce, *Risk Assessment, Genetic Counseling, and Genetic Testing for* BRCA-*Related Cancer: US Preventive Services Task Force Recommendation Statement*, 322 J. Am. Med. Ass'n 652, 653 (2019), https://bit.ly/3mUZ44C.

[47] U.S. Preventive Servs. Taskforce, *Interventions to Prevent Falls in Community-Dwelling Older Adults: US Preventive Services Task Force Recommendation Statement*, 319 J. Am. Med. Ass'n 1696, 1696 (2018), https://jamanetwork.com/journals/jama/fullarticle/2678104.

[48] Kaiser Family Foundation, *Preventive Services Covered by Private Health Plans Under the ACA* 1 (Aug. 2015), https://bit.ly/3oBU98W.

[49] 155 Cong. Rec. 32890 (2009) (statement of Sen. Cardin).

B. The ACA's requirement of cost-free coverage has significantly increased Americans' use of these critical services.

The Department of Health and Human Services (HHS) estimates that 151.6 million people, as of January 2020, were enrolled in private health insurance plans subject to the ACA's preventive services requirement.[50] By eliminating cost-sharing, the ACA has increased access to and utilization of preventive services. Indeed, approximately 100 million Americans used the free preventive services guaranteed by the ACA in 2018.[51] The number is likely even higher today: the number of Americans with private health insurance coverage has increased since then, and therefore the use of preventive services surely has increased as well.[52]

There can be no doubt that eliminating cost-sharing has increased Americans' use of preventive services. An extensive review of 35 academic studies found that eliminating cost-sharing "led to increases in utilization" of preventive services since the ACA

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[50] *Access to Preventive Services* at 3, 5.

[51] Krutika Amin et al., *Preventive Services Use Among People With Private Insurance Coverage* (Mar. 20, 2023), https://bit.ly/3oxjfWO.

[52] Nat'l Ctr. for Health Statistics, Ctrs. for Disease Control & Prevention, *Interactive Summary Health Statistics for Adults – 2019-2023* (last visited Oct. 15, 2024), https://bit.ly/3LoZf1j (selecting topic "Private health insurance at time of interview: Adults aged 18-64") (showing 1.4% rise in percentage of adults with private health insurance from 2019 to 2023). Based on estimated population distribution by age, that increase corresponds to over 4 million additional individuals with private health insurance. *See* Kaiser Family Foundation, *Population Distribution by Age* (last visited Apr. 27, 2023), https://bit.ly/3HkyDfu.

was enacted, including "substantial increases" among the financially vulnerable.[53] One study, for example, found increased use of a variety of preventive services at community health centers across 14 states.[54]

This increase is a direct result of the elimination of cost-sharing. Multiple studies demonstrate that "the presence of cost-sharing, even if the amount is relatively modest, deters patients from receiving care."[55]

One study, for example, found that patient cost-sharing produced a 9-10% decline in use of mammograms and 8-10% decline in use of pap smears.[56] Indeed, prior to the ACA, 9% of insured men and 13% of

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[53] Hope C. Norris et al., *Utilization Impact of Cost-Sharing Elimination for Preventive Care Services: A Rapid Review*, 79 Med. Care Res. & Rev. 175, 192, 194 (2022); *see also Access to Preventive Services* at 10; Xuesong Han et al., *Has Recommended Preventive Service Use Increased After Elimination of Cost-Sharing As Part of the Affordable Care Act in the United States?*, 78 Prev. Med. 85 (2015), https://bit.ly/41sg8ht.

[54] Brigit Hatch et al., *Impacts of the Affordable Care Act on Receipt of Women's Preventive Services in Community Health Centers in Medicaid Expansion and Nonexpansion States*, 31 Women's Health Issues 9, 15 (2021), https://bit.ly/43UD1vp.

[55] Norris, *supra* n.53, at 175; see also Han, *supra* n.53, at 85 (collecting studies); Amal N. Trivedi et al., *Effect of Cost-Sharing on Screening Mammography in Medicare Health Plans*, 358 N. England J. Med. 375, 375 (2008), https://bit.ly/3Amo6fU (noting that even "[r]elatively small copayments" have been found to be associated with decreased use of effective preventive care); Robert H. Brook et al., *The Health Insurance Experiment: A Classic RAND Study Speaks to the Current Healthcare Reform Debate* (2006), https://bit.ly/3H3byhn.

[56] Geetesh Solanki & Helen Halpin Schauffler, *Cost-sharing and the Utilization of Clinical Preventive Services*, 17 Am. J. Preventive Med. 127 (1999), https://bit.ly/3NmKFcn.

insured women—and 31% of low-income men and 35% of low-income women—reported postponing preventive services because of cost.[57] And a survey of 2,199 Americans conducted after the district court's ruling found that 40% of respondents would not utilize most preventive services without cost-free coverage.[58] One study found that 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."[59]

These results are unsurprising, given that cost generally is a major barrier to healthcare access. In 2022, 28% of American adults, including 26% of insured adults, went without medical care because they could not afford it.[60] Moreover, since preventive services "do not address acute health problems," people may be more likely to "skip such care" in particular.[61]

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[57] Kaiser Family Foundation, *supra* n.48, at 1.

[58] Jay Asser, *Patients Likely to Skip Preventive Care if ACA Ruling Holds*, Healthleaders (Mar. 17, 2023), https://bit.ly/3AiiP94. For example, 46% of respondents said they would not pay for prediabetes screening and 42% would not pay for cardiovascular preventive services. Morning Consult, *National Tracking Poll #2301147 January 28-29, 2023*, at 94, 110, https://assets.morningconsult.com/wp-uploads/2023/03/06150931/2301147_crosstabs_MC_HEALTH_ACA_COURT_CASE_Adults.pdf.

[59] Samantha Artiga et al., *The Effects of Premiums and Cost Sharing on Low-Income Populations; Updated Review of Research Findings* (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/.

[60] Board of Governors of the Federal Reserve System, *Economic Well-Being of U.S. Households in 2022*, at 34-35 (May 2023), https://bit.ly/3plW967.

[61] Laura Skopec & Jessica Banthin, *Free Preventive Services Improve Access to Care* 2 (July 2022), https://bit.ly/3pcDQjE.

And in deciding whether to pay for preventive care, individuals likely will not consider the substantial benefits to third parties and population health generally that flow from broad use of preventive services.

In sum, abundant academic research demonstrates that "[c]onsumer cost-sharing * * * diminish[es] utilization of preventive services."[62]

C. Without the federal requirement, companies and insurers will re-impose cost-sharing, which will reduce the use of life-saving services.

The court of appeals' decision would allow companies and insurers to re-impose cost-sharing for preventive services recommended since 2010. Some companies and insurers will do just that—and many may do so with just sixty days' notice to covered individuals.[63]

That was the case before the ACA, and it is the reason why Congress enacted the preventive services requirement. Thus, HHS estimated in 2015 that the preventive services requirement had brought 76 million Americans expanded cost-free access that they previously lacked.[64]

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[62] Norris, *supra* n.53, at 175.

[63] *See* Declaration of Jeff Wu, Deputy Director for Policy in the Center for Consumer Information & Insurance Oversight, Centers for Medicare & Medicaid Services, ROA.2170-71; Declaration of Lisa Gomez, Assistant Secretary for Employee Benefits, Dep't of Labor, ROA.2178; *see also* 42 U.S.C. § 300gg-15(d)(4) (requiring group health plans and health insurance issuers to provide 60 days' notice of material modifications).

[64] Assistant Sec'y for Planning & Evaluation, U.S. Dep't of Health and Human Servs., *The Affordable Care Act Is Improving*

A survey of large employers confirms this reality. Eight percent of employers reported that, without the ACA's requirement, they would impose cost-sharing for preventive services while another 12% were uncertain whether they would.[65] Even if only 8-20% of employers impose cost-sharing, millions of Americans would be affected. And once some insurers and companies impose cost-sharing, it may become a competitive disadvantage not to, because much of the cost savings from preventive care will not accrue until after the end of the covered year—because that is when costlier treatments will be avoided. This may lead even more insurers and companies to drop cost-free coverage.

Indeed, that is what companies have done in other contexts where cost-free coverage is not required. For example, although IRS regulations allow companies' health savings account (HSA)-eligible plans to cover the cost of certain services related to chronic conditions even when the insured has not satisfied the deductible, a recent study shows only 8% of companies covered the costs of all of those services.[66]

Many patients will forgo life-saving preventive services if required to pay for them, because even "modest" cost-sharing "deters patients from receiving

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Access to Preventive Services for Millions of Americans 1 (May 14, 2015), https://bit.ly/43RpzIP.

[65] Employee Benefit Res. Inst., *Will Employers Introduce Cost Sharing for Preventive Services? Findings from EBRI's First Employer Pulse Survey* 2 (Oct. 27, 2022), https://bit.ly/41tbAY3.

[66] Employee Benefit Res. Inst., *Employer Uptake of Pre-Deductible Coverage for Preventive Services in HSA-Eligible Health Plans* 1 (Oct. 14, 2021), https://bit.ly/3N7RqhR.

care."[67] In addition, by replacing the ACA's clear rules for preventive services coverage with the choices of particular insurers, the court of appeals' ruling will leave providers and patients uncertain as to what services are or are not covered cost-free. Faced with that uncertainty, providers may stop recommending, and patients may stop using, crucial services—even if some plans retain cost-free coverage.[68] Providers who are uncertain what is covered may err on the side of not providing or prescribing services, while patients may not even seek services they suspect might not be covered.

In sum, the court of appeals' decision will lead to fewer patients receiving life-saving preventive healthcare. Patients across the Nation may miss cancer screenings and other important services, including critical maternal healthcare. Others will contract diseases that could have been avoided. Without early detection and treatment, more Americans will suffer serious illness and even death.

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[67] Norris, *supra* n.53, at 175.

[68] Michele Late, *Court Ruling on Prevention Coverage 'Disastrous for Public Health'*, Pub. Health Newswire (Mar. 31, 2023), https://bit.ly/3UWSqXX ("The confusion and uncertainty will no doubt be a deterrent to early and effective life-saving interventions.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2024

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