

No. 23-10326

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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BRAIDWOOD MANAGEMENT, INC.; JOHN SCOTT KELLEY; KELLEY ORTHODONTICS;  
ASHLEY MAXWELL; ZACH MAXWELL; JOEL STARNES,

*Plaintiffs-Appellees/Cross-Appellants*

JOEL MILLER; GREGORY SCHEIDEMAN,

*Plaintiffs-Cross-Appellants*

v.

XAVIER BECERRA, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN  
SERVICES, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN  
SERVICES; UNITED STATES OF AMERICA; JANET YELLEN, SECRETARY, U.S.  
DEPARTMENT OF TREASURY, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE  
TREASURY; JULIE A. SU, ACTING SECRETARY, U.S. DEPARTMENT OF LABOR, IN HER  
OFFICIAL CAPACITY AS SECRETARY OF LABOR

*Defendants-Appellants/Cross-Appellees*

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On Appeal from the United States District Court  
for the Northern District of Texas (Fort Worth Division)

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***AMICUS CURIAE* BRIEF OF AIDS HEALTHCARE FOUNDATION –  
SUPPORTING REVERSAL**

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June 27, 2023

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Marks, Gary, et al., “Meta-Analysis of High-Risk Sexual Behavior in Persons Aware and Unaware They Are Infected with HIV in the United States: Implications for HIV Prevention Programs,” 39:4 *Journal of Acquired Immune Deficiency Syndrome* 446 (Aug. 1, 2005).....4

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## CERTIFICATE OF INTERESTED PERSONS

Per Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29.2, *Amicus Curiae* AIDS Healthcare Foundation (“AHF”) certifies that it is a California non-profit corporation, with no parent corporation, and that no publicly traded corporation has any kind of ownership interest in AHF.

*/s/ Jonathan M. Eisenberg*

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Jonathan M. Eisenberg, Attorney for *Amicus Curiae* AIDS Healthcare Foundation

***AMICUS CURIAE BRIEF OF AIDS HEALTHCARE FOUNDATION***

**INTEREST OF *AMICUS CURIAE***

*Amicus Curiae* AIDS Healthcare Foundation (“AHF”) provides cutting-edge medicine and advocacy, regardless of ability to pay, to nearly 120,000 people in 17 U.S. states, including Louisiana, Mississippi, and Texas. AHF provides these services through 69 healthcare centers, 62 pharmacies, 36 wellness centers, and two dental clinics. In 2022, AHF administered nearly 200,000 free HIV (Human Immunodeficiency Virus) tests to people in the United States.

AHF is interested in maintaining and improving the availability of preventive healthcare services, particularly but not exclusively related to HIV, to AHF patients as well as to all people in the United States. AHF desires to assist the Court in understanding some of the impacts of maintaining versus eliminating the Affordable Care Act’s requirements for most group health-insurance plans to cover certain preventive-care services without cost-sharing with people who are plan subscribers.

**SUMMARY OF ARGUMENT**

Interpreting the Affordable Care Act (42 U.S. Code, chapter 157) to allow private health-insurance plans not to cover, without cost-sharing, certain preventive care related to HIV and Hepatitis B would result in significant negative outcomes for individual people and public health generally.

## ARGUMENT

Over the last 40 years, more than 700,000 people in the United States have died of AIDS (Acquired Immune Deficiency Syndrome), the syndrome that develops from HIV if it is not treated effectively, or of other HIV-related illnesses. (See Kaiser Family Foundation, *The HIV/AIDS Epidemic in the United States: The Basics* (Jun. 7, 2021) (“*Basics*”), available online at <https://www.kff.org/hivaids/fact-sheet/the-hivaids-epidemic-in-the-united-states-the-basics/#> (last visited Jun. 27, 2023).) Each year in the United States, there are 35,000 new HIV infections. (See *ibid.*) The South (including Louisiana, Mississippi, and Texas) accounts for more than half the new infections. (See Centers for Disease Control and Prevention, *The State of the HIV Epidemic in the United States* (Jun. 23, 2022), available online at <https://www.cdc.gov/nchhstp/newsroom/fact-sheets/hiv/state-of-the-hiv-epidemic-factsheet.html#:~:text=Geographically%2C%20the%20South%20is%20also%20disproportionately%20affected.%20The,it%20only%20represented%2038%25%20of%20the%20U.S.%20population> (last visited Jun. 27, 2023).)

In 2019 dollars, the estimated lifetime HIV-related medical costs for a person living with HIV is \$420,285. (See Adrienna Bingham, “Estimated Lifetime HIV-Related Medical Costs in the United States,” 48:4 *Sexually Transmitted Diseases* 299 (Apr. 2021), available online at

[https://journals.lww.com/stdjournal/Fulltext/2021/04000/Estimated\\_Lifetime\\_HIV\\_Related\\_Medical\\_Costs\\_in.15.aspx](https://journals.lww.com/stdjournal/Fulltext/2021/04000/Estimated_Lifetime_HIV_Related_Medical_Costs_in.15.aspx) (last visited Jun. 27, 2023).)

In 2019, the Trump Administration launched the “Ending the HIV Epidemic Initiative: A Plan for America” (“EHE”), which aims to reduce new HIV infections in the United States by 75 percent within five years and 90 percent within 10 years. (See *Basics*.) EHE has a goal of advancing “health equity” by scaling up key HIV-prevention as well as HIV-treatment strategies. (Centers for Disease Control and Prevention, *Ending the HIV Epidemic in the U.S. (EHE)* (Jun. 9, 2023) (“*Ending*”), available online at <https://www.cdc.gov/endhiv/index.html> (last visited Jun. 27, 2023).) EHE continues under the Biden Administration. (See *Basics*.)

Interpreting the Affordable Care Act to allow private health-insurance plans not to cover HIV screening, without cost-sharing, would work at cross purposes with the bipartisan EHE plan and would exacerbate the HIV/AIDS epidemic. In many healthcare settings, HIV screening and the subsequent identification of HIV status in people have been shown to reduce transmission of HIV. For example, in the United States, HIV transmission via blood transfusion has been nearly eliminated following the implementation of screening practices. (See R.Y. Dodd, et al., “Current Prevalence and Incidence of Infectious Disease Markers and Estimated Window-Period Risk in the American Red Cross Blood Donor

Population,” 42:8 *Transfusion* 975 (Aug. 28, 2002).) Also, prenatal HIV transmission rates have declined following the adoption of routine HIV screening for pregnant women. (See Centers for Disease Control and Prevention, 11:2 *HIV/AIDS Surveillance Report* 5 (1999).) Third, a meta-analysis found that people who are aware of their HIV status have, on average, 68 percent less unprotected sex with uninfected partners, compared to the behavior of people who are unaware of their status. (See Gary Marks, et al., “Meta-Analysis of High-Risk Sexual Behavior in Persons Aware and Unaware They Are Infected with HIV in the United States: Implications for HIV Prevention Programs,” 39:4 *Journal of Acquired Immune Deficiency Syndrome* 446 (Aug. 1, 2005), available online at [https://journals.lww.com/jaids/Fulltext/2005/08010/Meta\\_Analysis\\_of\\_High\\_Risk\\_Sexual\\_Behavior\\_in.13.aspx](https://journals.lww.com/jaids/Fulltext/2005/08010/Meta_Analysis_of_High_Risk_Sexual_Behavior_in.13.aspx) (last visited Jun. 27, 2023).)

Likewise, interpreting the Affordable Care Act to allow private health-insurance plans not to cover pre-exposure prophylaxis (“PrEP”) medications, without cost-sharing, would harm the fight against HIV/AIDS. AHF agrees with the statement that Defendants-Appellants/Cross-Appellees Xavier Becerra, Secretary, U.S. Department of Health and Human Services, et al. (the “Federal Defendants”), made herein in their June 20, 2023, Opening Brief for the Federal Defendants: “Preexposure prophylaxis medications can reduce the risk of HIV infection by 99%.” (*Id.* at 48.) Unfortunately, as of 2020, only about 24 percent of

people in the United States indicated for PrEP medications were receiving them. (*Ending.*)<sup>1</sup> Moreover, although PrEP medications are highly effective at preventing HIV infections among PrEP users, medication adherence and persistence are required. (See Matthew A. Spinelli, et al., “Missed Opportunities to Prevent HIV Infections among Pre-Exposure Prophylaxis Users: A Population-Based Mixed Methods Study, San Francisco, United States,” *Journal of the International AIDS Society* (Apr. 15, 2020), available online at <https://pubmed.ncbi.nlm.nih.gov/32294338> (last visited Jun. 27, 2023).) The monetary costs of PrEP medications and their omission from some insurance coverage are “major barriers to PrEP persistence.” (*Ibid.*)

While avoiding contracting HIV is obviously preferable for an individual person, curbing new transmission of HIV *en masse*, rather than treating many new HIV patients, at a lifetime cost of more than \$400,000 per patient, is also preferable from a strictly monetary standpoint.

The data are similar with respect to Hepatitis B. A 2022 economic study estimated that implementing a one-time universal screening for chronic Hepatitis B (“CHB”) followed by monitoring and treatment would avert 7.4 cases of

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<sup>1</sup> Contrary to popular conceptions, worldwide, “[t]he majority of people who have initiated PrEP are cisgender women.” (Gus Cairns, “PrEP and Women,” *Aidsmap* (Apr. 2023), available online at <https://www.aidsmap.com/about-hiv/prep-and-women> (last visited Jun. 27, 2023).)

compensated cirrhosis, 3.3 cases of decompensated cirrhosis, 5.5 cases of hepatocellular carcinoma, 1.9 liver transplants, and 10.3 Hepatitis B virus-related deaths per 100,000 adults -- and thus performing the CHB screenings would reduce healthcare expenditures overall. (See Mehlika Toy, et al., “Cost Effectiveness of 1-Time Universal Screening of Chronic Hepatitis B Infection in Adults in the United States, 74:2 *Clinical Infectious Diseases* 210 (Jan. 29, 2022), available online at <https://pubmed.ncbi.nlm.nih.gov/33956937/> (last visited Jun. 27, 2023).)

### CONCLUSION

For the foregoing reasons, AHF respectfully requests that this Court reverse the lower court’s decision with respect to, and thus preserve, Affordable Care Act mandatory healthcare coverage, without patient cost-sharing, for preventive care.

Respectfully submitted,

Date: June 27, 2023

AIDS HEALTHCARE FOUNDATION

*/s/ Jonathan M. Eisenberg*

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Jonathan M. Eisenberg, Attorney for *Amicus Curiae* AIDS Healthcare Foundation

## CONSENT DECREE

I, Jonathan M. Eisenberg, attorney for *Amicus Curiae* AIDS Healthcare Foundation (“AHF”), certify that I conferred with counsel for both Defendants-Appellants/Cross-Appellees and Plaintiffs-Appellees/Cross-Appellants and obtained their consent, in writing, to the filing of this brief.

I further certify that no third party provided any compensation or consideration, of any kind whatsoever, to AHF to file this brief.

*/s/ Jonathan M. Eisenberg*

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Jonathan M. Eisenberg, Attorney for *Amicus Curiae* AIDS Healthcare Foundation

## CERTIFICATE OF COMPLIANCE

This brief complies with the word limits established in Federal Rule of Appellate Procedure 29(a)(5) and Fifth Circuit Rule 29.3. This brief contains 1,069 words (excluding words exempted from being counted per Federal Rule of Appellate Procedure 32(f)).

This brief complies with the formatting requirements established in Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1. The brief is displayed in 14-point Times New Roman font.

*/s/ Jonathan M. Eisenberg*

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Jonathan M. Eisenberg, Attorney for *Amicus Curiae* AIDS Healthcare Foundation

## CERTIFICATE OF SERVICE

I, Jonathan M. Eisenberg, attorney for *Amicus Curiae* AIDS Healthcare Foundation, certify that on June 28, 2023, I filed and served this brief via the Court's CM/ECF Document Filing System, into the docket for the above-entitled case. I further certify that, to the best of my understanding after checking the electronic docket for this case, each participant in this case is represented by at least one attorney who is a registered CM/ECF system user, and who will receive electronic service of this brief automatically through that system.

*/s/ Jonathan M. Eisenberg*

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Jonathan M. Eisenberg, Attorney for *Amicus Curiae* AIDS Healthcare Foundation

*United States Court of Appeals*

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June 28, 2023

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No. 23-10326 Braidwood Mgmt v. Becerra  
USDC No. 4:20-CV-283

Dear Mr. Eisenberg,

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