No. 23-10326

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRAIDWOOD MANAGEMENT, INC., *et al.*
Plaintiffs-Appellees-Cross-Appellants,

v.

XAVIER BECERRA, *et al.*,
Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas,
No. 4:20-CV-283-O, Hon. Reed C. O'Connor

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF FOR AMERICAN PUBLIC HEALTH ASSOCIATION AND PUBLIC HEALTH DEANS AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PARTIAL STAY PENDING APPEAL

Andrew Pincus
Erik P. Fredericksen
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT AND SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Case No. 23-10326, *Braidwood Management, Inc., et al. v. Xavier Becerra, et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in Rule 28.2.1, in addition to those disclosed in the parties' statements of interested persons, have an interest in this case's outcome. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

American Public Health Association

> The American Public Health Association is a professional association. It is not publicly traded and has no parent corporation. No publicly held corporation owns 10% or more of its stock.

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Counsel for *Amici Curiae*

Mayer Brown LLP (Andrew J. Pincus; Erik P. Fredericksen)

/s/ Andrew J. Pincus
Andrew J. Pincus
Erik P. Fredericksen
MAYER BROWN LLP
1999 K Street NW Washington,
DC 20006
(202) 263-3000
apincus@mayerbrown.com

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29, the American Public Health Association (APHA) and the individual Public Health Deans and Scholars listed in the Appendix move for leave to file a brief of no more than 5,200 words as *amici curiae* in support of a partial stay pending appeal. All parties have consented to the filing of this brief.

1. The APHA, which was 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.

2. Individual *amici* are a group of 68 distinguished deans and professors of public health with deep expertise in policies that promote population health and alleviate barriers to care. They are identified in the attached Appendix.

3. *Amici* have a strong interest in ensuring the continued availability of cost-free coverage for preventive healthcare, given their professional mission to promote public health through evidence-based policies.

4. *Amici* file this brief to explain the importance of the cost-free preventive services impacted by the district court's order and the significant harm to public health that will result if the order is not stayed with respect to persons other than Plaintiffs.

5. Pursuant to Fifth Circuit Rule 29.2, the attached brief avoids repeating facts and legal arguments contained in Appellants' brief. Drawing on the public-health expertise of *amici*, the brief explains the benefits of the Affordable Care Act's preventive services requirement and the significant harms to Americans' health that will result from the district court's order eliminating this requirement with respect to valuable preventive services.

6. Counsel for *amici* contacted the parties' counsel for their position on this motion. Counsel for all parties consent to the motion.

CONCLUSION

The Court should grant leave to file the attached brief of *amici curiae*.

Dated: April 28, 2023

Respectfully submitted,

/s/ Andrew J. Pincus

Andrew J. Pincus
Erik P. Fredericksen
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

APPENDIX

LIST OF *AMICI CURIAE*

1. American Public Health Association

Public Health Deans

2. Burroughs, Thomas E., PhD, MS, MA, Dean and Professor, SLU College for Public Health and Social Justice, Saint Louis University

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document was filed and served on April 28, 2023, via ECF upon counsel of record for the parties. I further certify that a copy of this brief was served on Christopher M. Lynch, counsel for U.S. Department of Justice, via United States mail.

/s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATIONS UNDER ECF FILING STANDARDS

Pursuant to paragraph A(6) of this Court's ECF Filing Standards, I hereby certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because this motion contains 352 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f).

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in 14-point Century Schoolbook font.

Dated: April 28, 2023

/s/ Andrew J. Pincus
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Heinrich, Janet, DrPH, RN, FAAN, Research Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

Horton, Katherine, RN, MPH, JD, Research Professor in the Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

Huberfeld, Nicole, JD, Professor of Health Law, Ethics & Human Rights, Boston University School of Public Health and Professor of Law, Boston University School of Law

Ku, Leighton, PhD, MPH, Professor, Department of Health Policy and Management, Director, Center for Health Policy Research, Milken Institute School of Public Health, The George Washington University

Lantz, Paula, PhD, James B. Hudak Professor of Health Policy, Professor of Public Policy, Gerald R. Ford School of Public Policy, Professor of Health Management and Policy, School of Public Health, University of Michigan

Law, Sylvia A., JD, Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry, Emerita Co-Director, Arthur Garfield Hays Civil Liberties Program, NYU Law School

Levi, Jeffrey, PhD, Professor of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

Mariner, Wendy K., JD, LLM, MPH, Professor Emerita, Health Law, Ethics and Human Rights, Boston University School of Public Health

Mason, Diana J., RN, PhD, FAAN, Senior Policy Service Professor, Center for Health Policy and Media Engagement, School of Nursing, The George Washington University

Michaels, David, PhD, MPH, Professor, Department of Environmental and Occupational Health, Milken Institute School of Public Health, The George Washington University

Musumeci, MaryBeth, JD, Associate Teaching Professor, Milken Institute School of Public Health, The George Washington University

Perreira, Krista M., PhD, Department of Social Medicine, UNC School of Medicine

Peterson, Mark A., PhD, Professor of Public Policy, Political Science, and Law, Department of Public Policy, UCLA Meyer and Renee Luskin School of Public Affairs

Pollack, Harold, PhD, Helen Ross Professor, Crown Family School of Social Work, Policy, and Practice, The University of Chicago

Rimer, Barbara K., DrPH, MPH, Alumni Distinguished Professor, Dean Emerita, UNC Gillings School of Global Public Health

Rosenblatt, Rand E., JD, Professor Emeritus, Rutgers University School of Law

Rosenbaum, Sara, JD, Professor Emerita, Health Law and Policy, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

Schneider, Andy, JD, Research Professor of the Practice, McCourt School of Public Policy, Georgetown University

Seiler, Naomi, JD, Associate Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

Shin, Peter, PhD, MPH, Associate Professor and Geiger Gibson-RCHN Research Director, Department of Health Policy and

Management, Milken Institute School of Public Health, The George Washington University

Silberman, Pam, JD, DrPH, Professor Emerita, Director, Executive Doctoral Program in Health Leadership, Department of Health Policy and Management, UNC Gillings School of Global Public Health

Siminoff, Laura A., PhD, Laura H. Carnell Professor of Public Health, Department of Social and Behavioral Sciences, Temple University

Skinner, Daniel, PhD, Associate Professor of Health Policy, Ohio University

Slifkin, Becky, PhD, Professor, Department of Health Policy and Management, UNC Gillings School of Global Health

Stoltzfus Jost, Timothy, JD, Emeritus Professor, Washington and Lee University School of Law

Swartz, Katherine, PhD, Professor of Health Economics and Policy, Harvard T.H. Chan School of Public Health

Teitelbaum, Joel, JD, LLM, Professor of Health Policy and Law, Director, Hirsh Health Law and Policy Program, Co-Director, National Center for Medical-Legal Partnership, The George Washington University

Vermund, Sten H., MD, PhD, Anna M.R. Lauder Professor of Public Health, Yale School of Public Health, and Professor of Pediatrics, Yale School of Medicine

Vyas, Amita N., PhD, MHS, Associate Professor, Director, Maternal & Child Health Program, Milken Institute School of Public Health, The George Washington University

Wasserman, Alan G., MD, MACP, Eugene Meyer Professor, Senior Academic Advisor to the Dean, Department of Medicine, The George Washington School of Medicine and Health Sciences

Westmoreland, Timothy M., JD, Professor from Practice, Emeritus, Georgetown University School of Law

Counsel for *Amici Curiae*

Mayer Brown LLP (Andrew J. Pincus; Erik P. Fredericksen)

/s/ Andrew J. Pincus
Andrew J. Pincus
Erik P. Fredericksen
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

The American Public Health Association ("APHA"), which was 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.[1]

The individual *amici* are a group of 68 distinguished deans and professors of public health with deep expertise in policies that promote population health and alleviate barriers to care. They are identified in Appendix A.

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

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

amici share that interest. *Amici* file this brief to explain the importance of the cost-free preventive services impacted by the district court's order and the significant harm to public health that will result if the order is not stayed with respect to persons other than Plaintiffs.

SUMMARY OF ARGUMENT

Prior to enactment of the Affordable Care Act ("ACA"), some health insurance plans failed to cover preventive services addressing major health threats, even though these services are critical to reducing the incidence and severity of numerous diseases and life-threatening conditions. Plans that did provide coverage often required patients to pay a share of the cost, which deterred many patients from obtaining these life-saving services.

To protect Americans' health, the ACA requires virtually all private insurance plans to cover critical preventive services cost-free. And the statute relies on a body of medical experts to identify the services that qualify for that coverage.

The district court's nationwide order eliminates this requirement for dozens of life-saving services. If it is not stayed, some companies and insurers will re-impose cost-sharing—indeed, some plans could impose cost-sharing with just sixty days' notice. As a result, 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 will lead to more serious illnesses and even deaths

among the individuals deprived of coverage. It also will affect 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 irreparable harm and the public interest in maintaining access to these life-saving services heavily outweigh any harm that might be suffered by some non-party insurers and companies—the deprivation, pending appeal, of the ability to reduce health insurance costs by imposing cost-sharing. Plaintiffs themselves will suffer no harm from a partial stay, because it leaves in place the relief as applied to them. This Court therefore should grant a stay to maintain the status quo of guaranteed cost-free coverage.

ARGUMENT

THE COURT SHOULD GRANT THE PARTIAL STAY.

In evaluating a stay request, the Court considers "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v.*

Braunskill, 481 U.S. 770, 776 (1987)). Additionally, "'the maintenance of the status quo is an important consideration in granting a stay.'" *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quoting *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1341, 1346 (1977)). These factors weigh heavily in favor of a stay here.

Appellants explain why they are likely to succeed on the merits in challenging the application of the order to non-parties. *Amici* write separately to address the balance of harms and public-interest considerations.

A stay will maintain the status quo for the more than 150 million Americans who rely on cost-free coverage for preventive services. By contrast, the district court's order will inflict irreparable harm by causing many Americans to suffer serious and life-threatening conditions and illnesses that otherwise would have been avoided. That harm is not outweighed by the temporary exclusion of non-parties from the relief granted by the district court.

A. Americans Will Suffer Irreparable Injury—Including Death and Serious Illness—Without a Stay.

The district court's order will inflict severe irreparable harm by eliminating guaranteed cost-free coverage for dozens of preventive

services recommended by the U.S. Preventive Services Task Force ("USPSTF") since 2010. If companies and insurers are no longer required to provide these services without cost-sharing by patients, some will impose cost-sharing. And multiple studies demonstrate that when patients face costs, many will forgo these critical services, jeopardizing their own long-term health as well as, in many cases, the health of others. The district court's order also has alarmed public health experts and physicians because of the confusion it creates among insurers, patients, and providers about which services will continue to be covered cost-free and which will not. That confusion may lead some insurers, physicians, and patients to assume that some services are subject to cost-sharing even though they are not excluded from the ACA's protection by the district court's order—which will further decrease the use of preventive services. All of this will lead to higher incidence of serious illness, major health complications, and death.

1. *The district court's order eliminates guaranteed cost-free coverage for life-saving services.*

The USPSTF is a panel of experts that rigorously evaluates peer-reviewed scientific evidence to recommend critically important

preventive services.[2] 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 reducing the risks of transmission to third parties. That is why Congress, in the ACA, made this high-value care more accessible to patients by prohibiting cost-sharing for services with an A or B recommendation from the USPSTF. *See* 42 U.S.C. § 300gg-13(a)(1).

The district court's order eliminates guaranteed cost-free coverage for at least two dozen services with recommendations published or updated after 2010, listed in the attached Appendix B. These include:

- Lung cancer screening for high-risk persons:[3] Lung cancer is the second most common cancer and the leading cause of cancer death in the United States.[4] Studies demonstrate that this cancer is significantly more treatable when detected

[2] *See* U.S. Preventive Servs. Task Force, *About the USPSTF* (last visited Apr. 21, 2023), https://bit.ly/3UVQLSs.

[3] 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*).

[4] *See* Am. Cancer Soc'y, *Key Statistics for Lung Cancer* (Jan. 12, 2023), https://bit.ly/3oEF1Yo.

early,[5] which is why the USPSTF recommended screenings in 2013 and expanded that recommendation to apply to more persons in 2021.[6]

- Colorectal cancer screening for adults 45-49:[7] Colorectal cancer is the Nation's third leading cause of death from cancer, and its incidence has increased for adults 40-49 years old.[8] Colorectal cancer screening is especially beneficial because it involves removing precancerous growths.[9] So screening not only detects cancer early, but keeps it from developing in the first place. The USPSTF's 2021 recommendation provides this benefit to 15-17.5 million

[5] *See Screening for Lung Cancer* at 962.

[6] *See id.* at 965.

[7] *See* 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.

[8] *Id.* at 1965.

[9] *See* Assistant Sec'y for Planning & Evaluation, U.S. Dep't of Health and Human Servs., *Access to Preventive Services Without Cost-Sharing: Evidence from the Affordable Care Act* 8 (Jan. 11, 2022), https://bit.ly/41rGtfm (*Access to Preventive Services*).

additional people, by expanding to include adults 45-49 years old.[10]

- Statins to Prevent Cardiovascular Disease:[11] Cardiovascular disease is the leading cause of death in the United States.[12] For those at increased risk, statins effectively reduce both cardiovascular-disease events and mortality.[13] 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.[14]
- Preexposure Prophylaxis ("PrEP") to Prevent HIV:[15] An estimated 1.1 million Americans are living with HIV.[16] By

[10] *Id.*

[11] *See* 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.

[12] *Id.* at 746.

[13] *See id.* at 748 tbl.

[14] *See id.* at 747, 750.

[15] *See* U.S. Preventive Servs. Taskforce, *Preexposure Prophylaxis for the Prevention of HIV Infection: US Preventive Services Task Force Recommendation Statement*, 321 J. Am. Med. Ass'n 2203 (2019), https://bit.ly/3UUF5Q7.

[16] *Id.* at 2204-05.

preventing HIV transmission, PrEP protects the health of those who use the service and others who might, in the absence of PrEP, be infected from them.[17] One study found that if the number of individuals using PrEP increased by 25%, new HIV cases would decrease by 54%.[18] Conversely, a recent study suggests that there will be 1140 additional HIV transmissions among men who have sex with men for every 10% reduction in PrEP coverage caused by the district court's ruling.[19]

- Screening for Hepatitis B Infection in Adolescents and Adults:[20] 862,000 Americans are estimated to be living with

[17] *Id.* at 2204.

[18] 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 (2022), https://bit.ly/3H7bz3L.

[19] 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 (2023), https://bit.ly/3H4nM9t.

[20] 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.

chronic infection of the hepatitis B virus.[21] For 15-40% of these individuals, chronic infection will develop into cirrhosis, liver cancer, or liver failure, which can be deadly.[22] 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.[23] Screening of at-risk individuals, as recommended by the USPSTF in 2014 and 2020, addresses these problems.[24]

- Screening for Hepatitis C Infection in Adolescents and Adults:[25] Hepatitis C virus is "is associated with more deaths in the United States than the top 60 other reportable

[21] *Id.* at 2415.

[22] *Id.*

[23] *Id.*

[24] *See id.* at 2416.

[25] 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.

infectious diseases *combined*."[26] An estimated 4.1 million Americans have past or current Hepatitis C infection.[27] 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.[28]

- Aspirin Use to Prevent Preeclampsia:[29] Preeclampsia is "one of the most serious health problems that affect pregnant persons."[30] It is a leading cause of maternal death in the United States,[31] and can also lead to preterm births.[32] Daily low-dose use of aspirin—recommended by the USPSTF in

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

[27] *Id.*

[28] *See id.* at 972.

[29] 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, 1186 (2021), https://bit.ly/3oD9oig (*Aspirin Use to Prevent Preeclampsia*).

[30] *Id.* at 1186.

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

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

> 2021—reduces the risk of preeclampsia, preterm birth, and maternal mortality, thus protecting both maternal and infant health.[33]

These are only a few of the services for which the district court's order eliminates guaranteed cost-free coverage. Others include expanded screening for genetic mutations that increase women's risk of breast cancer by 45-65% by age 70;[34] expanded screening for prediabetes and type 2 diabetes, enabling earlier detection and treatment;[35] 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.[36]

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[33] *Id.* at 1187.

[34] 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 (2019), https://bit.ly/3mUZ44C.

[35] U.S. Preventive Servs. Taskforce, *Screening for Prediabetes and Type 2 Diabetes: US Preventive Services Task Force Recommendation Statement*, 326 J. Am. Med. Ass'n 736 (2021), https://bit.ly/3H0HpiQ.

[36] 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 (2021), https://bit.ly/3UXsY4I.

Saving lives and preventing illness are the most important benefits of cost-free coverage for these services. But the services also reduce healthcare costs.[37] Illnesses that are prevented need not be treated at all, saving significant health costs. As Congress reasoned, for example, 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.[38]

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

The Department of Health and Human Services ("HHS") estimates that 151.6 million people, as of January 2022, were enrolled in private health insurance plans subject to the ACA's preventive services requirement.[39] 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

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

[38] 155 Cong. Rec. 32890 (2009) (statement of Sen. Cardin).

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

the ACA in 2018.[40] The number is likely even higher today: because the number of Americans with private health insurance coverage has increased since then, the use of preventive services surely has increased as well.[41]

Eliminating cost-sharing has increased the 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 was enacted, including "substantial increases" among the financially vulnerable.[42] One study, for example, found

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

[41] *See* Nat'l Ctr. for Health Statistics, Ctrs. for Disease Control & Prevention, *Interactive Summary Health Statistics for Adults – 2019-2021* (last visited Apr. 24, 2023), https://bit.ly/3LoZf1j (selecting topic "Private health insurance at time of interview: Adults aged 18-64") (showing 1.7% rise in percentage of adults with private health insurance from 2019 to 2021). 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.

[42] 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.

increased use of a variety of preventive services at community health centers across 14 states.[43]

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."[44] 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.[45] Indeed, prior to the ACA, 9% of insured men and 13% of insured women—and 31% of low-income men and 35% of low-income women—

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[43] 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 (2021), https://bit.ly/43UD1vp.

[44] Norris, *supra* n.42, at 175; *see also Has Recommended Preventive Service Use Increased?*, 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.

[45] 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.

reported postponing preventive services because of cost.[46] 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.[47]

There can be no serious debate that cost-sharing deters Americans from using critical preventive services.[48]

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

The district court's decision allows companies and insurers to re-impose cost-sharing for preventive services. Some companies and

[46] Kaiser Family Foundation, *supra* n. 37, at 1.

[47] Jay Asser, *Patients Likely to Skip Preventive Care if ACA Ruling Holds*, Healthleaders (Mar. 17, 2023), https://bit.ly/3AiiP94.

[48] Plaintiffs have suggested, without support, that "rational people" will continue to use preventive services even with cost-sharing imposed, simply because the services are "valuable." Pls. Response to Defs. Mot. for Partial Stay of J. Pending Appeal at 8-9, *Braidwood Mgmt. v. Becerra*, No. 20-cv-283 (N.D. Tex. Apr. 12, 2023). This assumption is flatly contradicted by the abundant academic research discussed above, which shows that "[c]onsumer cost-sharing . . . diminish[es] utilization of preventive services." Norris, *supra* n. 42, at 175.

insurers will do just that—and many may do so with just sixty days' notice to covered individuals.[49]

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.[50]

A recent 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.[51] Even if only 8-20% of employers impose cost-sharing, millions of Americans would be affected. And once

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[49] *See* Defs. Mot. for Part. Stay of J. Pending Appeal, Ex. 1, Decl. of Jeff Wu ¶¶ 5-6, Ex. 2., Decl. of Assistant Sec'y Lisa M. Gomez ¶ 4, *Braidwood Mgmt. v. Becerra*, No. 20-cv-283 (N.D. Tex. Apr. 12, 2023); *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).

[50] Assistant Sec'y for Planning & Evaluation, U.S. Dep't of Health and Human Servs., *The Affordable Care Act Is Improving Access to Preventive Services for Millions of Americans*, at 1 (May 14, 2015), https://bit.ly/43RpzIP.

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

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 accrue outside a given covered year. 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.[52]

Patients will forgo life-saving preventive services if required to pay for them, because even "modest" cost-sharing "deters patients from receiving care."[53] A stay is the only way to ensure Americans' access to this essential coverage pending the government's appeal.

In addition, the district court's order creates uncertainty for insurers, patients, and providers about which services remain covered

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

[53] Norris, *supra* n. 42, at 175.

cost-free and which are not. That uncertainty creates a further risk that providers will stop recommending, and patients will stop using, crucial services, even those not affected by the district court's order.[54] 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 district court's order 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. This widespread and severe irreparable harm strongly supports a stay.

B. The Balance of the Equities and the Public Interest Strongly Favor a Stay.

The partial stay Appellants have requested will preserve the status quo of guaranteed cost-free coverage for the over 150 million Americans

[54] *See* 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.").

who rely on it. And it will impose no burden on Plaintiffs, nor on companies who do not plan to withdraw cost-free coverage. Any harm to companies temporarily prevented from withdrawing such coverage, or to individuals temporarily prevented from purchasing insurance without it, is outweighed by the serious harms described above to the health and lives of so many Americans.

Finally, the public interest favors a stay. Congress enacted the ACA to save costs to the healthcare system, expand access to healthcare, and improve Americans' health. It made the policy determination to do so in part by incentivizing patients to obtain high-quality preventive care. The district court's order not only creates significant public-health harms, but also runs roughshod over this considered policy determination.

CONCLUSION

The Court should partially stay the district court's order pending appeal, as requested by Appellants.

Dated: April 28, 2023

Respectfully submitted,

/s/ Andrew J. Pincus

Andrew J. Pincus
Erik P. Fredericksen
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

APPENDIX A

LIST OF *AMICI CURIAE*

1. American Public Health Association

Public Health Deans

2. Burroughs, Thomas E., PhD, MS, MA, Dean and Professor, SLU College for Public Health and Social Justice, Saint Louis University

3. Chandler, G. Thomas, MS, PhD, Dean and Professor of Environmental Health Sciences, Arnold School of Public Health, University of South Carolina

4. Drenkard, Karen, PhD, RN, NEA-BC, FAAN, Associate Dean of Clinical Practice and Community Engagement, School of Nursing Center for Health Policy and Medical Engagement, The George Washington University

5. El-Mohandes, Ayman, MBBCh, MD, MPH, Dean, CUNY Graduate School of Public Health & Health Policy

6. Fallin, Daniele, PhD, James W. Curran Dean of Public Health, Rollins School of Public Health, Emory University

7. Fried, Linda P., MD, MPH, Dean and DeLamar Professor of Public Health, Mailman School of Public

Health, Professor of Epidemiology and Medicine, Columbia University

8. Galea, Sandro, MD, DrPH, Dean, Robert A. Knox Professor, Boston University

9. Glied, Sherry, PhD, MA, Dean, Robert F. Wagner Graduate School of Public Service, New York University

10. Godwin, Hilary, PhD, Dean, University of Washington School of Public Health

11. Goldman, Lynn R., MD, MPH, MS, Michael and Lori Milken Dean of Public Health, Milken Institute School of Public Health, The George Washington University

12. Gusmano, Michael K., PhD, Professor and Associate Dean of Academic Programs, College of Health, Director, Center for Ethics, Lehigh University

13. Hoffman, Allison K., JD, Deputy Dean and Professor of Law, University of Pennsylvania Carey Law School

14. Jeffries, Pamela R., PhD, RN, FAAN, ANEF, FSSH, Dean, Vanderbilt School of Nursing, Valere Potter Distinguished Professor of Nursing, RWJF Nurse Executive Fellow Alumna, Vanderbilt School of Nursing

15. Lu, Michael C., MD, MS, MPH, Dean, UC Berkeley School of Public Health

16. Lushniak, Boris, MD, MPH, Professor and Dean, University of Maryland School of Public Health

17. Parker, Edith A., MPH, DrPH, Dean, Professor, Community and Behavioral Health, Director, Prevention Research Center for Rural Health, Professor, Public Policy Center, Office of the Vice

President for Research, The University of Iowa College of Public Health

18. Petersen, Donna J., ScD, MHS, CPH, Dean, College of Public Health, Professor of Public Health, University of South Florida

19. Pettigrew, Melinda M., PhD, Interim Dean, Anna M. R. Lauder Professor of Epidemiology, Yale School of Public Health

20. Schuster, Mark A., MD, PhD, Founding Dean and CEO, Kaiser Permanente Bernard J. Tyson School of Medicine

21. Trapido, Edward, ScD, FACE, Interim Dean, LSU School of Public Health – New Orleans

Public Health Scholars

22. Beckerman, Julia Zoe, JD, MPH, Teaching Associate Professor & Vice Chair, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

23. Markus, Anne R., PhD, MHS, JD, Professor and Chair, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

24. McDonnell, Karen A., PhD, Associate Professor and Vice Chair, Department of Prevention and Community Health, Milken Institute School of Public Health, The George Washington University

25. Oberlander, Jonathan, PhD, Professor and Chair, Department of Social Medicine, Professor, Department

of Health Policy & Management, University of North Carolina at Chapel Hill

26. Thorpe, Jane, JD, Professor and Sr. Associate Dean for Academic, Student & Faculty Affairs, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

27. Warren-Findlow, Jan, PhD, Professor and Chair, Department of Public Health Sciences, UNC Charlotte

28. Alker, Joan, MPhil, Research Professor, McCourt School of Public Policy, Georgetown University

29. Blewett, Lynn A., PhD, MA, Professor of Health Policy, University of Minnesota School of Public Health

30. Borden, William B., MD, FACC, FAHA, Chief Quality and Population Officer, Associate Professor of Medicine and Health Policy, George Washington University Medical Faculty Associates

31. Brindis, Claire D., DrPH, Professor, Departments of Pediatrics and Obstetrics, Gynecology and Reproductive Sciences, Director, Philip R. Lee Institute for Health Policy Studies, Director emeritus and Senior Scholar, Center for Global Reproductive Health, Co-Director, Adolescent and Young Adult Health National Resource Center, Adjunct Professor, UC Hastings School of Law, University of California, San Francisco

32. Byrnes, Maureen, MPA, Teaching Instructor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

33. Catalanotti, Jillian, MD, MPH, FACP, Associate Professor of Medicine, Associate Professor of Health Policy and Management, Director, Internal Medicine

Residency Programs, The George Washington University

34. Cohen, Alan B., Sc.D., Research Professor, Markets, Public Policy and Law, Boston University Questrom School of Business, and Professor of Health Law, Policy and Management, Boston University School of Public Health

35. Frankford, David M., JD, Professor of Law, Rutgers University School of Law

36. Goldstein, Melissa M., JD, Associate Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

37. Grogan, Colleen M., PhD, Deborah R. and Edgar D. Jannotta Professor, Crown Family School of Social Work, Policy, and Practice, The University of Chicago

38. Halfon, Neal, MD, MPH, Professor of Pediatrics, Public Health and Public Policy, Director, UCLA Center for Healthier Children, Families & Communities, UCLA

39. Heinrich, Janet, DrPH, RN, FAAN, Research Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

40. Horton, Katherine, RN, MPH, JD, Research Professor in the Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

41. Huberfeld, Nicole, JD, Professor of Health Law, Ethics & Human Rights, Boston University School of Public

Health and Professor of Law, Boston University School of Law

42. Ku, Leighton, PhD, MPH, Professor, Department of Health Policy and Management, Director, Center for Health Policy Research, Milken Institute School of Public Health, The George Washington University

43. Lantz, Paula, PhD, James B. Hudak Professor of Health Policy, Professor of Public Policy, Gerald R. Ford School of Public Policy, Professor of Health Management and Policy, School of Public Health, University of Michigan

44. Law, Sylvia A., JD, Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry, Emerita Co-Director, Arthur Garfield Hays Civil Liberties Program, NYU Law School

45. Levi, Jeffrey, PhD, Professor of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

46. Mariner, Wendy K., JD, LLM, MPH, Professor Emerita, Health Law, Ethics and Human Rights, Boston University School of Public Health

47. Mason, Diana J., RN, PhD, FAAN, Senior Policy Service Professor, Center for Health Policy and Media Engagement, School of Nursing, The George Washington University

48. Michaels, David, PhD, MPH, Professor, Department of Environmental and Occupational Health, Milken

Institute School of Public Health, The George Washington University

49. Musumeci, MaryBeth, JD, Associate Teaching Professor, Milken Institute School of Public Health, The George Washington University

50. Perreira, Krista M., PhD, Department of Social Medicine, UNC School of Medicine

51. Peterson, Mark A., PhD, Professor of Public Policy, Political Science, and Law, Department of Public Policy, UCLA Meyer and Renee Luskin School of Public Affairs

52. Pollack, Harold, PhD, Helen Ross Professor, Crown Family School of Social Work, Policy, and Practice, The University of Chicago

53. Rimer, Barbara K., DrPH, MPH, Alumni Distinguished Professor, Dean Emerita, UNC Gillings School of Global Public Health

54. Rosenblatt, Rand E., JD, Professor Emeritus, Rutgers University School of Law

55. Rosenbaum, Sara, JD, Professor Emerita, Health Law and Policy, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

56. Schneider, Andy, JD, Research Professor of the Practice, McCourt School of Public Policy, Georgetown University

57. Seiler, Naomi, JD, Associate Professor, Department of Health Policy and Management, Milken Institute

School of Public Health, The George Washington University

58. Shin, Peter, PhD, MPH, Associate Professor and Geiger Gibson-RCHN Research Director, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

59. Silberman, Pam, JD, DrPH, Professor Emerita, Director, Executive Doctoral Program in Health Leadership, Department of Health Policy and Management, UNC Gillings School of Global Public Health

60. Siminoff, Laura A., PhD, Laura H. Carnell Professor of Public Health, Department of Social and Behavioral Sciences, Temple University

61. Skinner, Daniel, PhD, Associate Professor of Health Policy, Ohio University

62. Slifkin, Becky, PhD, Professor, Department of Health Policy and Management, UNC Gillings School of Global Health

63. Stoltzfus Jost, Timothy, JD, Emeritus Professor, Washington and Lee University School of Law

64. Swartz, Katherine, PhD, Professor of Health Economics and Policy, Harvard T.H. Chan School of Public Health

65. Teitelbaum, Joel, JD, LLM, Professor of Health Policy and Law, Director, Hirsh Health Law and Policy Program, Co-Director, National Center for Medical-Legal Partnership, The George Washington University

66. Vermund, Sten H., MD, PhD, Anna M.R. Lauder Professor of Public Health, Yale School of Public

Health, and Professor of Pediatrics, Yale School of Medicine

67. Vyas, Amita N., PhD, MHS, Associate Professor, Director, Maternal & Child Health Program, Milken Institute School of Public Health, The George Washington University

68. Wasserman, Alan G., MD, MACP, Eugene Meyer Professor, Senior Academic Advisor to the Dean, Department of Medicine, The George Washington School of Medicine and Health Sciences

69. Westmoreland, Timothy M., JD, Professor from Practice, Emeritus, Georgetown University School of Law

APPENDIX B

LIST OF AFFECTED SERVICES[55]

Services With A or B Recommendation After 2010

Service	Recommendation
Screening for Lung Cancer	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.
Interventions to Prevent Falls in Community-Dwelling Older Adults	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 (2021), https://bit.ly/3UXsY4I.
Screening for Hepatitis B Virus Infection in Adolescents and Adults	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.
Screening for Hepatitis C Virus Infection in Adolescents and Adults	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.

[55] These lists were created by comparing current USPSTF recommendations to the list of recommendations as of September 2011 in the USPSTF's First Annual Report to Congress on High-Priority Evidence Gaps for Clinical Preventive Services. *Compare* U.S. Preventive Servs. Task Force, *Published Recommendations* (last visited Apr. 21, 2023), https://bit.ly/3H4AQeU (listing current recommendations) *with* U.S. Preventive Servs. Task Force, *First Annual Report to Congress on High-Priority Evidence Gaps for Clinical Preventive Services – Appendix C* (Dec. 2011), https://bit.ly/41XGbg9.

Preexposure Prophylaxis for the Prevention of HIV Infection	U.S. Preventive Servs. Taskforce, *Preexposure Prophylaxis for the Prevention of HIV Infection: US Preventive Services Task Force Recommendation Statement*, 321 J. Am. Med. Ass'n 2203 (2019), https://bit.ly/3UUF5Q7.
Aspirin Use to Prevent Preeclampsia and Related Morbidity and Mortality	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.
Behavioral Counseling to Prevent Skin Cancer	U.S. Preventive Servs. Taskforce, *Behavioral Counseling to Prevent Skin Cancer: US Preventive Services Task Force Recommendation Statement*, 319 J. Am. Med. Ass'n 1134 (2018), https://bit.ly/3LBsPkd.
Interventions to Prevent Perinatal Depression	U.S. Preventive Servs. Taskforce, *Interventions to Prevent Perinatal Depression: US Preventive Services Task Force Recommendation Statement*, 321 J. Am. Med. Ass'n 580 (2019), https://bit.ly/40LTFL3.
Screening for Unhealthy Drug Use	U.S. Preventive Servs. Taskforce, *Screening for Unhealthy Drug Use: US Preventive Services Task Force Recommendation Statement*, 323 J. Am. Med. Ass'n 2301 (2020), https://bit.ly/421YrFd.
Behavioral Counseling Interventions for Healthy Weight and Weight Gain in Pregnancy	U.S. Preventive Servs. Taskforce, *Behavioral Counseling Interventions for Healthy Weight and Weight Gain in Pregnancy: US Preventive Services Task Force Recommendation Statement*, 325 J. Am. Med. Ass'n 2087 (2020), https://bit.ly/3ndIDAk.

Services With Change to A or B Recommendation After 2010

Service	Recommendation	Change Since 2010
Statin Use to Prevent Cardiovascular Disease	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.	The current recommendation and the 2016 recommendation are updated to include the use of statins rather than only screening for lipid disorders.
Medication Use to Reduce Risk of Breast Cancer	U.S. Preventive Servs. Taskforce, *Medication Use to Reduce Risk of Breast Cancer: US Preventive Services Task Force Recommendation Statement*, 322 J. Am. Med. Ass'n 857 (2020), https://bit.ly/41JnAor.	The current recommendation and the 2013 recommendation are updated to include offering to prescribe risk-reducing medications.
Screening for Prediabetes and Type 2 Diabetes	U.S. Preventive Servs. Taskforce, *Screening for Prediabetes and Type 2 Diabetes: US Preventive Services Task Force Recommendation Statement*, 326 J. Am. Med. Ass'n 736 (2021), https://bit.ly/3H0HpiQ.	The current recommendation expands the covered population.

Screening for Colorectal Cancer (Adults 45 to 49 years)	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.	The current recommendation expands the covered population to include adults aged 45 to 49 years.
Screening for Colorectal Cancer (Adults 50 to 75 years)	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.	The current recommendation expands the recommended screening strategies.
Screening for Osteoporosis to Prevent Fractures	U.S. Preventive Servs. Taskforce, *Screening for Osteoporosis to Prevent Fractures: US Preventive Services Task Force Recommendation Statement*, 319 J. Am. Med. Ass'n 2521 (2018), https://bit.ly/41MnYT3.	The current recommendation expands the covered population.
Screening for Hypertension in Adults	U.S. Preventive Servs. Taskforce, *Screening for Hypertension in Adults: US Preventive Services Task Force Recommendation Statement*, 325 J. Am. Med. Ass'n 1650 (2021), https://bit.ly/3Vcsvvs.	The current recommendation and the 2015 recommendation are updated to include optimal screening intervals.

Behavioral Counseling Interventions to Promote a Healthy Diet and Physical Activity for Cardiovascular Disease Prevention in Adults With Cardiovascular Risk Factors	U.S. Preventive Servs. Taskforce, *Behavioral Counseling Interventions to Promote a Healthy Diet and Physical Activity for Cardiovascular Disease Prevention in Adults With Cardiovascular Risk Factors: US Preventive Services Task Force Recommendation Statement*, 324 J. Am. Med. Ass'n 2069 (2020), https://bit.ly/3oNXOAL.	The current recommendation expands the covered population based on cardiovascular risk factors.
Risk Assessment, Genetic Counseling, and Genetic Testing for *BRCA*-Related Cancer	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 (2019), https://bit.ly/3mUZ44C.	The current recommendation expands the covered population.
Screening for Depression in Adults	U.S. Preventive Servs. Taskforce, *Screening for Depression in Adults: US Preventive Services Task Force Recommendation Statement*, 315 J. Am. Med. Ass'n 380 (2016), https://bit.ly/3oRBWEM.	The current recommendation expands the circumstances in which screening is recommended and is updated to include specific recommendations for pregnant and postpartum women.

Interventions for Tobacco Smoking Cessation in Adults, Including Pregnant Persons (Nonpregnant Adults)	U.S. Preventive Servs. Taskforce, *Interventions for Tobacco Smoking Cessation in Adults, Including Pregnant Persons: US Preventive Services Task Force Recommendation Statement*, 325 J. Am. Med. Ass'n 265 (2021), https://bit.ly/41Mm4lx.	The current recommendation expands the recommended interventions.
Interventions for Tobacco Smoking Cessation in Adults, Including Pregnant Persons (Pregnant Persons)	U.S. Preventive Servs. Taskforce, *Interventions for Tobacco Smoking Cessation in Adults, Including Pregnant Persons: US Preventive Services Task Force Recommendation Statement*, 325 J. Am. Med. Ass'n 265 (2021), https://bit.ly/41Mm4lx.	The current recommendation and the 2015 recommendation expand the recommended interventions.
Screening for Chlamydia and Gonorrhea	U.S. Preventive Servs. Taskforce, *Screening for Chlamydia and Gonorrhea: US Preventive Services Task Force Recommendation Statement*, 326 J. Am. Med. Ass'n 949 (2021), https://bit.ly/3ncUMFQ.	The current recommendation and the 2014 recommendation expand the covered population for screening for gonorrhea.

Behavioral Counseling Interventions to Prevent Sexually Transmitted Infections	U.S. Preventive Servs. Taskforce, *Behavioral Counseling Interventions to Prevent Sexually Transmitted Infections: US Preventive Services Task Force Recommendation Statement*, 324 J. Am. Med. Ass'n 674 (2020), https://bit.ly/3oOyGtL.	The current recommendation expands the recommended interventions.
Screening for HIV Infection	U.S. Preventive Servs. Taskforce, *Screening for HIV Infection: US Preventive Services Task Force Recommendation Statement*, 321 J. Am. Med. Ass'n 2326 (2019), https://bit.ly/3NiPy5U.	The current recommendation and the 2013 recommendation expand the covered population.
Screening and Behavioral Counseling Interventions to Reduce Unhealthy Alcohol Use in Adolescents and Adults	U.S. Preventive Servs. Taskforce, *Screening and Behavioral Counseling Interventions to Reduce Unhealthy Alcohol Use in Adolescents and Adults: US Preventive Services Task Force Recommendation Statement*, 320 J. Am. Med. Ass'n 1899 (2018), https://bit.ly/3LxNs0N.	The current recommendation and the 2013 recommendation expand the forms of unhealthy alcohol use covered.

Screening for Syphilis Infection in Nonpregnant Adolescents and Adults	U.S. Preventive Servs. Taskforce, *Screening for Syphilis Infection in Nonpregnant Adolescents and Adults: US Preventive Services Task Force Recommendation Statement*, 328 J. Am. Med. Ass'n 1243 (2022), https://bit.ly/3ndN5Py.	The current recommendation and the 2016 recommendation update the covered population to explicitly include adolescents at increased risk.
Screening for Preeclampsia	U.S. Preventive Servs. Taskforce, *Screening for Preeclampsia: US Preventive Services Task Force Recommendation Statement*, 317 J. Am. Med. Ass'n 1661 (2017), https://bit.ly/41IvEpB.	The current recommendation is updated to recommend screening during each prenatal care visit throughout pregnancy.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document was filed and served on April 28, 2023, via ECF upon counsel of record for the parties. I further certify that a copy of this brief was served on Christopher M. Lynch, counsel for U.S. Department of Justice, via United States mail.

/s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATIONS UNDER ECF FILING STANDARDS

Pursuant to paragraph A(6) of this Court's ECF Filing Standards, I hereby certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 3,796 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: April 28, 2023

/s/ Andrew J. Pincus
Andrew J. Pincus