



Preventive care such as birth control, anti-HIV medicine challenged in Texas lawsuit

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The Affordable Care Act has survived many challenges in court, but the case of *Kelley v. Becerra* – now before a federal judge in Texas – threatens to undermine one of the most popular provisions in the law, which requires most health plans to provide coverage for preventive care with no copays.

If the judge rules in favor of the plaintiffs, access to free birth control, cancer screenings, vaccines, PrEP (HIV pre-exposure prophylaxis), counseling for alcohol misuse, diet counseling for people at higher risk of chronic disease, and many more preventive services would be in jeopardy, according to the nation's leading doctors' groups, which have sounded the alarm.

"The lawsuit could cause millions of Americans, probably more than 150 million, to lose guaranteed access to preventive services," Dr. Jack Resneck, president of the American Medical Association, told NPR. "There's really a great deal at stake," he said.

The doctors' group points to research showing that expanded access to preventive care and coverage, ushered in by the ACA, has led to an increase in colon cancer screenings, vaccinations, use of contraception and chronic disease screenings. There's also data to show that expanded coverage has reduced racial and ethnic disparities in preventive care.

Resneck warns that if the preventive care mandate is rolled back in court, it threatens to reverse this progress. Some plans may decide to limit or deny coverage for certain services. Others would tack on copays.

"Having copays and deductibles brought back for these services would actually keep many patients from getting them," Resnick says. He says for people on a tight budget, a copay for a mammogram or colonoscopy could be enough of a disincentive to skip the screening.

Americans have saved billions of dollars in out-of-pocket spending on contraceptives since the ACA's preventive services and birth control coverage took effect. And since the overturning of *Roe v. Wade*, the Biden administration has taken steps to clarify the benefits. "Under the ACA, most private health plans are required to provide birth control and family planning counseling at no additional cost," according to an HHS release. (A small percentage of American workers are covered by grandfathered insurance plans that are not required to follow the ACA's preventive care coverage rules.)

Plaintiffs in the Texas case argue that the preventive care mandates violate the Religious Freedom Restoration Act. Some object to paying for health insurance plans that cover contraceptives, PrEP drugs, or other preventive care services that may violate their religious beliefs. Plaintiffs also object for economic reasons, arguing that the mandate to cover preventive services raises the price of insurance coverage.

Plaintiff John Kelley, an orthodontist who lives in Tarrant County, Texas, "has no desire to purchase health insurance that includes contraceptive coverage because his wife is past her child-bearing years," according to the complaint. "He does not want or need health insurance that covers Truvada or PrEP drugs because neither he nor any of his family members is engaged in behavior that transmits HIV," the complaint continues.

"Mr. Kelley is also a Christian," and is unwilling to purchase health insurance plans that subsidize certain types of contraception or PrEP drugs "that encourage homosexual behavior and intravenous drug use."

The plaintiffs are represented by attorney Jonathan Mitchell, who is known as a key strategist behind the Texas abortion law passed in 2021 that bans abortions after 6 weeks of pregnancy. America First Legal Foundation, launched by former Trump administration official Stephen Miller, is also providing counsel.

"The plaintiffs seem perhaps extra motivated by the contraceptive requirement and coverage of services like PrEP," says Katie Keith, director of the Health Policy and the Law Initiative at the O'Neill Institute at Georgetown University. But she says the lawsuit is broad in its reach: "This is very clearly a threat to the entire preventive services requirement under the Affordable Care Act."

One of the plaintiffs' legal arguments rests on the nondelegation doctrine, the principle that Congress may not delegate its legislative power to other entities, explains Andrew Twinamatsiko of the O'Neill Institute for National and Global Health at Georgetown University.

When the ACA was written, Congress empowered several groups to use their expertise to identify evidence-based preventive services. The Advisory Committee on Immunization Practices helped identify the appropriate vaccines, the Preventive Services Task Force reviewed evidence to recommend which procedures and services could be covered, and the Health Resources and Services Administration determined services and screenings for maternal and child health coverage.

"The plaintiffs argue that this structure delegates too much decision-making power to the groups without providing sufficient guidance – or what they call 'intelligible principle' – to exercise their discretion," Twinamatsiko explains.

Some legal scholars say that the argument that Congress has not provided enough specific guidance on what counts as preventive care could hold up in court.

"I've argued for years that the phrase preventive care is very open-ended," says Josh Blackman, a constitutional law professor at South Texas College and a scholar at the Cato Institute. "The

courts might react to this position by saying, 'Congress: If you want something like birth control covered, you have to be more precise,' Blackman says.

The case was argued in late July before Judge Reed O'Connor of the U.S. District Court, Northern District of Texas — the same judge who ruled in 2018 that the Affordable Care Act was unconstitutional. A decision is expected in the coming weeks.

"I'm expecting a pretty sweeping decision that is likely to invalidate all the preventive care requirements," Keith says. Legal experts expect the case will be appealed to the U.S. Court of Appeals for the Fifth Circuit and ultimately end up before the U.S. Supreme Court.

Though the Supreme Court has upheld the Affordable Care Act in prior cases, there's now a new make-up of justices. Scholars point to the recent *EPA v. West Virginia decision*, in which justices challenged the EPA's authority to act without specific direction from Congress. Georgetown's Twinamatsiko points to another case, *Little Sisters of the Poor v. Pennsylvania*, that also centered on the Affordable Care Act's preventive services provision requiring employers to include cost-free birth control in their health plans in accordance with the Health Resources and Services Administration guidelines. In that case, "Justice Clarence Thomas specifically said that the ACA's preventive services requirement seems to give HRSA virtually unlimited power to determine what counts as preventive care," tipping his hand at what his opinion would be if *Kelley v. Becerra* comes before the Supreme Court.

State attorneys general in 20 states filed a friend of the court brief defending access to free, preventive care. And public health experts have weighed in too. "It's really difficult to take away something that people already have," says A. Mark Fendrick, a doctor who directs the University of Michigan Center for Value-Based Insurance Design. "If the preventive mandate were to be struck down, I believe lots of people will not get the preventive care they need."