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Summary of Legal Analysis[1]

1. As the Fifth Circuit panel itself notes, its decision in *Braidwood v. Becerra* is a "mixed bag" for the plaintiffs, who challenged the constitutionality of the Affordable Care Act's preventive care mandate. The Fifth Circuit's decision leaves access to preventive services intact for now but threatens to block it as the case proceeds.
2. Although the court concluded that members of the United States Preventive Services Task Force ("USPSTF") were not appointed in a constitutional manner, and that the preventive care mandate therefore cannot be enforced, the court limited its remedy to the plaintiffs in the lawsuit, at least temporarily. The USPSTF's recommendations remain in full effect for the rest of the nation.
3. As for ACIP and HRSA, the court left open a way that the United States Department of Health and Human Services could preserve a preventive care mandate in the future under these committees. The Court recognized that HHS could provide greater supervision over these committees that would solve the "problem" it identified.
4. The court remanded the case to the lower court to consider whether the plaintiffs' constitutional challenge to other agencies should fail because, unlike the USPSTF, HHS provided these agencies with greater supervision. And the question remanded to the lower court is whether the Secretary followed the proper procedures to ratify ACIP and HRSA's recommendations, thereby curing the Appointments Clause "defects."
5. I am less worried about the ACIP and HRSA ruling. Even in the worst-case scenario where the lower court finds the recommendations did not follow proper procedures, the ruling would have to remain narrowly applied to just the

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plaintiffs and the secretary can then follow proper procedures to make them valid.

6. We must remain vigilant and plan to preserve PrEP Access and preventive care. While the court has averted an immediate national healthcare crisis, they have instead put down a ticking timebomb. The 5th Circuit's erroneous conclusion that the USPSTF is unconstitutional lays the groundwork for other courts to reach the same conclusion, and a new case under the Administrative Procedure Act could result in the type of national ruling we fortunately avoided here.

In Depth Analysis of the 5th Circuit Decision

I. The Appointments Clause

At issue in this case is the entire Preventative Services regime established by the Affordable Care Act. The ACA empowered three committees to decide what preventative services must be covered by insurance with no cost-sharing. These three committees are the US Preventative Services Taskforce (USPSTF), the Advisory Committee on Immunization Practices (ACIP) and the Health Resources and Services Administration (HRSA). Officials in the Department of Health and Human Services appoint the members of these committees.

Constitutional law makes a distinction between principal officers and inferior officers of the United States. Principal officers, like who's in a President's cabinet who wield substantial power under US law, under the Appointments Clause of the Constitution, must be nominated by the President and confirmed by the Senate. In contrast, inferior officers can be appointed by lower level officials such as the Secretary of Health.

Plaintiffs argued that the ACA placed too much unreviewable power in the hands of the three preventative services committees. They argued because committee members hold so much power, they must be considered principal officers of the United States rather than inferior officers. Accordingly, they must have been appointed by the President and confirmed by the Senate and not just be appointed by HHS.

The Fifth Circuit agreed with the Plaintiffs and ruled that the members of the USPSTF are unconstitutionally appointed principal officers. Even though the Secretary of Health has the power to terminate members of the USPSTF, the court reasoned that because (1)

the statute provides little to no supervisory control of the committee by HHS and (2) there is a provision in the ACA that requires the committee to be politically independent to the extent practicable, they are principal officers. Thus, the USPSTF Committee is unconstitutional because its members were appointed by HHS instead of by the President with Senate confirmation. In contrast, the Court analyzed the statutory scheme that governs ACIP and HRSA and found that HHS has significantly greater supervisory control that includes the ability to ratify ACIP and HRSA's preventive care recommendations.

II. Scope of Remedy

Having found that the Plaintiffs claim that USPSTF is unconstitutional was successful, the question becomes what relief, or remedy, is appropriate in light of the violation. The nature of a party's legal claims determines the available relief they are able to obtain from the court. Here, the Plaintiffs raised claims that the preventive care mandates violated two Constitutional provisions (the Appointments Clause and non-delegation principles under Art. I, s. 1) and the Religious Freedom Restoration Act (RFRA), and no others.

The Plaintiffs did not, however, bring a claim under the Administrative Procedure Act (APA), a suit typically available to plaintiffs when suing regarding unlawful agency actions. The APA is a federal statute that governs the process by which federal agencies develop and issue regulations and rules, such as USPSTF's, ACIP's, and HRSA's determinations about what preventative services insurance must cover. The APA gives the court "vacatur" powers or the ability to nullify and revoke unlawful agency action. When a court invokes its vacatur powers, it is a universal remedy that applies not just to the case at hand, but to the entire nation.

Here, the Plaintiffs *did not* bring an APA claim in their complaint. Instead, having removed any APA claims from their underlying complaint, they raised the issue for the first time late in the third round of summary judgment briefing. Accordingly, the Court concluded that the Plaintiffs were not entitled to either vacatur of all agency actions to enforce the preventive care coverage requirements or universal injunctive relief that would bar HHS from enforcing them. The Court narrowed the ruling to make it only applicable to the Plaintiffs who brought the case—meaning that the only people HHS is precluded from enforcing the preventive care mandates against is those Plaintiffs.

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III. ACIP and HRSA

The 5th Circuit agreed with the district court that the statutory scheme of the ACA gives the Secretary of Health greater ability to supervise and control ACIP and HRSA. Like the USPSTF, ACIP and HRSA can issue preventative care recommendations which then subsequently must be covered without the Secretary being involved. Unlike the USPSTF however, the Secretary has the power to review, reject, change, or ratify these recommendations. Here, Secretary of Health and Human Services Xavier Becerra issued a memo in January of 2022 ratifying all recommendations by USPSTF, ACIP and HRSA. He did this to strengthen the individual agency actions and arguments at the trial level.

The Plaintiffs raised the argument that such actions by the Secretary must follow the procedures outlined in the Administrative Procedures Act (which requires notice to interested parties of proposed rulemaking and a period for those parties to comment on the agency action), and that the Secretary's memo was arbitrary and capricious because it failed to explain its reasoning and was improperly retroactive. The 5th Circuit ordered that the case return to the district court for further consideration of the propriety of the Secretary's memo.

Accordingly, the recommendations made by ACIP and HRSA after the ACA was passed in 2010 are at issue. The question is whether HHS followed the requirements under administrative law for these recommendations.

I am less worried about this aspect of the 5th Circuit's ruling. In the worst-case scenario, even if the trial court concludes that the Secretary's ratification memo violated the APA, then the Secretary can subsequently go through the process of Notice and Comment and provide further rationale to ratify the recommendations to satisfy the court's ruling.

III. RFRA

The Plaintiffs claimed that by forcing them to purchase insurance that covers PrEP violates their religious beliefs because it "promotes homosexuality, promiscuity, drug

use and prostitution." Despite this claim having no basis in reality, the trial court ruled that requiring Plaintiffs to purchase insurance that included this healthcare did violate Plaintiff's religious beliefs. Fortunately, the district court ruled narrowly that it could only grant relief to the Plaintiffs and did not issue a ruling that applied to all religious individuals in the United States. Because this ruling was so narrow, the Department of Justice did not appeal it to the 5th Circuit so the ruling still stands. RFRA does not grant any sort of broad-based exemption from having to comply with generally applicable laws that protect LGBTQ+ people and people living with HIV, and thus the district court's narrow ruling on this issue should not have strong precedential value for other cases.

IV. Predictions

This is a great short-term victory, but we should not be too celebratory; while we have averted an immediate national healthcare crisis, the court has laid down a ticking timebomb. The 5th Circuit's erroneous finding that the USPSTF is unconstitutional lays the groundwork for other courts to reach the same conclusion, whether within this Circuit or across the country. Though this case did not result in a nationwide setting aside of the preventive care mandates, it has become much easier for a future case that brings forward the proper claims to do so,- which will allow the court to issue a vacatur with national effects.

Questions?

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