No. 23-10326

In the United States Court of Appeals for the Fifth Circuit

BRAIDWOOD

in his official capacity as
SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division
Case No. 4:20-cv-283

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AMERICAN MEDICAL ASSOCIATION, AEROSPACE MEDICAL ASSOCIATION, AMERICAN ACADEMY OF OPHTHALMOLOGY, AMERICAN ACADEMY OF PEDIATRICS, AMERICAN COLLEGE OF CARDIOLOGY, AMERICAN COLLEGE OF CHEST PHYSICIANS, AMERICAN COLLEGE OF LIFESTYLE MEDICINE, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE, AMERICAN COLLEGE OF PHYSICIANS, AMERICAN COLLEGE OF PREVENTIVE MEDICINE, AMERICAN GASTROENTEROLOGICAL ASSOCIATION, AMERICAN MEDICAL WOMEN'S ASSOCIATION, AMERICAN OSTEOPATHIC ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN SOCIETY OF CLINICAL ONCOLOGY, AMERICAN SOCIETY OF ECHOCARDIOGRAPHY,

AMERICAN SOCIETY FOR GASTROINTESTINAL ENDOSCOPY, AMERICAN THORACIC SOCIETY, AMERICAN SOCIETY OF NEPHROLOGY, GLMA: HEALTH PROFESSIONALS ADVANCING LGBTQ+ EQUALITY, INFECTIOUS DISEASES SOCIETY OF AMERICA, NATIONAL HISPANIC MEDICAL ASSOCIATION, NATIONAL MEDICAL ASSOCIATION,

Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

The **Aerospace Medical Association** is the largest and most-representative professional membership organization in the fields of aerospace medicine and human performance. Aerospace Medicine physicians are certified by the American Board of Preventive Medicine and their professional practice is focused on the prevention of illness and injury. The Aerospace Medical Association is interested in preserving free preventive medicine services for all U.S. citizens.

The **American Academy of Ophthalmology** is the world's largest association of ophthalmologists—medical and osteopathic doctors who provide comprehensive eye care including medical, surgical, and optical care. A global community of 32,000 medical doctors, we protect sight and empower lives by setting the standards for ophthalmic education and advocating for our patients and the public.

The **American Academy of Pediatrics** (AAP) was founded in 1930 and is a national, not-for-profit professional organization

dedicated to furthering the interests of child and adolescent health. Since AAP's inception, its membership has grown from 60 physicians to over 67,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists. Over the past 90 years, AAP has become a powerful voice for child and adolescent health through education, research, advocacy, and the provision of expert advice. Among other things, AAP has worked with the federal and state governments, health care providers, and parents on behalf of America's children and adolescents to ensure the availability of effective preventive services.

As the global leader in transforming cardiovascular care and improving heart health for all, the **American College of Cardiology** (ACC) is committed to ensuring patient access to preventive screening and evidence-based treatment and medication, sed t

guidelines, as well as the dissemination of world-class research and science across its family of JACC Journals.

The **American College of Chest Physicians** (CHEST) is the global leader in advancing best patient outcomes through innovative chest medicine education, clinical research, and team-based care. With more than 21,000 members representing more than 100 countries around the world, its mission is to champion the prevention, diagnosis, and treatment of chest diseases through education, communication, and research. CHEST invests resources directly in developing clinical guidance aimed at enabling the diagnosis and treatment of diseases and advocates for the implementation of policies best designed to promote disease prevention and improve public health.

The **American College of Lifestyle Medicine**

patients have access to preventive health care services to keep them healthy throughout all stages of life.

The **American College of Physicians**

(CRC), which remains the number two cancer killer in the U.S. Additionally, since the implementation of the ACA, there has been a decline in morbidity and mortality in CRC which is directly related to this benefit. Since the implementation, additional financial barriers to screening have been eliminated to help more patients access screening services. Unraveling this benefit would be detrimental to our nation's public health and Americans' ability to utilize prevention services.

The **American Medical Women's Association** (AMWA) is the oldest multi-specialty organization for women in medicine. Founded in 1915, AMWA's mission is to advance women in medicine, advocate for equity, and ensure excellence in health care. This is achieved by providing and developing programs in advocacy, leadership, education, and mentoring. AMWA and its members are dedicated to ensuring excellence in clinical care for all Americans.

The **American Osteopathic Association** represents more than 178,000 osteopathic physicians (DOs) and osteopathic medical students; promotes public health; encourages scientific research; and serves as the primary certifying body for DOs. Osteopathic physicians practice in every medical specialty and in every state. DOs are trained in a patient-

to patients. Striking down this requirement will have grave consequences to the health and lives of millions of Americans.

Physician members of the **American Society for Gastrointestinal Endoscopy** provide screening colonoscopies, which has an "A" rating from the U.S. Preventive Services Task Force for those age 50–75. This means that colorectal cancer screening in this age group is a covered preventive service without cost-sharing. After March 23, 2010, the USPSTF increased access to preventive colorectal cancer screening by assigning a "B" rating for screening in individuals age 45–49. Therefore, this court case could jeopardize access to colorectal cancer screening without cost-sharing in the 45–49 age population.

The **American Thoracic Society** is the world's leading medical society dedicated to accelerating the advancement of global respiratory health through multidisciplinary collaboration, education, and advocacy. Core activities of the Society's more than 16,000 members are focused on leading scientific discoveries, advancing professional development, impacting global health, and transforming patient care.

The **American Society of Nephrology** strongly supports the delivery of recommended preventive services without cost sharing as

determined by the independent, evidence-based U.S. Preventive Services Task Force and encourages the use of more screening measures to improve patient outcomes. Prevention and early detection are key to slowing or stopping the progression of kidney diseases to complete kidney failure: recent research of new therapies to slow the progression of kidney diseases provides promise to advance kidney health, improve quality of care, and avoid costly kidney failure.

As the oldest and largest association of LGBTQ+ and allied health professionals, **GLMA: Health Professionals Advancing LGBTQ+ Equality** (GLMA) is dedicated to the promotion of health equity and access to affirming health care, including abortion care. GLMA is also invested in advancing inclusive health policy informed by medical evidence, not mis- and disinformation.

The **Infectious Diseases Society of America** is a community of over 12,000 physicians, scientists, and public health experts who specialize in infectious diseases. Its purpose is to improve the health of individuals, communities, and society by promoting excellence in patient care, education, research, public health, and prevention relating to infectious diseases.

The **National Hispanic Medical Association** was established in 1994 and is a non-profit association representing the interests of more than 50,000 licensed Hispanic physicians in the United States. Its mission is to empower Hispanic physicians in their efforts to improve the health of underserved populations, including increasing access to preventive health services.

The **National Medical Association** (NMA) is the collective voice of African American physicians and the leading force for parity and justice in medicine and the elimination of disparities in health. The NMA is the largest and oldest national organization representing African American physicians (over 50,000) and their patients in the United States. NMA is committed to improving the quality of health among minorities and disadvantaged people through its membership, professional development, community health education, advocacy, research and partnerships with federal and private agencies. Throughout its history the National Medical Association has focused primarily on health issues related to African Americans and medically underserved populations; however, its principles, goals, initiatives, and philosophy encompass all ethnic groups.

practice through education, training, and information distribution. SLS provides a forum for the introduction, discussion and dissemination of new and established ideas, techniques and therapies in minimal access surgery. Ensuring that patients can receive appropriate, preventive-care services without financial barriers is of the utmost importance to public health.

The **Undersea and Hyperbaric Medical Society, Inc.** (UHMS) believes that preventive health care services improve health outcomes and the functioning of the health system, overall.

ARGUMENT

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this brief to provide a medical perspective on the issues in this case, with a specific focus on the importance of eliminating financial barriers to accessing preventive care.

Whether to grant a motion for leave to participate as *amicus curiae* is within the Court's discretion. *Richardson v. Flores*, 979 F.3d 1102, 1106 (5th Cir. 2020).

parties' briefs. It provides a physician's perspective on the importance of preventive care, how financial barriers discourage the use of preventive care, how the ACA substantially alleviated those barriers, and how the district court's decision could result in millions of Americans losing access to or forgoing preventive care.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), proposed *amici* state that no counsel for any party authored the proposed brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Accordingly, proposed *amici* respectfully request that this Court grant leave to file the attached brief.

Respectfully submitted,

s/ Madeline H. Gitomer

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32(b), this document contains 2,555 words.

This filing also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

s/ Madeline H. Gitomer

Madeline H. Gitomer
Counsel of Record

Dated: June 27, 2023

CERTIFICATE OF SERVICE

I, Madeline H. Gitomer, counsel for *amici*, certify that on June 27, 2023, a copy of the foregoing motion was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

s/ Madeline H. Gitomer

Madeline H. Gitomer
Counsel of Record

Dated: June 27, 2023

No. 23-10326

In the United States Court of Appeals for the Fifth Circuit

BRAIDWOOD MANAGEMENT, INC.,,
Plaintiffs-Appellees/Cross-Appellants,

v.

XAVIER

AMERICAN COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE, AMERICAN COLLEGE OF PHYSICIANS, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN SOCIETY OF CLINICAL ONCOLOGY, AMERICAN SOCIETY, HEALTH PROFESSIONALS ADVANCING LGBTQ+ EQUALITY,

INFECTIOUS DISEASES SOCIETY OF AMERICA, NATIONAL HISPANIC MEDICAL ASSOCIATION, NATIONAL MEDICAL

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the

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Dated: June 27, 2023

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INTEREST OF [1]

As set forth in the accompanying motion for leave, *amici* include 28 associations representing hundreds of thousands of practicing physicians providing vital preventive healthcare services to millions of patients. *Amici* submit this brief to explain how the decision below jeopardizes the coverage of preventive healthcare services and threatens to reverse positive trends in patient health.

[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than *amici*, their members, and their counsel contributed money to fund this brief. All parties consent to the filing of this brief.

INTRODUCTION

As professional organizations representing physicians across the country, *amici* know that no-cost preventive care saves lives, saves money, improves health outcomes, and enables healthier lifestyles. Ensuring that patients can receive these services without financial barriers is of the utmost importance to public health—and was one of the central features of the Affordable Care Act. The decision below threatens to gut the ACA's preventive-care requirements and imperil access to vital healthcare services nationwide. *Amici* file this brief to explain the consequences the lower court's decision could have on preventive-care access and to encourage this Court to reverse it.

As medical professionals, *amici* know that preventive care can mean the difference between kicking a smoking habit or living with a heightened risk of dozens of illnesses; between taking a statin or suffering a life-changing heart attack; between providing essential prenatal and postnatal care and screening or leaving pregnant people and children behind; and between catching a patient's cancer early or catching it after it's too late. Identifying and treating conditions before

insurance, many Americans may forgo preventive services that could save or drastically improve their lives—to their detriment and to the detriment of our nation's health system.

For the reasons that the government explains, the decision below regarding USPSTF services is wrong on the law and should be reversed on the merit2.6 (s)0(2.6 (3-2.6 ce)-8.4 (s)]4 (s)i0(2.6 (t3.2-4.1 (v)-1 mT)-4.5 (5 (a)-3. (ic

ARGUMENT

I. Encouraging patients to obtain preventive care improves health outcomes and the functioning of the health system overall.

Preventive care is an umbrella term that refers to "[r]outine health care that includes screenings, check-ups, and patient counseling to prevent illnesses, disease, or other health problems."[3] As medical professionals, *amici* have an obligation to ensure that our patients, and the public as a whole, receive medically indicated preventive services. As Principle VII of the AMA Principles of Medical Ethics states, "A physician shall recognize a responsibility to participate in activities contributing to the improvement of the community and the betterment of public health."[4] To that end, Opinion 8.11 of the AMA Code of Medical Ethics specifies that, "[w]hile a physician's role tends to focus on diagnosing and treating illness once it occurs, physicians also have a

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[3] *Preventive Services*, HealthCare.gov, https://www.healthcare.gov/glossary/preventive-services/ (last visited June 23, 2023).

[4] *AMA Principles of Medical Ethics*, AMA Code Med. Ethics, https://code-medical-ethics.ama-assn.org/principles (last revised June 2001).

prenatal care or no prenatal

immunizations, risky behavior counseling (*e.g.* smoking cessation, illicit drug abstinence), . . . and certain cancer screens."[11] Indeed, "[e]ighteen of the 25 preventive services evaluated by the [National Convention on Prevention Priorities] cost $50,000 or less per quality-adjusted life year (QALY) and 10 of these cost less than $15,000 per QALY, all well within the range of what is considered a favorable cost-effectiveness ratio."[12]

But patients reap the many benefits of preventive care only if they

"strong[] support" for "the concept that cost sharing, as a financial barrier, decreases … the use of preventive services."[16] Prior to the enactment of the Affordable Care Act, the majority of Americans either lacked health insurance or were enrolled in insurance plans that did not cover preventive care without cost-sharing[17]—

> recommendations of the United States Preventive Services Task Force . . . .[21]

"The [Task Force] is an internationally recognized, independent

In enacting the ACA, Congress sought to guarantee access to services like these regardless of financial constraints.

The ACA's preventive-care requirements have generally been successful in expanding access to preventive care, and, for that reason, have proven to be one of the most popular parts of the statute.[26] "While some plans already covered the full costs of these services prior to the Affordable Care Act, millions of Americans were enrolled in health plans that did not."[27] In 2014, the Office of the Assistant Secretary for Planning angnl32.5 (i)0.7 (ve)]To (in hn0 Tc 0 Tw 1.502 0 44( )Tj-0.002 Tc 0.001 Tw

This dramatic expansion of preventive coverage has generally increased the utilization of preventive services. A recent study found, for example, that "6 in 10 privately insured people (60%) received ACA preventive care in 2018," or roughly 100 million people.[32] A 2022 literature review of 35 separate studies conducted by the University of Michigan Center for Value-Based Insurance Design determined that "[t]he majority of findings in our literature conclude that cost-sharing elimination led to increases in utilization for select preventive services."[33] "Changes in utilization may be localized or augmented among specific populations, including low-income individuals, Medicare beneficiaries lacking supplemental insurance, and those with high levels of cost-sharing for a service pre-elimination," which "suggest that low-socioeconomic groups and those who experience the greatest financial barriers to care appear to benefit the most from cost-sharing

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[32] Krutika Amin et al., *Preventive Services Use Among People with Private Insurance Coverage*, Peterson-KFF Health Sys. Tracker (Mar. 20, 2023), https://www.healthsystemtracker.org/brief/preventive-services-use-among-people-with-private-insurance-coverage/.

elimination."[34] To the extent preventive services remain under-utilized, it is because of additional barriers like lack of awareness of particular services or the benefits of preventive care.[35]

So, for example, a study of 64,000 adults with different insurance profiles found that in the two years after the ACA's preventive-care mandate eliminated cost-sharing for many health plans, "the rate of

More recent studies have found significant increases in cancer screening rates. ASPE's 2022 report on preventive care utilization found that "[s]tudies examining changes in cancer screening among privately insured individuals after the ACA eliminated cost-sharing show an overall increase in colorectal cancer screening tests," as well as "increase[d] cervical cancer screening rates among Latinas and Chinese-American women."[38] And a study of improvements in cancer screenings in community health centers found that "both increased insurance options (Medicaid expansion and subsidized exchange coverage) and preventive service coverage requirements (ensuring no out-of-pocket cost to patients for these screenings) helped patients obtain recommended services."[39]

Studies have also confirmed that the ACA's preventive care requirements increased the use of general wellness services. A 2014 study found that the expansion of insurance "accounted for the increase

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Task Force practice recommendations, while insurance coverage changes under the Affordable Care Act were associated with increased screening volumes among women age 50-74.").

38 2022 ASPE Report, supra note 6, at 7, 8.

39 Nathalie Huguet et al., *Cervical and Colorectal Cancer Screening Prevalence Before and After Affordable Care Act Medicaid Expansion*, 124 Preventive Med. 91, 95 (2019), https://www.sciencedirect.com/science/article/pii/S0091743519301719.

percentage point rate among both Hispanic and Black adults compared with White adults with the implementation of the ACA."[47] Other studies have also found increases in cancer screening rates and improvements in blood pressure and glucose levels among members of historically marginalized communities.[48]

III. Affirming the judgment below would imperil access to preventive care for millions of Americans.

Research Institute survey of employers found that between 8 and 20 percent of respondents may impose cost-sharing for some preventive services.[49] "According to the Kaiser Family Foundation's Employer Health Benefits Survey in 2012, 41 percent of all workers were covered by employer-sponsored group health plans that expanded their list of covered preventive services due to the Affordable Care Act."[50] If even ten percent of those workers' plans reverted to excluding preventive care or requiring cost-sharing—at the low end of the survey's findings—more than six million Americans could lose access to no-cost preventive services.

Patients who fall within that category could therefore face substantial out-of-pocket costs for obtaining preventive services—costs that could deter many of them from seeking necessary care. A recent Morning Consult survey found that "at least half [of survey respondents] said they would not pay out of pocket for preventive services such as tobacco cessation or screenings for HIV, depression and

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49 *Will Employers Introduce Cost Sharing for Preventive Services? Finding from EBRI's First Employer Pulse Survey*, EBRI Fast Facts (Oct. 27, 2022), https://www.ebri.org/docs/default-source/fast-facts/ff-445-pssurvey-27oct22.pdf?sfvrsn=52f4382f_4.

50 Burke & Simmons, *supra* note 27, at 2.

unhealthy drug use."[51] Thirty-eight percent of the adults in the survey responded that they would not even pay for cancer screenings.[52]

In other words, subjecting patients to a copay or deductible to access preventive services will deter some of them—and, in particular, those of limited means—from scheduling mammograms, colonoscopies, and screening tests for osteoporosis, hypertension, diabetes, lung cancer, depression, and other conditions that could shorten their lives if undetected and untreated.[53] Millions of patients could lose first-dollar coverage for these treatments, to the detriment of their health.

vital services will result in worse health outcomes and impose higher costs on the health system to treat the maladies that emerge or worsen.

All Americans, moreover, will be affected by the confusion that would emerge from gutting the ACA's decade-old preventive-care requirements. Doing so would yield a "confusing patchwork of health plan benefit designs offered in various industries and in different parts of the country," making it difficult for "[p]atients who have serious medical conditions or are at high risk for such conditions" to "find[] a plan that fully covers preventive and screening services."[54] Patients will, for the first time in ten years, have to scrutinize insurance plans to determine what preventive services they cover, and at what out-of-pocket cost. And they will have to do so *both* when deciding which plan to select during enrollment, and then *again* when deciding whether to obtain a particular service. Many will instead decide to forgo basic preventive services entirely.[55]

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54 *Id.*

55 *See, e.g.*, Norris et al., *supra* note 33, at 193 (identifying "patients' unawareness of what services are exempt from cost-share" and "misperceptions of the importance of preventive care" as reasons patients decline to obtain preventive care); Stacey A. Fedewa et al., *Elimination of Cost-Sharing and Receipt of Screening for Colorectal and Breast Cancer*, 121 Cancer 3272, 3278 (2015), https://acsjournals.onlinelibrary.wiley.com/doi/epdf/10.1002/cncr.29494.

Insurers may

to individual and small business health plans, not large employer plans.[59]

If the decision below invalidating the Task Force's recommendations nationwide is not reversed, *amici* know from experience that their patients will be less likely to accept services that will save lives. Patients will struggle to navigate new and confusing insurance schemes. Ultimately, *amici* will see many of their patients, including some of their most vulnerable, turn down medically indicated services because of the very financial barriers that Congress sought to remove. The past ten years have shown the benefits of no-cost preventive coverage. *Amici* ask the Court to preserve those benefits by reversing the expansive injunctive relief that imperil 0 Tw -24 0 b g,Tecel /dc0.5 (th

Respectfully submitted,

s/ Madeline H. Gitomer

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CERTIFICATE OF COMPLIANCE

With Type-Volume Limit, Typeface Requirements,
and Type-Style Requirements

I certify that this filing complies with the type-volume limitation

of [illegible]