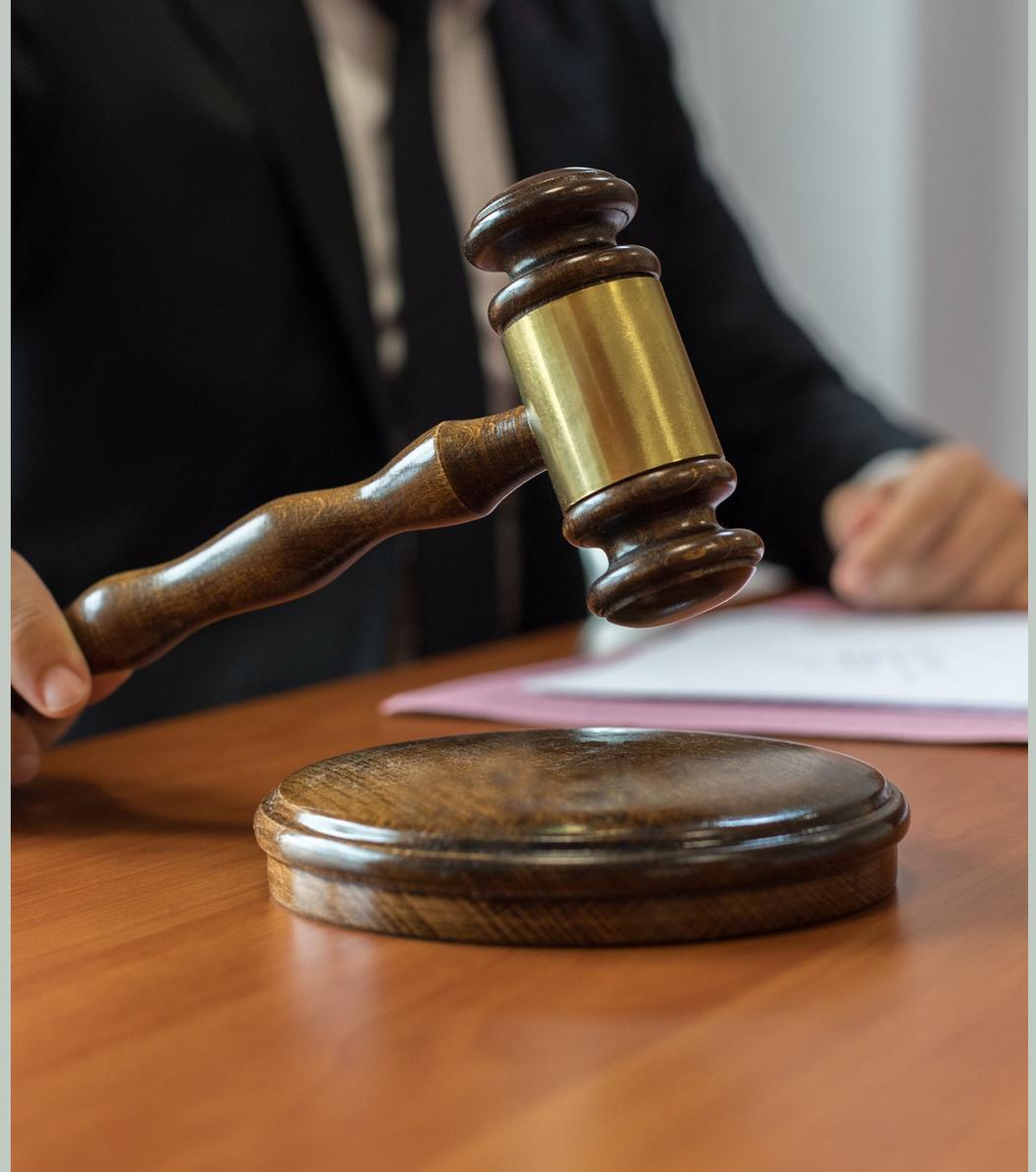

Braidwood v. Becerra

Implications and Strategies to
Fortify Access to Preventive Care

Information and graphics adapted
from Kaiser Family Foundation,
see reference slide.



Outline

01 Background

02 The Problem

03 Analysis

04 Possible Solutions

01 Background

In the current case, *Braidwood Management Inc. v. Becerra*, the plaintiffs claim that the preventive services requirements for private health insurance are unconstitutional and the requirement to cover PrEP-specific coverage requirement violates the Religious Freedom Restoration Act (RFRA) (**Table 2**). The plaintiffs are six individuals and Christian owned businesses. Braidwood Management, a for-profit closely held organization, owned by a trust, with Dr. Steven F. Hotze, a religious Christian, as the sole trustee and beneficiary. Braidwood is self-insured and provides health insurance to its 70 employees. The other plaintiff is Kelley Orthodontics, a Christian professional association owned by plaintiff John Kelley. The plaintiffs are asserting both economic harm for having to pay more money for a health plan that includes services they do not want or need, and religious harm for having to include services they object to.

Table 2: *Braidwood v. Becerra*: Litigation Challenging the ACA's Preventive Services Provision: Summary of the Plaintiffs' and Government's Position

Claim: The ACA preventive services provisions (42 U.S.C. § 300gg-13(a)(1)-(4)) Violate The Appointments Clause because the members of the committees act as "officers of the United States" and have not be properly appointed

The Appointments Clause provides: [The President] shall have Power, by and with the Advice and Consent of the Senate, to . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II § 2. Y

Q&A: Implications of the ruling on the ACA's Preventive Services Requirement. KFF. (2023, April 4). Retrieved April 24, 2023, from <https://www.kff.org/policy-watch/qa-implications-of-the-ruling-on-the-acas-preventive-services-requirement/>

Plaintiff Claims

Position 1:

ACA Preventive Services Provision Violates Appointments Clause



Government's Position:

- The secretary's ratification of the current preventive services coverage requirements defeats plaintiffs' appointments clause claim
- HRSA and the CDC (which ACIP Advises) are components of the HHS that exercise the secretary's power and are under the secretary's control.
- The USPSTF is an independent body that does not exercise Executive Power. Its independent recommendations about the quality of evidence backing the effectiveness of certain preventive services is separate from any judgment about what should or should not be covered by health insurance, which latter judgment was made by Congress.

Position 2:

Preventive Services Provision Violates Nondelegation Doctrine



Government's Position:

- "Delegations are constitutional so long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized [to exercise the authority] is directed to conform."
- The grants of authority under 42 U.S.C. § 300gg-13(a) fall well within the wide range of delegations approved by the Supreme Court and the Fifth Circuit and are consistent with established limits on Congress's power to delegate.
- Congress did not "delegate" power to PSTF at all but instead incorporates its work.

Position 3:

Preventive Services Provision Violates The Religious Restoration Act



Government's Position:

- The plaintiffs have failed to demonstrate the PrEP coverage requirement substantially burdens their religious beliefs.
- The plaintiffs cannot identify any impact on their health insurance premiums arising from the requirement to cover PrEP drugs.
- Even if the plaintiffs could show a substantial burden, the government has a compelling interest in countering the spread of HIV infections, and the plaintiffs have not argued that there is a less restrictive way of meeting this compelling interest (requiring private health insurance to cover PrEP without cost sharing).

Attack on Affordable Care Act

PrEP Access Under Attack!



Table 1: Committees Issuing Recommendations for Preventive Services

Recommending Entity	Role of the Agency	Process for Appointments and Oversight
U.S. Preventive Services Task Force (USPSTF)	The U.S. Preventive Services Task Force is an independent, volunteer panel of national experts in evidence-based medicine. The Task Force issues recommendations nationwide by making evidence-based recommendations about clinical preventive services.	<ul style="list-style-type: none"> USPSTF members appointed by the Director of AHRQ to serve 4-year terms. USPSTF recommendations are not subject to review by the CDC Director.
Advisory Committee on Immunization Practices (ACIP)	The ACIP shall provide advice and guidance to the Director of the CDC regarding use of vaccines and related agents for effective control of vaccine-preventable diseases in the civilian population of the United States.	<ul style="list-style-type: none"> The Secretary of the U.S. Department of Health and Human Services selects the members following an application and nomination process. Recommendations made by the ACIP are reviewed by the CDC Director, and if adopted, are published as official CDC/HHS recommendations which determines insurance coverage policy.
Health Resources and Services Administration (HRSA) – Women's Preventive Services Initiative	HRSA is an agency of the U.S. Department of Health and Human Services that operates programs intended to provide equitable health care to people who are geographically isolated and economically or medically vulnerable.	<ul style="list-style-type: none"> HRSA contracts with an external organization, currently ACOG, to convene a panel of experts, the Women's Preventive Services Initiative (WPSI) to make and update recommendations for women's preventive services. HRSA can accept or reject recommendations which determines insurance coverage requirements.
HRSA — Bright Futures for Children	HRSA (see above)	<ul style="list-style-type: none"> HRSA uses the guidelines developed by The Bright Futures Program to identify evidence-informed guidelines for preventive care screenings and routine visits for newborns through adolescents up to age 21. The American Academy of Pediatrics (AAP) convenes experts in pediatric care with support from HRSA to review scientific evidence and recommend updates.

The plaintiffs contend that the ACA provisions violate the Appointments Clause of the US Constitution, which provides that “officers of the United States” may only be appointed by the president, subject to the advice and consent of the Senate. They claim that the members of USPSTF, ACIP and HRSA are “officers of the United States” who have not been appointed in conformity with the Appointments Clause because they were not nominated by the President and approved by the Senate. Rather, members of these bodies are appointed by the heads of agencies within HHS (**Table 1**). The plaintiffs are asking the court to declare all preventive-care mandates based on recommendations or guidelines issued by USPSTF, ACIP or HRSA after March 23, 2010 (the day the ACA was signed into law) as unconstitutional. The plaintiffs contend that the ACA does not allow the Secretary of HHS or the directors of the agencies within HHS to reject the recommendations made by the committees and is thus insufficient oversight.

Q&A: Implications of the ruling on the ACA's Preventive Services Requirement. KFF. (2023, April 4). Retrieved April 24, 2023, from <https://www.kff.org/policy-watch/qa-implications-of-the-ruling-on-the-acas-preventive-services-requirement/>

02 The Problem



"In siding with the plaintiffs, Judge O'Connor has jeopardized access to critical health care services, [potentially affecting over 150 million insured Americans.](#)"

Dorfman, D., McCluskey, E., & Sachs, R. (2023, April 3). *Three reactions to Braidwood v. Becerra*. Harvard Law Bill of Health. Retrieved April 25, 2023, from <https://blog.petrieflom.law.harvard.edu/2023/04/03/three-reactions-to-braidwood-v-becerra/#:~:text=In%20siding%20with%20the%20plaintiffs,over%20150%20million%20insured%20Americans.>

Major Additions and Revisions to USPSTF Recommendations Made On or After March 23, 2010

Health Area	Preventive Service	Affected Population
Cancer	Breast Cancer: Medication Use to Reduce Risk	Women at increased risk for breast cancer aged 35 years or older
Cancer	Lung Cancer: Screening	Adults aged 50 to 80 years who have a 20 pack-year smoking history and currently smoke or have quit within the past 15 years
Cancer	Colorectal Cancer: Screening	Adults aged 45-49 years*
Chronic Conditions	Statin Use for the Primary Prevention of Cardiovascular Disease in Adults: Preventive Medication	Adults aged 40 to 75 years who have 1 or more cardiovascular risk factors and an estimated 10-year cardiovascular disease (CVD) risk of 10% or greater
Chronic Conditions	Hepatitis C Virus Infection in Adolescents and Adults: Screening	Adults 22 and older
Health Promotion	Unhealthy Drug Use: Screening	Adults 22 and older
Pregnancy	Aspirin Use to Prevent Preeclampsia and Related Morbidity and Mortality: Preventive Medications	Pregnant persons at high risk for preeclampsia
Pregnancy	Perinatal Depression: Preventive Interventions	Pregnant persons**
Sexual and Reproductive Health	Prevention of Human Immunodeficiency Virus (HIV) Infection: Preexposure Prophylaxis	Persons at high risk of HIV acquisition
Sexual and Reproductive Health	Human Immunodeficiency Virus (HIV) Infection: Screening	Men 22 and older***

NOTE: *Coverage for colorectal cancer screening is still required for adults 50-75. **Coverage for postpartum depression screening is still required under Bright Futures. ***Coverage for HIV infection screening is still required for adolescents up to age 21 and all women.

SOURCE: United States Preventive Services Task Force, 2023

03 Analysis

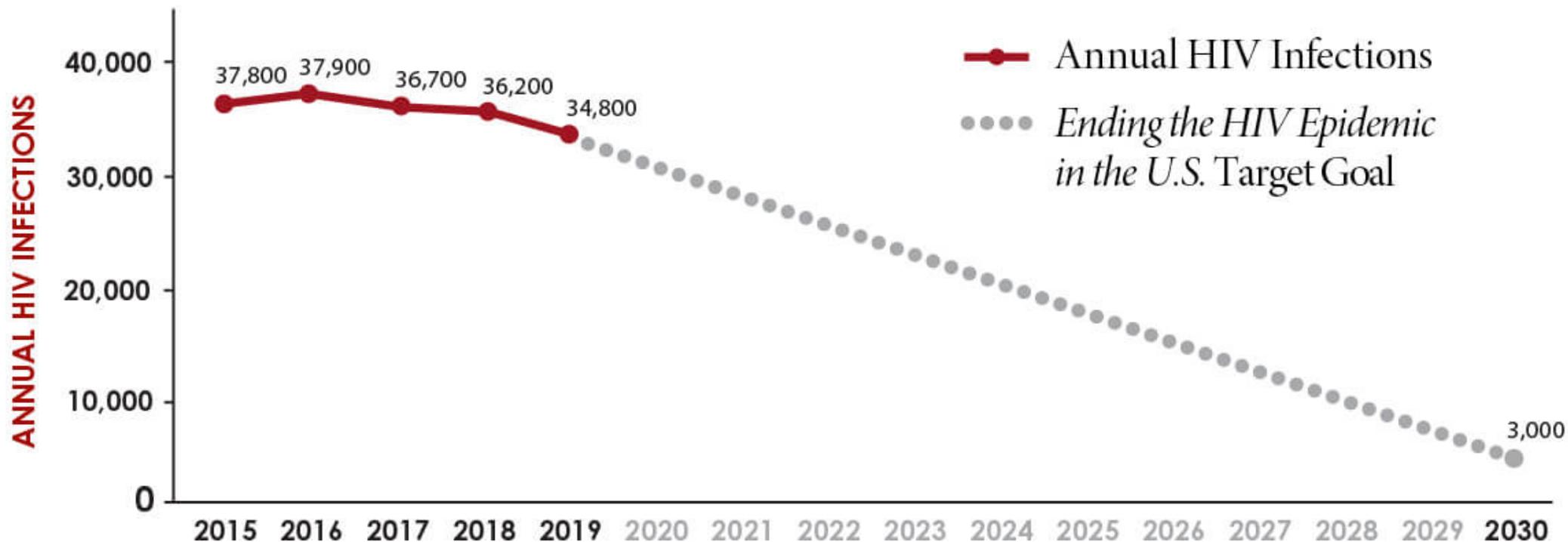
Impact of *Braidwood v. Becerra*

The findings demonstrate how decisions related to public health, on the structural and individual levels, are colored by moral judgment. This is detrimental not only to LGBTQ individuals but also to society as a whole. The law's paradoxical treatment of PrEP impedes major public health projects: fighting chronic blood scarcity, increasing the pool of donors who could give antibodies in times of a pandemic, and eliminating HIV.”

Dorfman, Doron, The PrEP Penalty (March 19, 2021). 63 Boston College Law Review 813 (2022), Available at
SSRN: <https://ssrn.com/abstract=3808234> or <http://dx.doi.org/10.2139/ssrn.3808234>

NEW HIV INFECTIONS FELL 8% FROM 2015 TO 2019, AFTER A PERIOD OF GENERAL STABILITY

ANNUAL HIV INFECTIONS IN THE U.S., 2015-2019



For more information, visit
cdc.gov/nchhstp/newsroom



U.S. Department of
Health and Human Services
Centers for Disease
Control and Prevention

Epidemiology of HIV in USA

Proportion of People with HIV by Race/Ethnicity Compared to Proportion of U.S. Population, 2019

Race/Ethnicity	% of People with HIV, 2019 ¹¹	% of U.S. Population, 2019 ¹⁴
<u>Black/African American</u>	<u>40.3%</u>	<u>13.4%</u>
White	28.5%	60.1%
<u>Hispanic/Latino</u>	<u>24.7%</u>	<u>18.5%</u>
Asian	1.5%	5.9%
American Indian/Alaska Native	0.3%	1.3%
Native Hawaiian and Other Pacific Islander	0.09%	0.2%

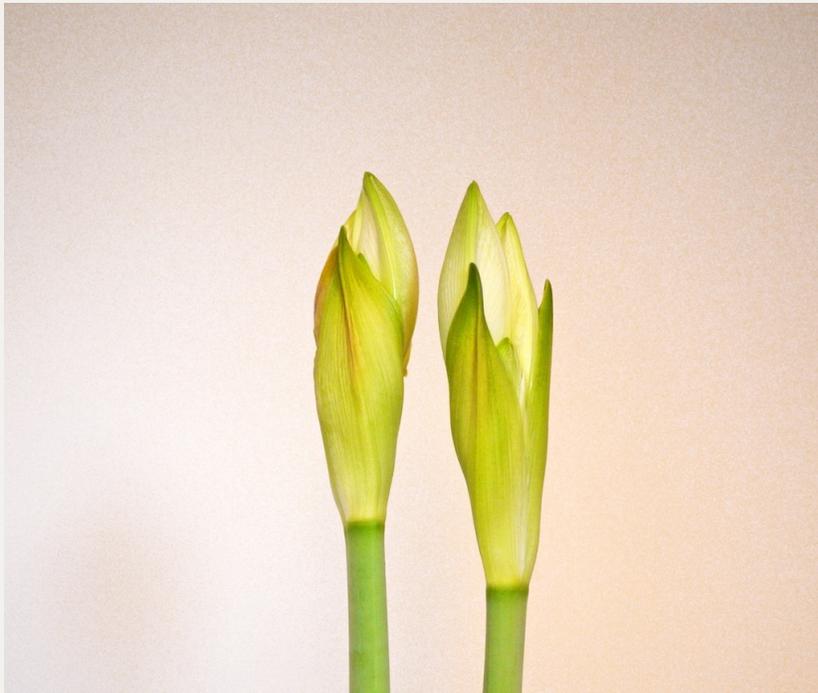
Source: CDC, [Estimated HIV incidence and prevalence in the United States, 2015–2019](#), HIV Surveillance Supplemental Report 2021;26(1) and US Census Bureau, [Quick Facts—United States](#).

04 Possible Solutions

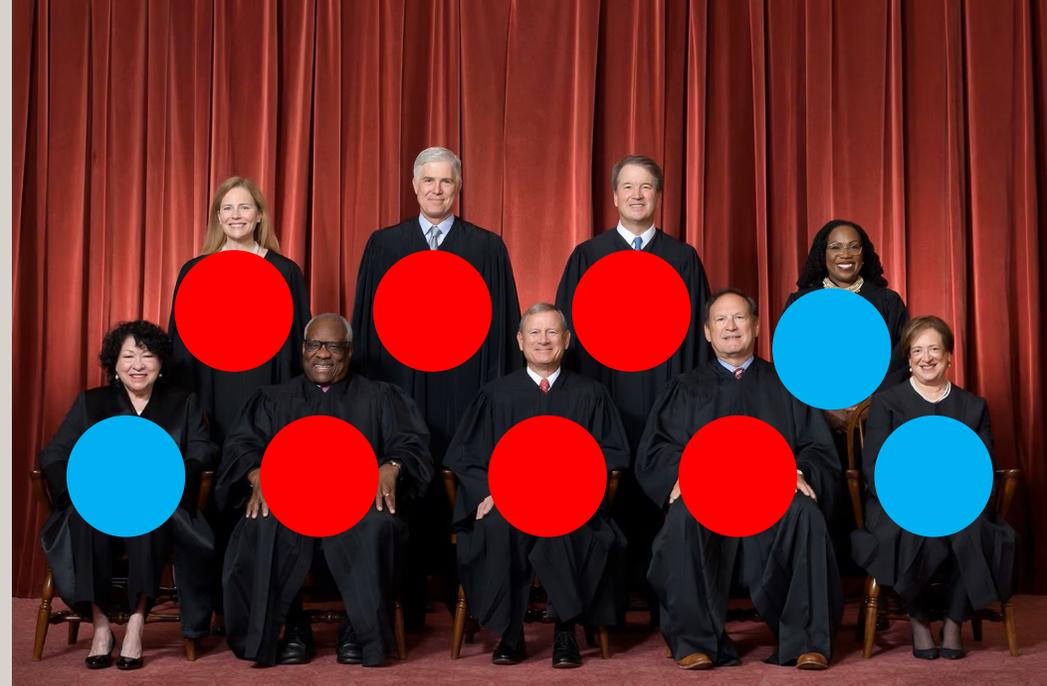
Plan A

Staid Ruling

- File for an injunction
- Await impact of USPSTF Ruling



Plan B



Appeal Ruling

Conservative
Supermajority

Risks Further Harm
to ACA

Plan C



Public Awareness

- Educate public re: impact of Braidwood v. Becerra
- Initiate bipartisan campaign to support legislation
- Focus on districts most likely to remove noncompliant Republican Congressional Rep.

Introduce Legislation

- Introduce House legislation w/bipartisan support
- Senate support likely, given Democrat control

Summary

Ending HIV Epidemic is Achievable

Black/African American Communities
Most Impacted by Ruling

Due to systemic racism

SCOTUS Intervention likely to result in
further harm to ACA

Biomedical Prevention including PrEP
Essential

Many Millions of Americans Will Lose
Access to Preventive Care

Including Cancer Screenings, Chronic Conditions

Best chance for remedy via Legislative
Branch

References

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- Dorfman, Doron, *The PrEP Penalty* (March 19, 2021). 63 Boston College Law Review 813 (2022), Available at SSRN: <https://ssrn.com/abstract=3808234> or <http://dx.doi.org/10.2139/ssrn.3808234>
- Dorfman, D., McCluskey, E., & Sachs, R. (2023, April 3). *Three reactions to Braidwood v. Becerra*. Harvard Law Bill of Health. Retrieved April 25, 2023, from <https://blog.petrieflom.law.harvard.edu/2023/04/03/three-reactions-to-braidwood-v-becerra/#:~:text=In%20siding%20with%20the%20plaintiffs,over%20150%20million%20insured%20Americans.>
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