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

BRIEF FOR AMERICAN PUBLIC HEALTH ASSOCIATION,
PUBLIC HEALTH DEANS AND SCHOLARS, THE ROBERT
WOOD JOHNSON FOUNDATION, AND PUBLIC HEALTH
ADVOCATES AS AMICI CURIAE
IN SUPPORT OF DEFENDANTS-APPELLANTS

Andrew J. Pincus
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


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.

Individual Amici Curiae

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

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

Deardorff, Julianna, PhD, Associate Dean of Faculty and Academic Affairs and Associate Professor, Director MCHB Center of Excellence and MCHB LEAP, Program Head, Maternal, Child and Adolescent Health, Center for Environmental Research and Community Health (CERCH), University of California Berkeley School of Public Health
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

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

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

Fried, Linda P., MD, MPH, Dean and DeLamar Professor of Public Health, Mailman School of Public Health, Professor of Epidemiology and Medicine, Columbia University

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ashe, Marice, JD, MPH, Lecturer, University of California Berkeley Law

Bard, Jennifer S., JD, MPH, PhD, Professor of Law, College of Law, Professor, Department of Internal Medicine, University of Cincinatti

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

Blewett, Lynn A., PhD, MA, Professor of Health Policy, University of Minnesota School of Public Health
Bonar, Robert, DrHA, Professor and Program Director, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

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

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

Burke, Taylor, JD, LLM, Adjunct Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

Burris, Scott, JD, Professor of Law, Director, Center for Public Health Law Research, Temple University Beasley School of Law

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

Cartwright-Smith, Lara, JD, MPH, Associate Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

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

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
Dorfman, Doron, JSD, JSM, LLM, LLB, Associate Professor of Law, Seton Hall University School of Law

Evans, Scott, PhD, MS, Director, The Biostatistics Center, Professor and Founding Chair, Department of Biostatistics and Bioinformatics, Milken Institute School of Public Health, The George Washington University

Field, Robert I., JD, MPH, PhD, Professor of Law, Thomas R. Kline School of Law, Professor of Health Management and Policy, Dornsife School of Public Health, Drexel University

Fox, Jacqueline, JD, LLM, Professor, School of Law, University of South Carolina

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

Freed, Salama, PhD, Assistant Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

Friedman, Leonard H., PhD, MPH, FACHE, Professor and Director, MHA@GW Program, Editor, Journal of Health Administration Education, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

Gable, Lance, JD, MPH, Professor of Law, Wayne State University Law School

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

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

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

Harris, Eva, PhD, Professor and Chair, Division of Infectious Diseases and Vaccinology, School of Public Health, Professor, Division of Immunology and Molecular Medicine, Department of Molecular and Cell Biology, Director, Center for Global Public Health, University of California, Berkeley

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

Herbst, Jennifer L., JD, LLM, M.Bioethics, Professor of Law and Medical Sciences, Quinnipiac University School of Law and Frank H. Netter School of Medicine

Hermer, Laura, JD, LLM, Professor of Law, Mitchell Hamline School of Law and Visiting Professor, Saint Louis University School of Law

Hoffman, Sharona, JD, LLM, SJD, Professor of Law and Bioethics, Edgar A. Hahn Professor of Jurisprudence, Co-Director, Law-Medicine Center, Case Western Reserve University School of Law

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

Ivey, Susan L., MD, MHSA, Professor, Adjunct, University of California, Berkeley, School of Public Health and UCB-UCSF Joint Medical Program

Jacobs, Feygele, DrPH, MS, MPH, Professor and Director, Geiger Gibson Program in Community Health, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University
Jacobson, Peter D., JD, MPH, Professor Emeritus of Health Law and Policy, University of Michigan School of Public Health

Kershner, Stacie, JD, Deputy Director, Center for Law, Health and Society, George State University College 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

Landers, Renée M., JD, Professor of Law and Faculty Director, Health and Biomedical Law Concentration, Suffolk University Law School

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

Lillie-Blanton, Marsha, PhD, Adjunct Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

Magnus, Manya, PhD, MPH, Professor and Interim Chair, Department of Epidemiology, 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

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

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

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

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

Minkler, Meredith, DrPH, Professor Emerita, UC Berkeley School of Public Health

Monroe, Anne K., MD, MSPH, Associate Professor, Department of Epidemiology, Milken Institute School of Public Health, The George Washington University

Morello-Frosch, Rachel, PhD, MPH, Professor, UC Berkeley School of Public Health

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

Oberlander, Jonathan, PhD, Professor and Chair, Department of Social Medicine, Professor, Department of Health Policy & Management, University of North Carolina at Chapel Hill

Paltiel, A. David, PhD, Professor of Health Policy and Management, Yale School of Public Health

Parmet, Wendy E., JD, Matthews University Distinguished, Professor of Law and Professor of Public, Policy and Urban Affairs, Northeastern 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

Pittman, Patricia, PhD, Professor of Health Policy and Management, Director of Health Workforce Research Center, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

Regenstein, Marsha, PhD, Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

Riegelman, Richard, MD, MPH, PhD, Professor of Epidemiology and Founding Dean, Milken Institute School of Public Health, The George Washington University

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

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

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

Sawicki, Nadia N., JD, M. Bioethics, Georgia Reithal Professor of Law, Co-Director, Beazley Institute for Health Law and Policy, Ambassador, Loyola Institute for Transformative Interprofessional Education, Loyola University Chicago School of Law

Schmit, Cason, JD, Assistant Professor, Texas A&M University School of Public Health

Schneider, Andy, JD, Research Professor of the Practice, McCourt School of Public Policy, Georgetown University
Schwartz, Jason L., PhD, Associate Professor, Department of Health Policy and Management, Yale School of Public Health

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

Shortell, Stephen M., PhD, MBA, MPH, Distinguished Professor of Health Policy and Management Emeritus and Dean Emeritus, School of Public Health, University of California Berkeley

Siegel, Marc, MD, Professor of Medicine, Chief, Infectious Diseases, George Washington School of Medicine and Health Sciences

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

Sinha, Michael S., MD, JD, MPH, FCLM, Assistant Professor of Law, Center for Health Law Studies, Saint Louis University School of Law

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

Strasser, Julia, DrPH, MPH, Director, Jacobs Institute of Women’s Health, Assistant Research Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The
George Washington University

Swartzberg, John, MD, FACP, Clinical Professor Emeritus, Professor, Emeriti Academy, School of Public Health, Division of Infectious Diseases and Vaccinology, Chair, Editorial Board, UC Berkeley Wellness Letter, University of California

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

Tielsch, James M., PhD, Professor and Chair, Department of Global Health, Milken Institute School of Public Health, The George Washington University

Ulrich, Michael R., JD, MPH, Assistant Professor, Center for Health Law, Ethics and Human Rights, Boston University School of Public Health, Boston University School of Law, Distinguished Visiting Scholar, Solomon Center for Health Law and Policy, Yale Law School

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

Vichare, Anushree, PhD, MBBS, MPH, Assistant Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

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

Warren-Findlow, Jan, PhD, Professor and Chair, Department of Public Health Sciences, University of North Carolina Charlotte

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

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Trust for America’s Health

Trust for America’s Health is a non-profit organization. It is not publicly traded and has no parent corporation. No publicly held corporation owns 10% or more of its stock.

ChangeLab Solutions

ChangeLab Solutions is a non-profit organization. It is not publicly traded and has no parent corporation. No publicly held corporation owns 10% or more of its stock.

Counsel for Amici Curiae

Mayer Brown LLP (Andrew J. Pincus)

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

Counsel for Amici Curiae
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**Other Authorities**


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 108 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.

The Robert Wood Johnson Foundation (“RWJF”) is the nation’s largest philanthropic organization dedicated solely to health. It supports efforts to build a national Culture of Health rooted in equity that provides

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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.
every individual with a fair and just opportunity for health and wellbeing. As part of those efforts, RWJF has supported research demonstrating the benefits of comprehensive coverage for no-cost preventive health services.

Trust for America’s Health ("TFAH") is a nonpartisan, nonprofit organization focused on public health research and policy. TFAH is committed to promoting optimal health for every person and community and making health equity foundational to policymaking at all levels. The organization’s work is focused on the antecedents of poor health and on policies and programs to advance an evidence-based public health system that is ready to meet the challenges of the 21st century. TFAH develops reports and other resources and initiatives to educate the public and recommends policies to promote health and wellbeing and to make the prevention of illness and injury a national priority.

ChangeLab Solutions is an interdisciplinary team of lawyers, planners, policy analysts, public health practitioners, and other professionals who work across the nation to advance equitable laws and policies that ensure healthy lives for all. With more than two decades of experience in enacting policy, systems, and environmental changes at
local and state levels, ChangeLab Solutions focuses on eliminating health disparities by addressing the social determinants of health. It envisions healthy, equitable communities where every person is economically secure and can attain their full health potential.

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 amici, RWJF, TFAH, and ChangeLab Solutions all share that interest. Amici file this brief to explain the importance of the cost-free preventive services requirement invalidated by the district court and the significant harm to public health that will result if that determination is permitted to stand.
INTRODUCTION AND SUMMARY OF ARGUMENT

The district court invalidated a critically important provision of the Affordable Care Act ("ACA") that ensures more than 150 million Americans’ access to essential life-saving tests and treatments. Amici submit this brief to explain that, if the ruling is permitted to stand, deadly diseases will not be detected and important treatments will be unavailable—resulting in serious illnesses, chronic medical conditions, and deaths that otherwise would have been prevented.

Prior to enactment of the ACA, a significant number of health insurance plans failed to cover preventive tests and other medical services for the detection and prevention of major diseases. 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, cost-free, four essential categories of preventive services. One of those categories is “evidence-based items or services” with an A or B recommendation from the U.S Preventive Services Task Force ("USPSTF"). See 42 U.S.C. § 300gg-13(a)(1). The USPSTF is a
panel of experts that rigorously evaluates peer-reviewed scientific evidence to recommend especially valuable preventive services.\textsuperscript{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 protecting all Americans against the risk of transmission of communicable diseases. They are critical to reducing the incidence and severity of numerous diseases and life-threatening conditions, and are especially important to maternal and child health.\textsuperscript{3} And the ACA’s requirement of cost-free coverage has dramatically increased use of these vital services by all Americans.

The district court’s decision eliminates this requirement nationwide for dozens of life-saving services recommended by the USPSTF—every preventive service specified after the enactment of the ACA in 2010. Without the ACA’s requirement, some companies and


insurers will re-impose cost-sharing. Some may eliminate coverage completely.

It is certain that without cost-free coverage, 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 brief discusses the particular preventive services affected, and the adverse public health consequences of the elimination of the cost-free coverage requirement for those services.

Importantly, those widespread adverse consequences flow in large measure from the district court’s decision to grant a “universal remedy” that bars the government from implementing or enforcing the cost-free coverage requirement nationwide. That broad relief is impermissible in the circumstances of this case, where it is not necessary to protect the very small number of Plaintiffs here; where none of the entities regulated
by the provision (insurance companies) have challenged it; and where
almost none of the tens of thousands of affected companies or many
millions of affected individuals are before the Court.

This Court should reverse the district court’s decision. At a
minimum, it should limit any remedy to what is necessary to redress any
harm to Plaintiffs, and leave unaffected the more than 150 million
Americans that benefit from the cost-free coverage requirement.

ARGUMENT

THE DISTRICT COURT’S DECISION WILL CAUSE AMERICANS
TO SUFFER INCREASED ILLNESS AND EVEN DEATH.

Congress determined that to promote the public health—and
prevent Americans from suffering from serious diseases, including
diseases that can lead to death—it is necessary to remove barriers to
Americans’ use of preventive health services. Congress therefore
included in the ACA provisions mandating that insurers cover many of
those services cost-free. See 42 U.S.C. § 300gg-13(a).

The government’s brief demonstrates why Congress acted well
within its constitutional authority in relying on the expertise of the
USPSTF to identify one of the categories of preventive services
warranting cost-free coverage.⁴ Amici write separately to explain the serious harm to Americans’ health that will be the inevitable consequence of eliminating the preventive services requirement for USPSTF-recommended services.

A. The district court’s order eliminates guaranteed cost-free coverage for life-saving services.

The district court’s order eliminates guaranteed cost-free coverage for at least two dozen services with USPSTF recommendations published or updated after 2010, which are listed in Appendix B. These life-saving services include:

- **Lung cancer screening for high-risk persons:**⁵ Lung cancer is the second most common cancer and the leading cause of cancer death in the United States.⁶ Studies demonstrate that this cancer is significantly more treatable when detected

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⁴ We agree with the government that if the Court were to conclude otherwise, any constitutional violation can be remedied by severing and invalidating the statute's limitations on secretarial oversight. Opening Br. for the Federal Defs. 35-40.
early, which is why the USPSTF recommended screenings in 2013 and expanded that recommendation to apply to more persons in 2021.8

- **Colorectal cancer screening for adults 45-49:**9 Colorectal cancer is the Nation’s third leading cause of death from cancer, and its incidence has increased for adults 40-49 years old.10 Colorectal cancer screening is especially beneficial because it involves removing precancerous growths.11 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

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7 See Screening for Lung Cancer at 962.

8 See id. at 965.


10 Id. at 1965.

additional people, by expanding to include adults 45-49 years old.\textsuperscript{12}

- **Statins to Prevent Cardiovascular Disease:**\textsuperscript{13} Cardiovascular disease is the leading cause of death in the United States.\textsuperscript{14} For those at increased risk, statins effectively reduce both cardiovascular-disease events and mortality.\textsuperscript{15} 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.\textsuperscript{16}

- **Preexposure Prophylaxis (“PrEP”) to Prevent HIV:**\textsuperscript{17} An estimated 1.1 million Americans are living with HIV.\textsuperscript{18} By

\textsuperscript{12} *Id.*


\textsuperscript{14} *Id.* at 746.

\textsuperscript{15} *See* id. at 748 tbl.

\textsuperscript{16} *See* id. at 747, 750.


\textsuperscript{18} *Id.* at 2204-05.
preventing HIV acquisition among those who are HIV-negative, PrEP protects the health of those who use the service and reduces further HIV transmission in the community.¹⁹ One study found that if the number of individuals using PrEP increased by 25%, new HIV cases would decrease by 54%.²⁰ 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.²¹

- Screening for Hepatitis B Infection in Adolescents and Adults:²² 862,000 Americans are estimated to be living with

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¹⁹ *Id.* at 2204.


chronic infection of the hepatitis B virus.\textsuperscript{23} For 15-40\% of these individuals, chronic infection will develop into cirrhosis, liver cancer, or liver failure, which can be deadly.\textsuperscript{24} 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.\textsuperscript{25} Screening of at-risk individuals, as recommended by the USPSTF in 2014 and 2020, addresses these problems.\textsuperscript{26}

- \textbf{Screening for Hepatitis C Infection in Adolescents and Adults:}\textsuperscript{27} As of March 2020, Hepatitis C virus was “associated with more deaths in the United States than the top 60 other

\begin{itemize}
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\end{itemize}

\begin{flushright}
\textsuperscript{23} Id. at 2415.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} See id. at 2416.
\end{flushright}
reportable infectious diseases combined.” An estimated 4.1 million Americans have past or current Hepatitis C infection. 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.

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

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28 Id. at 970 (emphasis added).

29 Id.

30 See id. at 972.


32 Id. at 1186.


34 *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.\textsuperscript{35}

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;\textsuperscript{36} expanded screening for prediabetes and type 2 diabetes, enabling earlier detection and treatment;\textsuperscript{37} 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.\textsuperscript{38}

\textsuperscript{35} Id. at 1187.


Saving lives and preventing illness are the most important benefits of cost-free coverage for these services, which not only promote the health of the insured but in many cases also protect third parties and the broader population from further transmission of disease. In addition, the services also reduce healthcare costs.\textsuperscript{39} 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.\textsuperscript{40}

B. 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.\textsuperscript{41} By eliminating cost-sharing, the ACA has increased


\textsuperscript{41} Access to Preventive Services at 3, 5.
access to and utilization of preventive services. Indeed, approximately 100 million Americans used the free preventive services guaranteed by the ACA in 2018.\textsuperscript{42} 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.\textsuperscript{43}

There can be no doubt that eliminating cost-sharing has increased Americans’ 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.\textsuperscript{44} One study, for

\begin{itemize}
\item \textsuperscript{42} Krutika Amin et al., \textit{Preventive Services Use Among People With Private Insurance Coverage} (Mar. 20, 2023), https://bit.ly/3oxjFWo.
\item \textsuperscript{44} Hope C. Norris et al., \textit{Utilization Impact of Cost-Sharing Elimination for Preventive Care Services: A Rapid Review}, 79 Med. Care Res. & Rev. 175, 192, 194 (2022); see also \textit{Access to Preventive Services} at 10; Xuesong
\end{itemize}
example, found increased use of a variety of preventive services at community health centers across 14 states.\(^{45}\)

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.”\(^{46}\) 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.\(^{47}\) Indeed, prior to the ACA, 9% of insured men and 13% of insured


\[^{46}\text{Brigit Hatch et al., Impacts of the Affordable Care Act on Receipt of Women’s Preventive Services in Community Health Centers in Medicaid Expansion and Nonexpansion States, 31 Women’s Health Issues 9 (2021), https://bit.ly/43UD1vp.}\]

\[^{47}\text{Norris, supra n.44, at 175; see also Has Recommended Preventive Service Use Increased?, at 85 (collecting studies); Amal N. Trivedi et al., Effect of Cost-Sharing on Screening Mammography in Medicare Health Plans, 358 N. England J. Med. 375, 375 (2008), https://bit.ly/3Amo6fU (noting that even “[r]elatively small copayments” have been found to be associated with decreased use of effective preventive care); Robert H. Brook et al., The Health Insurance Experiment: A Classic RAND Study Speaks to the Current Healthcare Reform Debate (2006), https://bit.ly/3H3byhn.}\]

women—and 31% of low-income men and 35% of low-income women—reported postponing preventive services because of cost.  

48 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.

49 These results are unsurprising, given that cost generally is a major barrier to healthcare access. In 2022, 28% of American adults, including 26% of insured adults, went without medical care because they could not afford it.  

50 Moreover, since preventive services “do not address acute health problems,” people may be more likely to “skip such care” in particular.  

51 And in deciding whether to pay for preventive care, individuals likely will not consider the substantial benefits to third parties and population health generally that flow from broad use of preventive services.

48 Kaiser Family Foundation, supra n. 39, at 1.


 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.” But this assumption is squarely contradicted by the abundant academic research discussed above, which demonstrates that “[c]onsumer cost-sharing . . . diminish[es] utilization of preventive services.”

C. 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 insurers will do just that—and many may do so with just sixty days’ notice to covered individuals.

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

52 ROA.2204-05.
53 Norris, supra n. 44, at 175.
54 See ROA.2170-71; ROA.2178; 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).
76 million Americans expanded cost-free access that they previously lacked.\textsuperscript{55}

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.\textsuperscript{56} Even if only 8-20% of employers impose cost-sharing, millions of Americans would be affected. And once 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 not accrue until after the end of the covered year—because that is when costlier treatments will be avoided. 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.\textsuperscript{57}

Many patients will forgo life-saving preventive services if required to pay for them, because even “modest” cost-sharing “deters patients from receiving care.”\textsuperscript{58} In addition, by replacing the ACA’s clear rules for preventive services coverage with the choices of particular insurers, the district court’s ruling will leave providers and patients uncertain as to what services are or are not covered cost-free. Faced with that uncertainty, providers may stop recommending, and patients may stop using, crucial services—even if some plans retain cost-free coverage.\textsuperscript{59} Providers who are uncertain what is covered may err on the side of not

\footnotesize
\begin{itemize}
\item \textsuperscript{58} Norris, \textit{supra} n. 44, at 175.
\end{itemize}
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.

**D. The district court’s universal remedy is the principal source of these draconian consequences.**

If the district court had granted relief only to Plaintiffs, the adverse consequences just discussed would be limited to the employees of the two company plaintiffs, the individual plaintiffs, and their families—a quite small group of individuals. It is the district court’s decision to grant a universal remedy and issue a nationwide injunction that produces the very substantial adverse public health consequences.

This dispute over a small number of private plaintiffs’ health insurance options provides no legitimate basis for eliminating important statutory protections safeguarding the health of more than 150 million Americans.
Grants of nationwide relief are controversial. See, e.g., Dep’t of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (nationwide injunctions “raise serious questions about the scope of courts’ equitable powers under Article III”); Arizona v. Biden, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring) (observing that nationwide injunctions “seem to take the judicial power beyond its traditionally understood uses”); Georgia v. President of the United States, 46 F.4th 1283, 1303 (11th Cir. 2022) (cautioning that “nationwide injunctions push against the boundaries of judicial power”); City of Chicago v. Barr, 961 F.3d 882, 912 (7th Cir. 2020) (“Courts and commentators . . . have recognized serious concerns with imposing injunctive relief that extends beyond the parties before the court.”).

That is because the federal courts’ “constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.” Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018); see also Gonzales-Veliz v. Barr, 938 F.3d 219, 228 (5th Cir. 2019) (citing Trump v. Hawaii, 138 S. Ct. 2392, 2427–28 (2018) (Thomas, J., concurring) for the proposition that “the traditional function of equitable relief is to vindicate the rights of the parties in the suit”).
Even in the context of an action under the Administrative Procedure Act, this Court has stated that “[i]t is well-established that ‘[a] plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury’”—and that a remedy “more limited” than universal vacatur may be appropriate. *Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir. 2023) (en banc) (quoting *Whitford*, 138 S. Ct. at 1934); *see also* 5 U.S.C. § 702 (preserving courts’ authority to “deny relief on any other appropriate legal or equitable ground”); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (holding that “a major departure from the long tradition of equity practice should not be lightly implied”).

Here, the district court believed it was obligated to order universal vacatur. *See ROA.2122*. It therefore failed to take into account the harms caused by nationwide relief and did not determine that a universal remedy was necessary to provide full relief to Plaintiffs.

As the government explains in detail (Br. 41-50), that broad relief is unjustified and impermissible here. That is particularly so because none of the parties subject to the requirement—insurance companies—and only a miniscule number of otherwise affected parties—companies and individuals—have challenged the statutory requirement. This is not
a case where organizations representing a significant portion of regulated entities, or of otherwise burdened parties, are before the Court.

Moreover, the adverse consequences of the district court’s universal remedy fall on the more than 150 million Americans who are not parties to this action. They will suffer the significant public-health harms and risks—increased illness, more severe health complications, and in some cases death—all of which is unnecessary to provide full relief to the Plaintiffs before this Court.

This Court should reverse the decision below. But if it does not, the Court should at a minimum narrow the district court’s nationwide injunction, tailoring any relief to extend no further than necessary to redress any harms to Plaintiffs.
CONCLUSION

The Court should reverse the district court’s judgment relating to the services specified by the USPSTF.

Dated: June 27, 2023

Respectfully submitted,

/s/ Andrew J. Pincus
Andrew J. Pincus
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
2. Robert Wood Johnson Foundation
3. Trust for America’s Health
4. ChangeLab Solutions

Public Health Deans

5. Burroughs, Thomas E., PhD, MS, MA, Dean and Professor, SLU College for Public Health and Social Justice, Saint Louis University
6. Chandler, G. Thomas, MS, PhD, Dean and Professor of Environmental Health Sciences, Arnold School of Public Health, University of South Carolina
7. Deardorff, Julianna, PhD, Associate Dean of Faculty and Academic Affairs and Associate Professor, Director, MCHB Center of Excellence and MCHB LEAP, Program Head, Maternal, Child and Adolescent Health, Center for Environmental Research and Community Health (CERCH), University of California Berkeley School of Public Health
8. 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
9. El-Mohandes, Ayman, MBBCh, MD, MPH, Dean, CUNY Graduate School of Public Health & Health Policy
10. Fallin, Daniele, PhD, James W. Curran Dean of Public Health, Rollins School of Public Health, Emory University

11. Fried, Linda P., MD, MPH, Dean and DeLamar Professor of Public Health, Mailman School of Public Health, Professor of Epidemiology and Medicine, Columbia University

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

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


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

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

17. 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

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

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

20. 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

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

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

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

24. 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

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

Public Health Scholars

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

27. Ashe, Marice, JD, MPH, Lecturer, University of California Berkeley Law

28. Bard, Jennifer S., JD, MPH, PhD, Professor of Law, College of Law, Professor, Department of Internal Medicine, University of Cincinatti

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

31. Bonar, Robert, DrHA, Professor and Program Director, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

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

33. 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

34. Burke, Taylor, JD, LLM, Adjunct Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

35. Burris, Scott, JD, Professor of Law, Director, Center for Public Health Law Research, Temple University Beasley School of Law

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

37. Cartwright-Smith, Lara, JD, MPH, Associate Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University
38. 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

39. 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

40. Dorfman, Doron, JSD, JSM, LLM, LLB, Associate Professor of Law, Seton Hall University School of Law

41. Evans, Scott, PhD, MS, Director, The Biostatistics Center, Professor and Founding Chair, Department of Biostatistics and Bioinformatics, Milken Institute School of Public Health, The George Washington University

42. Field, Robert I., JD, MPH, PhD, Professor of Law, Thomas R. Kline School of Law, Professor of Health Management and Policy, Dornsife University School of Public Health, Drexel University

43. Fox, Jacqueline, JD, LLM, Professor, School of Law, University of South Carolina

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

45. Freed, Salama, PhD, Assistant Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

46. Friedman, Leonard H., PhD, MPH, FACHE, Professor and Director, MHA@GW Program, Editor, Journal of Health Administration Education, Department of
Health Policy and Management, Milken Institute School of Public Health, The George Washington University

47. Gable, Lance, JD, MPH, Professor of Law, Wayne State University Law School

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


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

51. Harris, Eva, PhD, Professor and Chair, Division of Infectious Diseases and Vaccinology, School of Public Health, Professor, Division of Immunology and Molecular Medicine, Department of Molecular and Cell Biology, Director, Center for Global Public Health, University of California, Berkeley

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

53. Herbst, Jennifer L., JD, LLM, M.Bioethics, Professor of Law and Medical Sciences, Quinnipiac University School of Law and Frank H. Netter School of Medicine

54. Hermer, Laura, JD, LLM, Professor of Law, Mitchell Hamline School of Law and Visiting Professor, Saint Louis University School of Law
55. Hoffman, Sharona, JD, LLM, SJD, Professor of Law and Bioethics, Edgar A. Hahn Professor of Jurisprudence, Co-Director, Law-Medicine Center, Case Western Reserve University School of Law

56. 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

57. 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

58. Ivey, Susan L., MD, MHSA, Professor, Adjunct, University of California, Berkeley, School of Public Health and UCB-UCSF Joint Medical Program

59. Jacobs, Feygele, DrPH, MS, MPH, Professor and Director, Geiger Gibson Program in Community Health, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

60. Jacobson, Peter D., JD, MPH, Professor Emeritus of Health Law and Policy, University of Michigan School of Public Health

61. Kershner, Stacie, JD, Deputy Director, Center for Law, Health and Society, George State University College of Law

62. 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
63. Landers, Renée M., JD, Professor of Law and Faculty Director, Health and Biomedical Law Concentration, Suffolk University Law School

64. 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

65. 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

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

67. Lillie-Blanton, Marsha, PhD, Adjunct Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

68. Magnus, Manya, PhD, MPH, Professor and Interim Chair, Department of Epidemiology, Milken Institute School of Public Health, The George Washington University

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

70. 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

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

72. 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

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

74. Minkler, Meredith, DrPH, Professor Emerita, UC Berkeley School of Public Health

75. Monroe, Anne K., MD, MSPH, Associate Professor, Department of Epidemiology, Milken Institute School of Public Health, The George Washington University

76. Morello-Frosch, Rachel, PhD, MPH, Professor, UC Berkeley School of Public Health

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

78. Oberlander, Jonathan, PhD, Professor and Chair, Department of Social Medicine, Professor, Department of Health Policy & Management, University of North Carolina at Chapel Hill

79. Paltiel, A. David, PhD, Professor of Health Policy and Management, Yale School of Public Health

80. Parmet, Wendy E., JD, Matthews University Distinguished, Professor of Law and Professor of Public, Policy and Urban Affairs, Northeastern University
81. Perreira, Krista M., PhD, Department of Social Medicine, UNC School of Medicine

82. 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

83. Pittman, Patricia, PhD, Professor of Health Policy and Management, Director of Health Workforce Research Center, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

84. Regenstein, Marsha, PhD, Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

85. Riegelman, Richard, MD, MPH, PhD, Professor of Epidemiology and Founding Dean, Milken Institute School of Public Health, The George Washington University

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

87. 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

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

89. Sawicki, Nadia N., JD, M. Bioethics, Georgia Reithal Professor of Law, Co-Director, Beazley Institute for Health Law and Policy, Ambassador, Loyola Institute
for Transformative Interprofessional Education, Loyola University Chicago School of Law

90. Schmit, Cason, JD, Assistant Professor, Texas A&M University School of Public Health

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

92. Schwartz, Jason L., PhD, Associate Professor, Department of Health Policy and Management, Yale School of Public Health

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

94. 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

95. Shortell, Stephen M., PhD, MBA, MPH, Distinguished Professor of Health Policy and Management Emeritus and Dean Emeritus, School of Public Health, University of California Berkeley

96. Siegel, Marc, MD, Professor of Medicine, Chief, Infectious Diseases, George Washington School of Medicine and Health Sciences

97. 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
98. Siminoff, Laura A., PhD, Laura H. Carnell Professor of Public Health, Department of Social and Behavioral Sciences, Temple University

99. Sinha, Michael S., MD, JD, MPH, FCLM, Assistant Professor of Law, Center for Health Law Studies, Saint Louis University School of Law

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

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

102. Strasser, Julia, DrPH, MPH, Director, Jacobs Institute of Women’s Health, Assistant Research Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

103. Swartzberg, John, MD, FACP, Clinical Professor Emeritus, Professor, Emeriti Academy, School of Public Health, Division of Infectious Diseases and Vaccinology, Chair, Editorial Board, UC Berkeley Wellness Letter, University of California

104. 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

105. Tielsch, James M., PhD, Professor and Chair, Department of Global Health, Milken Institute School of Public Health, The George Washington University

106. Ulrich, Michael R., JD, MPH, Assistant Professor, Center for Health Law, Ethics and Human Rights, Boston University School of Public Health, Boston University School of Law, Distinguished Visiting
Scholar, Solomon Center for Health Law and Policy, Yale Law School

107. 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

108. Vichare, Anushree, PhD, MBBS, MPH, Assistant Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University

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

110. Warren-Findlow, Jan, PhD, Professor and Chair, Department of Public Health Sciences, University of North Carolina Charlotte

111. 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

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

LIST OF AFFECTED SERVICES\textsuperscript{60}

Services With A or B Recommendation After 2010

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### Services With Change to A or B Recommendation After 2010

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document was filed and served on June 27, 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

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Andrew J. Pincus
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1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 4,560 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief 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: June 27, 2023

/s/ Andrew J. Pincus
Andrew J. Pincus