***Braidwood v. Becerra*: A U.S. Court Undermines HIV Prevention by Granting a Religious Exemption Based on Animus Toward LGBTQ+ People**

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In September 2022, a federal district judge in Texas ruled in favor of a religious employer who objected to a U.S. federal mandates requiring that private insurance policies cover pre-exposure prophylaxis (PrEP), a class of drugs that prevents Human Immunodeficiency Virus (HIV).[[1]](#footnote-1) PrEP is the most celebrated biomedical success in the global fight to end the HIV epidemic. Based on the highest quality evidence, the United States Preventive Services Task Force (PSTF) gave an “A” rating to PrEP and which federal law requires most private insurers to cover.[[2]](#footnote-2),[[3]](#footnote-3) As of 2020, U.S. health insurers were required to cover PrEP when medically indicated according to stated eligibility criteria (the “PrEP Mandate”).[[4]](#footnote-4)

Despite the demonstrated benefits of PrEP, a U.S. district court in *Braidwood Management v. Becerra* (*Braidwood*) ruled that the PrEP Mandate violates the plaintiff’s (Braidwood’s) rights under the U.S. Religious Freedom Restoration Act (RFRA). The owner of Braidwood alleged that “providing coverage of PrEP drugs ‘facilitates and encourages homosexual behavior, intravenous drug use, and sexual activity outside of marriage between one man and one woman,’ and [that] providing coverage of PrEP drugs in Braidwood’s self-insured plan would make him complicit in those behaviors.”[[5]](#footnote-5)

The *Braidwood* decision endorses a religious exemption that is empirically unfounded, disastrously overbroad, and discriminatory. On any of three possible interpretations, the *Braidwood* religious exemption, if upheld, ignores at least two compelling state interests: one in protecting public health, and one in protecting LGBTQ people from invidious stereotyping and exclusion. The religious exemption sketched in *Braidwood* is so overbroad that its logic could justify a religious exemption to *any* public health protective measure, and indeed any medical treatment of any type.

# The *Braidwood* ruling disregards the state's compelling public interests in public health and in the full social inclusion of LGBTQ people.

The *Braidwood* decision granted a religious exception to PrEP insurance coverage based on a statute, the Religious Freedom Restoration Act (RFRA). The business owners in *Braidwood* argued that paying for PrEP violated their religious beliefs because PrEP would encourage “homosexual behavior, intravenous drug use, and sexual activity outside of marriage between one man and one woman” and make Braidwood “complicit” in those behaviors.[[6]](#footnote-6)

In setting aside the state’s interest in HIV protection, the *Braidwood* opinion claims that the government provided “no evidence of the scope of religious exemptions, the effect such exemptions would have on the insurance market or PrEP coverage, the prevalence of HIV in those communities, or any other evidence relevant 'to the marginal interest' in enforcing the PrEP mandate in these cases."[[7]](#footnote-7) However, rates of HIV are extremely high in Texas and the South, and the denial of insurance coverage for PrEP has been shown to reduce PrEP use. Ignoring these facts, the *Braidwood* analysis implies that granting a religious exemption to the PrEP Mandate would merely affect a few people at the margin.

In addition to the compelling interesting in preventing HIV in the entire population, the state has a compelling interest in protecting the full social inclusion of LGBTQ people and in combatting discrimination. In recent years, the Supreme Court has repeatedly struck down, as unconstitutional, statutes that target LGBTQ people. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution requires states to recognize marriages between persons of the same sex, writing that, “[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.” In *Lawrence v. Texas*, the Court struck down laws criminalizing same-sex intimacy, with Justice O’Connor (concurring), noting that “Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else.” And in *Romer v. Evans*, the Court invalidated a Colorado constitutional provision that denied discrimination protections to LGBTQ people.

The religious exemption in *Braidwood* is not a federal or state statute like those challenged in these cases. Nevertheless, the animus accommodated by the *Braidwood* analysis stands at odds with these national commitments to equality. The language of the opinion, endorsing the view that the PrEP Mandate renders insurance payors “complicit” in same-sex intimacy, harks back to harmful and discredited stereotypes of LGBTQ+ people as outcasts who engage in promiscuous and harmful behavior.

The availability of health insurance is itself an important governmental objective and not solely a private matter. The United States has, via regulation and extensive subsidies, expressed and delegated to private employers the critical state function of ensuring wide access to health care. These subsidies include tax credits under the Affordable Care Act, the tax deduction for employers who provide health insurance, and the tax exclusion for employees who receive health coverage. The Supreme Court has recognized, in the context of racial equality, that state-subsidized institutions have an obligation not to contravene important national and constitutional commitments.[[8]](#footnote-8) The *Braidwood* court did not acknowledge the state's compelling commitment to LGBTQ equality. Nor did the decision situate employer health insurance in the proper context of a state-subsidized regime that carries out an important state function.

1. **The *Braidwood* religious exemption is ambiguous and, on any of three possible interpretations, is untenable.**

A close examination shows that the nature of the religious objection granted in *Braidwood* is unclear. According to the court’s opinion, the plaintiffs believe that “providing coverage of PrEP drugs ‘facilitates and encourages homosexual behavior, intravenous drug use, and sexual activity outside of marriage between one man and one woman,’ and [that] providing coverage of PrEP drugs in Braidwood’s self-insured plan would make [the owner of the company] complicit in those behaviors.”[[9]](#footnote-9)

The meaning of “facilitates and encourages” is open to at least three interpretations, all of which either rely on mistaken facts or clear the way for sweeping religious objections to nearly any form of insurance coverage, including by employers who do not sincerely hold relevant religious beliefs. We address them in turn.

### PrEP does not increase the behavior to which the Braidwood religious plaintiffs object.

First, the *Braidwood* religious exemption might be grounded in the factual claim that the availability of PrEP increases the number of people who identify as gay, engage in same-sex or extramarital intimacy, or use injectable drugs (collectively, “plaintiffs’ religiously disfavored groups”). These are causal and empirical claims, and they are incorrect.

In theory, any preventive treatment might alter behavior, leading individuals to take greater risks because they feel safer doing so. However, the actual effect of any given preventive treatment on behavior and risk calculation is far more nuanced and highly individualized. The *Braidwood* plaintiffs and ruling employ pathologizing terms (“homosexual behavior, prostitution, sexual promiscuity and intravenous drug use”), which we reject, and the causal claims are refuted by empirical evidence.

The hypothesis that prevention leads to risk-taking has been historically posited – and refuted – across a range of public health measures, including the use of penicillin for the treatment of syphilis, mandates to install and wear seatbelts in cars and to wear helmets while riding bicycles, and the use of vaccines to prevent the human papilloma virus (HPV).[[10]](#footnote-10) For example, individuals who receive the HPV vaccine do not engage in sexual activity sooner in life than those who do not. A systematic review found that those who do not receive the HPV vaccine were *more* likely to report vaginal intercourse without a condom and higher rates of a bacterial STI.[[11]](#footnote-11)

The same finding applies to PrEP: a large body of research finds that these medications do not systematically increase sexual behavior.[[12]](#footnote-12) The 2010 iPrEx clinical trial evaluated the sexual behavior of study participants, including number of sexual partners which decreased for both PrEP and control groups. [[13]](#footnote-13) This finding suggests that, in certain settings, PrEP use is actually accompanied by less sexual activity, contrary to the Braidwood plaintiffs’ assertions.

In a second stage in 2014, the iPrEX study tested PrEP drug concentrations to evaluate the relationship between adherence (i.e., that patients reliably take their medication) and sexual behaviors, with syphilis infection being used as a proxy for sexual behavior because it can be transmitted even with barrier protection. Syphilis infections decreased dramatically, suggesting no evidence of increased sexual behavior in those using PrEP.[[14]](#footnote-14) Additional studies have shown that PrEP use correlates with reduced sexual activity while in use.[[15]](#footnote-15)

A 2019 systematic review evaluated the possibility of risk compensation in PrEP users in 17 studies and demonstrated equivocal findings but no major increase in sexual practices.[[16]](#footnote-16)

### Alternatively, if the Braidwood religious objection, as the court suggests, is valid without regard to the facts, it is so overbroad that it could permit religious objectors to opt out of insurance coverage for any preventative or procedure.

The *Braidwood* court dismisses the government's argument that the Braidwood plaintiffs' objection is "an empirical [claim] that requires factual support"[[17]](#footnote-17) and cites dicta in a concurring opinion in a case involving contraception for the proposition that the plaintiffs' "sincere religious belief" is all that is required to establish that any rule "substantially burdens" the plaintiffs' religion.[[18]](#footnote-18) Notably, the contraceptive cases have a distinct legal and factual setting: the plaintiffs in those cases objected expressly to contraception, and not to behaviors supposedly "facilitated" by it.

The *Braidwood* court's rejection of empirical reality suggests a second interpretation of the *Braidwood* religious exemption, which is that employers can opt out of the PrEP Mandate because they sincerely believe, even without any factual foundation, that members of disfavored groups will reap health benefits from PrEP.

But this interpretation of the *Braidwood* religious exemption would be disastrously overbroad, opening the way for employers to opt out of any treatment that may benefit members of groups whose identity or conduct contravenes employers’ beliefs. Following this line of reasoning, a court would be bound to approve a religious objection to any medical procedure or, indeed, healthcare in general, without any showing that the belief is grounded in reality.[[19]](#footnote-19)

The measles vaccine, to take a concrete example, benefits the whole community, and the community includes LGBTQ people, whose identity and sexuality the plaitniffs reject. Under the *Braidwood* logic, the plaintiffs could seek an exemption for covering measles vaccines. The same flawed logic would apply with equal force to any medical treatment. Emergency hospital care for heart failure, for example, benefits anyone with a medical emergency, including LGBTQ people. Preserving their lives would enable them to continue to live an identity or engage in behavior that violates the religious employer’s beliefs. Interpreted this way, the *Braidwood* religious exception is not an exception but an entry point for religious employers to opt out of health coverage entirely.

Further, the *Braidwood* court rests on the finding that the plaintiffs' religious beliefs about the consequences *of PrEP* were "sincere" without taking into account the massive difficulties in proving sincerity. The religious exemption as articulated by the court invites individuals and businesses to put forward marginal and insincere beliefs in order to act on animus toward LGBTQ people and other marginalized groups. Neither courts nor any other governmental authority can reliably distinguish sincere from insincere beliefs, and thus the religious exemption – freed from any factual basis – is an open invitation to misuse.

### As a third possibility, the Braidwood religious exemption might rest on the claim that PrEP “primarily” benefits members of the LGBTQ community, people who have extramarital sex, and users of injectable drugs, but this version of the religious exemption is overbroad and impossible to administer.

A third interpretation of the *Braidwood* religious exemption might rest on the (unstated) empirical proposition that PrEP primarily benefits members of religiously disfavored groups (the “primary benefit” claim). That is, the *Braidwood* court might assume that the PrEP Mandate violates the plaintiffs’ religious beliefs – in ways that other kinds of health care would not – because PrEP is perceived to be primarily a medication that benefits LGBTQ people and individuals who inject drugs.

The *Braidwood* court does not articulate this view, but it may be implicit, given the plaintiffs’ framing of PrEP. While men who have sex with men do benefit from the availability of PrEP, so do many others, including all sexually-active adults and their future children. The *Braidwood* court offers no standard for determining when a public health measure produces primary benefits to a group whose identity and relationships are rejected by religious plaintiffs. Nor could any standard be created. It is true that men who have sex with men and people who inject drugs do face a higher-than-average risk of contracting HIV. But within those groups, some individuals have higher or lower risks. For example, HIV risk is lower for men who have sex with men and use condoms; it is also lower for people who inject drugs who have access to clean needles.

The “primary benefit” rationale for the religious exemption is ultimately incoherent, because HIV risk (and, thus, the projected benefit of PrEP) depends on many factors. HIV disproportionately affects Black and other minority communities, for example. Adolescents and young adults are at greater-than-average risk for HIV, as are people who drink alcohol and people who live in urban areas.

It is difficult to avoid the conclusion that the *Braidwood* plaintiffs and the court chose to endorse, without question, damaging and inaccurate stereotypes of LGBTQ people and people who inject drugs. Denying access to PrEP, as the *Braidwood* decision does, will lead to new HIV transmissions, with attendant harm to the health and quality of life of people who are at risk for HIV throughout the United States, as well as individuals in their social networks. These harms are greatest in minority communities and among the economically disadvantaged, facts that are noticeably absent from the *Braidwood* analysis.

1. Braidwood Management Inc. v. Becerra, Civ. Act. No. 4:20-cv-00283-O, N.D. Tx (Sept. 7, 2022), at <https://storage.courtlistener.com/recap/gov.uscourts.txnd.330381/gov.uscourts.txnd.330381.92.0_2.pdf> [↑](#footnote-ref-1)
2. US. Preventive Services Task Force, Prevention of HIV Infection: Pre-Exposure Prophylaxis, June 11, 2019, at <https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/prevention-of-human-immunodeficiency-virus-hiv-infection-pre-exposure-prophylaxis#fullrecommendationstart>. For the definition of an “A” recommendation, see <https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/methods-and-processes/grade-definitions#:~:text=A%20%2D%20Strongly%20Recommended%3A%20The%20USPSTF,that%20benefits%20substantially%20outweigh%20harms>. The PrEP evidence review is Roger Chou et al., Pre-Exposure Prophylaxis for the Prevention of HIV Infection: A Systematic Review for the U.S. Preventive Services Task Force**,** Rockville (MD): [Agency for Healthcare Research and Quality (US)](http://www.ahrq.gov/); 2019 Jun.

   Report No.: 18-05247-EF-1, at https://www.ncbi.nlm.nih.gov/books/NBK542888/ [↑](#footnote-ref-2)
3. See 42 U.S.C. § 300gg-13(a)(1) (requiring health insurance plans to cover, without cost sharing, “evidence-based items or services that have in effect a rating of ‘A’ or ‘B’ in the current recommendations of the United States Preventive Services Task Force”). [↑](#footnote-ref-3)
4. 45 C.F.R. § 147.130(b)(1). Centers for Medicare and Medicaid Services, FAQs About Affordable Care Act Implementation Part 47, July 19, 2021, at <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQs-Part-47.pdf> [↑](#footnote-ref-4)
5. Braidwood [↑](#footnote-ref-5)
6. Braidwood, at \_\_. [↑](#footnote-ref-6)
7. Braidwood at 40. [↑](#footnote-ref-7)
8. Bob Jones University v. United States, 461 U.S. 574 (1983). [↑](#footnote-ref-8)
9. Braidwood, at \_\_. [↑](#footnote-ref-9)
10. Patients who receive penicillin for syphilis, or any other STI for that matter, do not necessarily engage in riskier sexual behaviors. Drivers with seatbelts in cars do not drive faster or less safely. Those who wear helmets do not use bicycles less safely. Mahsa Esmaeilikia, Igor Radun, Raphael Grzebieta, Jake Olivier, Bicycle helmets and risky behaviour: A systematic review, Transportation Research Part F: Traffic Psychology and Behaviour, Volume 60,

    2019, Pages 299-310, ISSN 1369-8478,

    https://doi.org/10.1016/j.trf.2018.10.026.

    (<https://www.sciencedirect.com/science/article/pii/S1369847818305941>); Houston, D.J. and Richardson, L.E. (2007), Risk Compensation or Risk Reduction? Seatbelts, State Laws, and Traffic Fatalities. Social Science Quarterly, 88: 913-936. <https://doi.org/10.1111/j.1540-6237.2007.00510.x> [↑](#footnote-ref-10)
11. Monica L. Kasting, Gilla K. Shapiro, Zeev Rosberger, Jessica A. Kahn & Gregory D. Zimet (2016) Tempest in a teapot: A systematic review of HPV vaccination and risk compensation research, Human Vaccines & Immunotherapeutics, 12:6, 1435-1450, DOI: [10.1080/21645515.2016.1141158](https://doi.org/10.1080/21645515.2016.1141158) [↑](#footnote-ref-11)
12. Traeger MW, Schroeder SE, Wright EJ, Hellard ME, Cornelisse VJ, Doyle JS, Stoové MA. Effects of Pre-exposure Prophylaxis for the Prevention of Human Immunodeficiency Virus Infection on Sexual Risk Behavior in Men Who Have Sex With Men: A Systematic Review and Meta-analysis. Clin Infect Dis. 2018 Aug 16;67(5):676-686. doi: 10.1093/cid/ciy182. PMID: 29509889. [↑](#footnote-ref-12)
13. Grant RM, Lama JR, Anderson PL, McMahan V, Liu AY, Vargas L, Goicochea P, Casapía M, Guanira-Carranza JV, Ramirez-Cardich ME, Montoya-Herrera O, Fernández T, Veloso VG, Buchbinder SP, Chariyalertsak S, Schechter M, Bekker LG, Mayer KH, Kallás EG, Amico KR, Mulligan K, Bushman LR, Hance RJ, Ganoza C, Defechereux P, Postle B, Wang F, McConnell JJ, Zheng JH, Lee J, Rooney JF, Jaffe HS, Martinez AI, Burns DN, Glidden DV; iPrEx Study Team. Preexposure chemoprophylaxis for HIV prevention in men who have sex with men. N Engl J Med. 2010 Dec 30;363(27):2587-99. doi: 10.1056/NEJMoa1011205. Epub 2010 Nov 23. PMID: 21091279; PMCID: PMC3079639.

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14. Grant et al. (2014), supra note \_\_. [↑](#footnote-ref-14)
15. Jill Blumenthal, David J. Moore, Sonia Jain, Xiaoying Sun, Eric Ellorin, Katya Corado, Martin Hoenigl, Michael Dube, Richard Haubrich, Sheldon R. Morris, and for the California Collaborative Treatment Group (CCTG) TAPIR Study Team.Recent HIV Risk Behavior and Partnership Type Predict HIV Pre-Exposure Prophylaxis Adherence in Men Who Have Sex with Men.AIDS Patient Care and STDs.May 2019.220-226.[http://doi.org/10.1089/apc.2018.0289](https://doi.org/10.1089/apc.2018.0289)

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16. Traeger, et al. (2018), supra note \_\_. [↑](#footnote-ref-16)
17. Braidwood, p. 38. [↑](#footnote-ref-17)
18. Id. [↑](#footnote-ref-18)
19. See Noah Feldman, A Texas Judge Just Took Religious “Freedom” Too Far, Bloomberg, Sept. 14, 2022, at <https://www.bloomberg.com/opinion/articles/2022-09-14/texas-prep-drug-ruling-in-braidwood-case-should-be-overturned>. [↑](#footnote-ref-19)