



## Policy Brief

February 4, 2022



### How a New SCOTUS Justice May Impact Health Care

Justice Stephen Breyer recently [announced](#) that he will retire this summer, creating an opportunity for President Biden to nominate a new justice. The President will have to move quickly to ensure his nomination will not be blocked should Republicans gain control of the Senate in the next election cycle. The Supreme Court (SCOTUS) already has a 6-3 conservative leaning; the Biden Administration will do whatever they can to preserve the three liberal-leaning minority seats. Historically, many of SCOTUS' cases have had major implications for the health care industry, including the constitutionality of the Affordable Care Act and COVID-10 [vaccine mandates](#).

#### **Nomination Predictions**

President Biden has committed to appointing a Black woman to the Court. While the President has not shared an official list, there are unofficial shortlists of qualified, Black female candidates that have been [identified](#) by policy experts. Black women are already severely underrepresented on the federal appeals courts, making up only 10 of the 300 sitting federal appellate judges—

limiting the pool of potential selections. President Biden will most likely choose someone already nominated to the appeals courts, such as [Judge Ketanji Brown Jackson](#), or one serving in a state supreme court, such as California's [Justice Leandra Kruger](#).

### **SCOTUS and Health Care**

The Supreme Court's impact on shaping the health care industry has been enormous. While justices are required to disregard politics in their decisions, many of their previous court decisions and legal writings reveal how they may lean in certain cases. Understanding the composition of sitting justices can help us predict how health care cases in the future may sway.

### **Current Health Care Cases**

The final health care [cases](#) that Justice Breyer will help decide are:

- **Whole Women's Health v. Jackson (11/1)** - [examines](#) the Texas law that allows private citizens to file civil lawsuits against abortion providers.
- **Becerra v. Empire Health Foundation (11/29)** - [decides](#) whether CMS can legally factor in Medicare and commercial insurance payments in determining the DSH payment cap.
- **American Hospital Association v. Becerra (11/30)** - [settles](#) a longstanding dispute around CMS' authority to make cuts to reimbursement rates for 340B drugs.
- **Dobbs v. Jackson Women's Health Org. (12/1)** - [examines](#) the constitutionality of pre-viability abortion prohibitions, which could be the most substantive case on the issue since Roe v. Wade.
- **CVS Pharmacy v. Doe (12/7)** - [considers](#) whether certain disability discrimination claims can arise from protections under the Rehabilitation Act or Section 1557 of the Affordable Care Act.



### **The National Blood Supply is Running Dry**

The U.S. is facing the worst blood shortage in over a decade. The recent Omicron wave of COVID-19 spurred on the situation, reducing the number of donors and collection staff. The American Red Cross has [declared](#) a “national blood crisis” as many blood centers around the

country are left with less than a day's supply of certain blood types. Keep reading to learn more about the blood shortage and strategies to remedy the situation.

### **How we got here....**

Going back to the beginning of the COVID-19 pandemic, the U.S. has seen a decline in the number of individuals donating blood. One notable [contributor](#) is the 62% drop in blood drives across schools and college campuses. However, the recent wave of the Omicron variant has worsened the situation; staffing shortages due to illness have led to the cancelation of blood drives and rescheduling of donation appointments. In recent weeks, the Red Cross has had to limit blood distributions to hospitals. On certain days, some hospitals may [not receive](#) as much as one-quarter of the blood products requested.

### **...and what is being done**

The Red Cross has [partnered](#) with organizations like the NFL to encourage people to get out and donate. Additionally, the Red Cross has put out a request for volunteers to support blood collection. The American Hospital Association, the American Medical Association and American Nurses Association have [released](#) a joint statement urging everyone who can to give blood. To access the AHA's tools kit for providers to navigate the blood supply shortage, click [here](#).

### **Where to donate?**

If you would like to donate blood, you can find a location by clicking [here](#) or downloading the Blood Donor App on your smartphone.



### **What's in the New "Pandemic Preparedness" Bill?**

With his [retirement](#) swiftly approaching, Senator Richard Burr (R-NC) has co-authored a [bipartisan proposal](#) aimed at strengthening the country's ability to respond to future pandemics. The draft legislation touches topics including vaccine development, public health outreach, and improving data collection and strategy. Alongside Sen. Patty Murray (D-WA), Sen. Burr leads the Senate Health, Education, Labor, and Pensions (HELP) Committee; the Committee is currently [considering](#) adding more provisions to the draft. Here's what we know so far:

## **What's in the draft legislation?**

### Federal Accountability

- Establish a task force similar to the 9/11 Commission to examine the nation's response to COVID-19 and the origins of the pandemic.
- Require Senate confirmation of the CDC Director, as well as require that the Agency develop a strategic plan every four years with specific and measurable objectives.
- Direct the Secretary of HHS to establish an advisory committee that would provide recommendations on how to best distribute scientific, evidence-based public health information during emergencies

### State and Local Readiness

- Use the CDC Public Health Emergency Preparedness cooperative agreement to encourage collaboration and coordination between county and state health departments and other agencies.
- Require a Government Accountability Office report on state and local preparedness and response plans to mitigate the spread of COVID-19.

### Addressing Disparities

- Provide grant funding to support evidence-based projects that reduce health disparities and improve outcomes.
- Encourage the funding of programs with strategies that address the social determinants of health, especially those that will share best practices with the broader public health community.

### Improving Public Health Data

- Direct the CDC to publish public health data standards within two years that will improve the exchange of data and reporting.
- Authorize the Office of the National Coordinator for Health IT to conduct a study on the use of electronic data standards to order and report laboratory test results.

## **What's next for the bill?**

A discussion draft of the bill is currently under review by the Senate HELP Committee. Sens. Burr and Murray have asked that their colleagues provide their feedback by today, February 4<sup>th</sup>.

Committee markup is likely to happen in the upcoming weeks.

## **Medicare to Cover Free Over-the-Counter COVID-19 Tests**

CMS has announced that Medicare beneficiaries will now be able to purchase COVID-19 tests at no cost. Starting "in the early spring," people with Medicare (including Medicare Advantage) will be able to buy up to eight tests over-the-counter. The Agencies will pay pharmacies "and other

participating entities. For more information and resources on free testing for Medicare beneficiaries, see the new [CMS FAQ](#).

## Government Funding Discussions

Lawmakers must meet the February 18<sup>th</sup> [deadline](#) to pass another Continuing Resolution or spending package to avoid a government shutdown. President Biden's Build Back Better (BBB) spending plan has been embedded in controversy and will be [difficult](#) to pass as it stands. Legislators are now in talks of breaking down the BBB plan into smaller packages. Some of the topics that are being included in the talks are bolstering disease surveillance [capabilities](#), curbing prescription drug costs and [expanding](#) access to health care. It remains to be seen what will be included in final bills.

## Report to Congress: 2022 Mental Health Parity and Addiction Equity Act Report

The Departments of Labor, [Health and Human Services](#) and the Treasury issued their 2022 [Report to Congress](#) on the Health Parity and Addiction Equity Act of 2008. The report includes information indicating that many health plans and health insurers are failing to deliver coverage parity for mental health and substance use disorder benefits, something that is required by federal law. The information included on this report will be used by AHPA as we advocate for policies that advance behavioral health. This report is particularly valuable at this time, when Congress is holding [several hearings](#) with the goal of passing a mental health and substance use legislative package this year.

## Updates to COVID-19 Regulations

AHPA continues to follow new COVID-19 regulations, guidance and other government actions. The updates below are the latest developments to help mitigate the impacts of COVID-19.

### **FDA Gives Final Approval to Moderna COVID-19 Vaccination**

The FDA has [granted](#) final approval to the Moderna COVID-19 vaccine in individuals 18 years of age and older. The vaccine will now be marketed as Spikevax.

### **FDA Restricts Use of Monoclonal Antibody Therapies Against Omicron**

The FDA has announced that it is again limiting the use of Eli Lilly and Regeneron's respective COVID-19 monoclonal antibody therapies. Director Cavazzoni said this is due to the data showing "these treatments are highly unlikely to be effective against the omicron variant."

### **OSHA Moves to Create Permanent Workplace Safety Rules for COVID-19**

In light of the Supreme Court decision blocking mandated vaccination, OSHA has [announced](#) the withdrawal of its temporary vaccination requirement, but hinted at instead promulgating [a final](#)

[rule](#) in the next six to nine months specifically for the health care sector. U.S. Secretary of Labor Marty Walsh will also [stated](#) that “OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the [COVID-19 National Emphasis Program](#) and [General Duty Clause](#).”



### AHPA Resources

#### Missed a recent AHPA Webinar?

Visit AHPA’s [YouTube channel](#), where members can stream webinars on demand at their convenience.

**Below is a directory of the recent regulatory work that AHPA has conducted:**

	Initial Summary	AHPA Comment	AHPA Summary
IPPS	<a href="#">X</a>	<a href="#">X</a>	<a href="#">X</a>
OPPS	<a href="#">X</a>	<a href="#">X</a>	<a href="#">X</a>
PFS	<a href="#">X</a>	<a href="#">X</a>	<a href="#">X</a>
Surprise Billing: Part 1	<a href="#">X</a>	<a href="#">X</a>	<a href="#">X</a>
Surprise Billing: Part 2	<a href="#">X</a>	<a href="#">X</a>	<a href="#">X</a>
OSHA ETS		<a href="#">X</a>	
CMS Vaccine Mandate	<a href="#">X</a>		
Behavioral Health RFI		<a href="#">X</a>	<a href="#">X</a>
SDOH RFI		<a href="#">X</a>	

### WHAT WE’RE READING...

[What Major National Payers are Offering in Medicare Advantage for 2022](#) – Fierce Healthcare

[Senate Begins Work on Bipartisan Mental Health Package](#) – Roll Call

[Biden Aims to Reduce Cancer Deaths by 50% Over Next 25 Years](#) – Modern Healthcare

[Universal Health Care Bill Fails to Pass in California](#) – ABC News