

MEMORANDUM

**To:** Powers Clients  
**From:** Powers Legislative Practice Group  
**Date:** November 12, 2020  
**Re:** 2020 Election Summary as of November 17 at 11:00am EST and Analysis from a Health Care Perspective

**I. Executive Summary**

This memorandum provides a detailed analysis of the 2020 election results to date and their implications on the Executive Branch and composition of the 117<sup>th</sup> Congress,<sup>1</sup> including the following:

- II. Overview of Election Results (President, Congress, and Governors)
- III. Key Changes to Congressional Committees Overseeing Health Policy
- IV. Select Ballot Initiatives and Referenda
- V. Health Care Impact and Analysis
  - a. Lame Duck Preview
  - b. Preview of Agenda for 117<sup>th</sup> Congress
  - c. Preview of Biden Administration Health Care Priorities

Although many states have not yet formally certified their vote counts, and several legal challenges remain outstanding, it appears that former Vice President Joe Biden has become the President-elect. Democrats are also likely to maintain control of the House of Representatives, though with a slimmer majority than in the current Congress. Control of the U.S. Senate is still undetermined, as both Georgia Senate seats are proceeding to runoff elections on January 5. Currently, Republicans will hold at least 50 seats and Democrats will hold 48 seats (including two Independent senators who caucus with the Democrats).

**II. Election 2020: Overview of Election Results**

**President**

Former Vice President **Joseph Biden (D)** appears to have won the 2020 presidential election, defeating incumbent President **Donald Trump (R)** by winning both the Electoral College and the popular vote. At the time of this writing, one state, Georgia, has yet to be officially called in the Presidential race, but President-elect Biden appears to have won at least 290 electoral votes,

<sup>1</sup> While there are still some races yet to be called, we are monitoring election results from multiple reputable sources including the Associated Press, Bloomberg Government, and Politico.

eclipsing the threshold of 270 required to determine a winner. However, President Trump has not yet conceded the election, with several legal challenges expected or pending and at least one recount that will in occur in Georgia. The formal vote of the Electoral College will not take place until mid-December.

As of this writing, President-elect Biden has won several key battleground states that President Trump won in 2016, including Arizona, Wisconsin, Michigan, and Pennsylvania. At the time of this writing, President-elect Biden is also leading in Georgia, another state that President Trump won in 2016. Voter turnout for the 2020 election increased dramatically, with both candidates beating the previous record number of votes cast (69+ million for former President Barack Obama in the 2008 election). As of this writing, President-elect Biden has earned more than 77 million votes to President Trump's 72 million.

## **Congress**

While it appears that Democrats will maintain their majority in the House, Republicans regained at least a handful of seats. It is uncertain which party will control the Senate; in order to flip the chamber, Democrats will have to win both runoff elections in Georgia. If Democrats are successful in both races, the Senate would be split at 50 Republicans and 50 Democrats, leaving Vice President-elect Kamala Harris to cast the tie-breaking vote.

### **III. Detailed Analysis of Election Dynamics (as of Nov. 12)**

***Confirmed Seats in the 2020 Congressional & Governors Races***

	Senate	House	Governors
Democrats	46	219	23
Republicans	50	204	27
Independents	2	0	0
To Be Determined	2	12	0

Some results are still pending as a result of recounts, runoffs, and absentee/mail-in ballots still to be counted. Information presented in these tables is, therefore, subject to change. Two Senate runoff elections in Georgia will be held on January 5. Thirteen House races remain too close to call, but the Democrats have now won enough seats (218) to hold at least a narrow majority.

Republicans gained control of one additional governor's seat, flipping Montana from Democratic control to Republican control.

#### *U.S. Senate*

Control of the Senate remains unclear as of this writing, with two runoffs yet to be decided. Alaska was recently called for the Republican incumbent Dan Sullivan, and incumbent Senator Thom Tillis narrowly defeated challenger Cal Cunningham in North Carolina. Currently, Republicans hold 50 seats to 48 seats for the Democrats (including the two Independents who caucus with Democrats), with Democrats having flipped two seats (Colorado and Arizona) and Republicans flipping one seat in Alabama.

On January 5, incumbent Georgia Republicans, Sens. David Perdue and Kelly Loeffler (who was appointed in 2019 after the resignation of former Sen. Johnny Isakson), will each face runoff elections against their Democratic challengers (Jon Ossoff and Raphael Warnock, respectively). Under Georgia’s election laws, a runoff is held when no candidate receives at least 50% of the vote in the general election. These races will decide control of the Senate. If Democrats win both Georgia races, the makeup of the Senate would be evenly split, with Vice President-elect Kamala Harris breaking the tie and giving Democrats the majority with Sen. Chuck Schumer (D-NY) becoming the majority leader. If Republicans win either or both Georgia seats, Sen. Mitch McConnell (R-KY) will remain the Majority Leader for at least another two years before the next Senate election.

Of the 35 Senate races, the following fourteen were, at most times during 2020, the most competitive.

### Battleground (Most Competitive) Senate Races

State	Elected	Defeated
Alabama	<b>Tommy Tuberville (R)</b>	Doug Jones (D)*
Alaska	Dan Sullivan (R)*	Al Gross (I)
Arizona	<b>Mark Kelly (D)</b>	Martha McSally (R)*
Colorado	<b>John Hickenlooper (D)</b>	Cory Gardner (R)*
Georgia	<i>TBD</i>	<i>TBD</i>
Georgia	<i>TBD</i>	<i>TBD</i>
Iowa	Joni Ernst (R)*	Theresa Greenfield (D)
Kansas	Roger Marshall (R)	Barbara Bollier (D)
Maine	Susan Collins (R)*	Sara Gideon (D)
Michigan	Gary Peters (D)*	John James (R)
Montana	Steve Daines (R)*	Steve Bullock (D)
North Carolina	Thom Tillis (R)*	Cal Cunningham (D)
South Carolina	Lindsey Graham (R)*	Jaime Harrison (D)
Texas	John Cornyn (R)*	Mary (MJ) Hegar (D)

*Some results are still pending as a result of recounts, runoffs, and absentee/mail-in ballots still to be counted.*

*Information presented in the table is subject to change.*

*\*Indicates Incumbent*

*Italics indicate a runoff*

**Bold indicates a flipped seat**

### U.S. House of Representatives

Democrats maintain control of the House; at the time of this writing, some races remain too close to call. However, Democrats did not expand their majority as many pollsters predicted.

Currently, Democrats retain 219 House seats and Republicans hold 204 seats. Democrats gained three seats, two in North Carolina and one in Georgia, and Republicans flipped eleven so far – in Iowa, Michigan Minnesota, New Mexico, Oklahoma, South Carolina, Utah two in California, and two in Florida.

Of the 435 House races, the following 38 were, at most times during 2020, the most competitive (approximately 12 additional competitive races have not yet been called).

## House of Representatives – Notable Districts that Have Been Called

State and District	Elected	Defeated
AZ-06	David Schweikert (R)*	Hiral Tipirneni (D)
CA-39	<b>Kim Young (R)</b>	Gil Cisneros (D)*
CA-48	<b>Michelle Steel (R)</b>	Harley Rouda (D)*
CO-03	Lauren Boebert (R)	Diane Mitsch Bush (D)
FL-15	Scott Franklin (R)	Alan Cohn (D)
FL-26	<b>Carlos Gimenez (R)</b>	Debbie Mucarsel-Powell (D)*
FL-27	<b>Maria Elvira Salazar (R)</b>	Donna Shalala (D)*
GA-06	Lucy McBath (D)*	Karen Handel (R)
GA-07	<b>Carolyn Bourdeaux (D)</b>	Rich McCormick (R)
IA-01	<b>Ashley Hinson (R)</b>	Abby Finkenauer (D)*
IA-03	Cindy Axne (D)*	David Young (R)
IL-13	Rodney Davis (R)*	Betsy Dirksen Londrigan (D)
IL-14	Lauren Underwood (D)*	Jim Oberweis
IN-05	Victoria Spartz (R)	Christina Hale (D)
ME-02	Jared Golden (D)*	Dale Crafts (R)
MI-03	<b>Peter Meijer (R)</b>	Hillary Scholten (D)
MN-01	Jim Hagedorn (R)*	Dan Feehan (D)
MN-07	<b>Michelle Fischbach (R)</b>	Collin Peterson (D)*
MO-02	Ann Wagner (R)*	Jill Schupp (D)
NC-02	<b>Deborah Ross (D)</b>	Alan Swain (R)
NC-06	<b>Kathy Manning (D)</b>	Lee Haywood (R)
NE-02	Don Bacon (R)*	Kara Eastman (D)
NJ-02	Jeff Van Drew (R)*	Amy Kennedy (D)
NM-02	<b>Yvette Herrell (R)</b>	Xochitl Torres Small (D)*
OK-05	<b>Stephanie Bice (R)</b>	Kendra Horn (D)*
OH-01	Steve Chabot (R)*	Kate Schroder (D)
PA-08	Matt Cartwright (D)*	Jim Bognet (R)
PA-10	Scott Perry (R)*	Eugene DePasquale (D)
SC-01	<b>Nancy Mace (R)</b>	Joe Cunningham (D)*
TX-10	Michael McCaul (R)*	Mike Siegel (D)
TX-21	Chip Roy (R)*	Wendy Davis (D)
TX-22	Troy Nehls (R)	Sri Kulkarni (D)
TX-23	Tony Gonzales (R)	Gina Ortiz Jones (D)
TX-24	Beth Van Duyne (R)	Candace Valenzuela (D)
UT-4	<b>Burgess Owens (R)</b>	Ben McAdams (D)*
VA-02	Elaine Luria (D)*	Scott Taylor (R)
VA-05	Robert Good (R)*	Cameron Webb (D)
VA-07	Abigail Spanberger (D)*	Nick Freitas (R)

## Gubernatorial Races

Of the 11 gubernatorial races that took place, Republicans picked up one seat by taking Montana (where incumbent Gov. Steve Bullock was term-limited out of office), while the rest of the states retained current party control. Republicans are set to hold 27 governorships and Democrats will hold 23.

### Notable Gubernatorial Races

State	Elected	Defeated
Missouri	Mike Parson (R)*	Nicole Galloway (D)
Montana	<b>Greg Gianforte (R)</b>	Mike Cooney (D)
North Carolina	Roy Cooper (D)*	Dan Forest (R)
New Hampshire	Chris Sununu (R)*	Dan Feltes (D)
West Virginia	Jim Justice (R)*	Ben Salango (D)

\*Indicates incumbent

**Bold indicates flipped seat**

## IV. Key Changes to Congressional Committees Overseeing Health Policy

The four committees of jurisdiction over health care in Congress will experience changes in membership due to the election, retirements, and term limits. While internal committee leadership and committee appointments have not yet occurred, several current committee members were impacted by the election and are worth noting.

### Senate

Senate Republicans have term limits in committee leadership, limiting the period a Republican Senator can serve to six cumulative years as a chairman and six cumulative years as ranking member of the same committee. Because of these limits, several Senate committees will experience a shift in Republican leadership. Senator Chuck Grassley (R-IA) has reached his term limit and will no longer be serving as the top Republican on the Senate Finance Committee in the next Congress (i.e., the 117<sup>th</sup> Congress). Senator Mike Crapo (R-ID) is expected to replace Senator Grassley as the Republican Chairman of the Finance Committee. If Democrats take the Senate in January, current Ranking Member Ron Wyden (D-OR) is expected to become the Chairman but will remain the Ranking Member if Republicans control the chamber.

### Senate Finance Committee Changes

State	Senator	Status on Committee
Iowa	Chuck Grassley (R)	Term Limited
Idaho	Mike Crapo (R)	Seniority on committee should result in Chairmanship
Kansas	<b>Pat Roberts (R)</b>	<b>Retired</b>
Louisiana	Bill Cassidy (R)*	Reelected
Montana	Steve Daines (R)*	Reelected
Nebraska	Ben Sasse (R)*	Reelected

Texas	<b>John Cornyn (R)*</b>	Reelected
Virginia	<b>Mark Warner (D)*</b>	Reelected
Wyoming	<b>Mike Enzi (R)</b>	<b>Retired</b>

\*Reelected

**Bold indicates retired**

The Senate Health, Education, Labor, and Pensions (HELP) Committee saw several retirements for top Republican members this year. Chairman Lamar Alexander (R-TN) is retiring; the next person in line to lead the Committee would be Senator Mike Enzi (R-WY), but he too is retiring. That leaves the Republican HELP Committee gavel open to either Senators Richard Burr (R-NC) or Rand Paul (R-KY). If Democrats take the Senate, current Ranking Member Patty Murray (D-WA) is expected to become the chairwoman.

Several current HELP Committee members faced competitive races this cycle. As of this writing, Sen. Doug Jones (D-AL) is the only committee member to have lost his seat.

### Senate Health, Education, Labor, and Pensions (HELP) Committee Changes

State	Senator	Status on Committee
Alabama	Doug Jones (D)	Defeated
Georgia	<b>Kelly Loeffler (R)</b>	Heading to Runoff
Kansas	<b>Pat Roberts (R)</b>	<b>Retired</b>
Kentucky	Rand Paul (R)	Leadership Candidate
Minnesota	Tina Smith (D)*	Reelected
North Carolina	Richard Burr (R)	Leadership Candidate
Tennessee	<b>Lamar Alexander (R)</b>	<b>Retired (current Chairman)</b>
Wyoming	<b>Mike Enzi (R)</b>	<b>Retired</b>

\*Reelected

**Bold indicates retired**

### House of Representatives

In the House, there will be some shuffling of seats on key committees with jurisdiction over health care, but there are few major changes based on the races that have been called so far. The Chairwoman of the House Appropriations Committee, Rep. Nita Lowey (D-NY), is retiring. Reps. Marcy Kaptur (D-OH), Debbie Wasserman Schultz (D-FL), and Rosa DeLauro (D-CT) are all running to take over her gavel on the Committee.

The House Ways and Means Committee saw two retirements with Reps. George Holding (R-NC) and Kenny Marchant (R-TX) both leaving Congress. Rep. Tom Suozzi (D-NY) is facing a tough re-election campaign, with the result, as of this writing, not yet decided.

### House Ways and Means Committee Changes

State	Representative	Status on Committee
New York	Tom Suozzi (D)	Undecided
North Carolina	<b>George Holding (R)</b>	<b>Retired</b>
Texas	<b>Kenny Marchant (R)</b>	<b>Retired</b>

**Bold indicates retired**

*Italics indicate race is not yet called*

Rep. Greg Walden (R-OR), currently Ranking Member of the Energy & Commerce Committee, is also retiring – Reps. Michael Burgess (R-TX), Bob Latta (R-OH), and Cathy McMorris Rodgers (R-WA) are all running to take over his minority leadership role on the Committee. Other Committee members who are not returning include Rep. Eliot Engel (D-NY), who lost his primary election, and Rep. Joe Kennedy (D-MA), who lost his race for Edward Markey’s Senate seat. Several other retirements are noted in the table below.

### House Energy and Commerce Committee Changes

State	Representative	Status on Committee
Illinois	<b>John Shimkus (R)</b>	<b>Retired</b>
Indiana	<b>Susan Brooks (R)</b>	<b>Retired</b>
Iowa	<b>David Loebsack (D)</b>	<b>Retired</b>
Massachusetts	Joe Kennedy (D)	Ran for Senate
New York	Eliot Engel (D)	Lost Primary
Oregon	<b>Greg Walden (R)</b>	<b>Retired (current Ranking Member)</b>
Texas	<b>Pete Olson (R)</b>	<b>Retired</b>
Texas	<b>Bill Flores (R)</b>	<b>Retired</b>

**Bold indicates retired**

On the House Education and Labor Committee, Rep. Donna Shalala (D-FL), former U.S. Department of Health and Human Services Secretary under President Bill Clinton, lost her race for reelection, and Rep. Bradley Byrne (R-AL) lost his primary election. Additional committee changes resulting from retirements are noted below.

### House Education and Labor Committee Changes

State	Representative	Status on Committee
Alabama	<i>Bradley Byrne (R)</i>	Lost Primary
California	<b>Susan Davis (D)</b>	<b>Retired</b>
Florida	Donna Shalala (D)	Defeated
North Carolina	<b>Mark Walker (R)</b>	<b>Retired</b>
Tennessee	<b>Phil Roe (R)</b>	<b>Retired</b>

**Bold indicates retired**

*Italics indicate race is not yet called*

## V. Select Ballot Issues and Referenda

In addition to the federal races, several states voted on notable ballot issues and other state policies impacting health care. The following offers a brief summary of some of the more notable results:

- **Abortion:** **Colorado** rejected a proposition to prohibit abortion after 22 weeks gestational age. **Louisiana** voted to amend their state’s constitution to explicitly outline that the document offers no protections for the right to an abortion or funding of an abortion.
- **Marijuana:** **Arizona, Montana, New Jersey, and South Dakota** all voted to legalize possession and use of marijuana for residents, while **Mississippi** voted to legalize medical marijuana.
- **Medicaid Expansion:** Earlier this summer, **Missouri** and **Oklahoma** voters approved initiatives to expand their state Medicaid programs under the Affordable Care Act (ACA), bringing the total number of expansion states to 39 (including the District of Columbia).
- **Election Policies:** **Alaska** voters rejected an initiative to move to an open (nonpartisan) primary system for the state’s executive, legislative, and congressional offices, and to institute ranked-choice voting for general elections, including presidential elections. **Colorado** voted to join the National Popular Vote Interstate Compact, which would automatically give the state’s electoral votes to the winner of the popular vote in the presidential election if enough states representing at least 270 electoral votes also adopt the compact. **Florida** rejected a proposal for a top-two open primary system for state office elections, where the top two candidates, regardless of their party advance to the general election. **Massachusetts** voted against enacting a ranked-choice voting system
- **Leave Policies:** **Colorado** approved a proposition to create a state program for paid medical and family leave.
- **Dialysis:** **California** voted down Proposition 23, which would have required an onsite physician to be present at dialysis clinics.

## VI. **Health Care Impact and Analysis**

### *End of Session Preview (“Lame Duck”)*

Following the election, Congress prepares for transition to a new session and, in this case, very likely to a new administration. We do not expect Congress to act on major legislation except for the following priorities that could or must be addressed before the 117<sup>th</sup> Congress is gaveled to order.

#### *Could be Addressed -- COVID-19 Stimulus*

Prior to the election, White House officials and House Speaker Nancy Pelosi were engaged in ongoing negotiations for another COVID-19 stimulus deal, but reached an impasse around a \$2.2 trillion offer from the Democrats, while the White House’s offer never exceeded \$1.8 trillion. Senate Majority Leader Mitch McConnell, meanwhile, was supportive of a much more limited stimulus bill, trying twice to pass a \$500 billion deal in the Senate. With President Trump’s assumed loss and ongoing election challenge, it is anticipated the White House will no longer be the primary negotiator on behalf of Republicans; instead, Majority Leader McConnell will play a more engaged role in negotiations.

Both Majority Leader McConnell and Speaker Pelosi have said that they believe Congress could pass a bill before the end of the year. Though the pre-election sticking points remain in place on



both sides, the election results may prompt an additional round of negotiations. Given the likely change in the White House and uncertainty about Senate control, it is also possible that such legislation will not advance before 2021. Key issues to be discussed in a COVID stimulus package include an extension of many of the provisions in the CARES Act passed in April, with the possible inclusion of liability protections for businesses and state and local assistance for COVID-19 testing, tracing, and vaccination efforts, to name a few.

### *Must be Addressed -- FY 2021 Appropriations and Health Extenders*

With funding for federal government agencies and programs set to expire on December 11, Congress must agree to either a final Fiscal Year (FY) 2021 appropriations package or a continuing resolution to fund the government at current levels for a defined period of time, or risk a government shutdown. Congress could opt to pass an omnibus spending bill, which packages individual appropriations bills into one large bill, or adopt a hybrid approach, passing continuing resolutions using existing funding levels for some agencies and enacting final appropriations bills for other departments where agreement can be more easily reached.

Whatever the final funding vehicle, Congress is likely to attach to that vehicle short-term reauthorizations of health care provisions, known as “health extenders,” which are set to expire on December 11. These reauthorizations include funding for community health centers; Graduate Medical Education (GME) funding; additional resources for outreach and assistance programs for low-income beneficiaries; extensions of the Money Follows the Person (MFP), Spousal Impoverishment, and Community Mental Health Services demonstration programs; and further delays of payment reductions for Disproportionate Share Hospitals (DSH).

### *Other Possible Actions*

During this time, the Senate is expected to continue confirming U.S. circuit and district court nominees, including the seat left open by Justice Amy Coney Barrett after she was nominated and confirmed to join the U.S. Supreme Court. Congress is also expected to pass the National Defense Authorization Act (NDAA); this bill authorizes appropriations and sets forth policies for the Department of Defense (DOD) that must be passed every year.

Additionally, as some legislators prepare to leave Congress and others look to wrap up their 2020 agendas, there may be enthusiasm to attach bipartisan health policy bills to a larger package. Such bills could include some small-scale drug pricing reforms, surprise billing legislation, extension of expiring home infusion/home health programs, changes to the use of prior authorization in the Medicare Advantage program, and other policy priorities that have long been championed by retiring members of Congress.

### *Preview of Congressional Agenda for the 117<sup>th</sup> Congress*

#### *Partisan Divide*

Many of the priorities Congress will attempt to tackle in the remaining months of 2020 may carry over into the next Congress, especially if bipartisan negotiations fall through before January. A divided Congress, where each party leads one congressional chamber, likely means that neither party will be able to pass policies that are considered radical or strongly partisan,

instead shifting to bipartisan policies that could make it to the White House for signature. Whether or not Republicans maintain control of the Senate, the most moderate members of each caucus (Republican Sens. Lisa Murkowski (AK), Susan Collins (ME), and Mitt Romney (UT); and Democratic Sens. Kyrsten Sinema (AZ), Mark Kelly (AZ), and Joe Manchin (WV)) will play key roles, as they may choose to vote with the opposition party and become swing votes on certain policy issues and legislation that advances.

President-elect Biden's long history of compromise and deal-making with Republican leaders, including Sen. Mitch McConnell, and the respect they seem to have for each other, will also be key to advancing any policy through a closely divided Congress, although it remains to be seen how resilient that relationship will be in an increasingly partisan environment. Even if Democrats regain Senate control by winning both Georgia races, their margins will make it very difficult to pursue more ambitious, progressive policies, including Medicare for All, the Green New Deal, and any significant Affordable Care Act expansion, including the creation of a public option.

Currently, the legislative filibuster remains in place, requiring 60 votes in the Senate to pass most legislation. Depending on the Senate GA runoff results, the party that holds the majority in the chamber may attempt to use the budget reconciliation process to advance difficult-to-pass legislation. This legislative procedure allows legislation to be passed with a simple majority (51 votes) if it is deemed "germane" to certain tax, spending, and debt limit legislation. For example, this procedure was used to enact the Affordable Care Act in 2010. If Democrats lead the Senate in 2021, it is likely that leadership will attempt to pass at least some priorities through budget reconciliation to avoid the filibuster.

### *Health Care Priorities*

In 2021 and beyond, there will be several health care policies on the Congressional agenda.

- **Surprise Billing:** Despite significant efforts in the 116<sup>th</sup> Congress, House and Senate leaders were not able to come to an agreement to address reforms to surprise medical billing. Several proposals on surprise billing were released in early 2020, and key committees are likely to revisit the discussions around how to limit surprise bills.
- **Drug Pricing:** Large-scale changes to drug pricing policies, such as those laid out in the House Democrats' H.R. 3 package passed in 2019, are unlikely to proceed, but there may be room for bipartisan agreement on more marginal policies. Sen. Chuck Grassley will no longer lead the powerful Finance Committee. However, his work with Ranking Member Ron Wyden on the Prescription Drug Pricing Reduction Act could form the basis for further bipartisan negotiations, including in such areas as an out-of-pocket cap for Medicare Part D drug costs, reduced cost-sharing for Medicare beneficiaries, and changes to the catastrophic phase of the benefit.
- **Telehealth:** Congress will also consider permanent extensions to new telehealth flexibilities provided during the COVID pandemic, which are set to expire when the declared public health emergency (PHE) comes to an end. CMS has the authority to determine which services are eligible to be provided via telehealth; however, the existing geographic restrictions on which beneficiaries can receive telehealth and authorities for non-physician practitioners (including therapists) to provide telehealth will have to

statutorily expanded by Congress. There seems to be significant bipartisan agreement in both chambers that Congress should act to protect telehealth expansions after the PHE has ended; it is expected that many, if not all, of the policies comprising the new telehealth paradigm are here to stay in one form or another.

## *Preview of Biden Administration Agenda*

### *Controlling the COVID-19 Pandemic*

President-elect Biden has stated that his top priority is getting the COVID-19 pandemic under control. Among the key issues are how to mitigate spread of the virus, identifying a vaccine, and ensuring there are enough resources available to treat the expected rise in cases. Below are some key areas the Biden team has identified for managing the pandemic.

- **Ensure COVID-19 Testing is Widely Available:** President-elect Biden has pledged to make testing more widely available to every American at no cost through increased production of rapid at-home testing and the establishment of at least 10 drive-through testing sites per state.
- **Implement Mask Requirements:** The Biden Administration plans to work with Governors to implement expanded state mask requirements. President-elect Biden has said that he would consider a national mask mandate, although there are questions around his authority to do so.
- **Tailored Lockdowns:** The incoming administration is unlikely to implement a nationwide lockdown; instead, they have indicated that they will tailor lockdowns and reopenings to the risk levels in individual communities.
- **Increase Contact Tracing Efforts:** President-elect Biden has promised to grow the current contact tracing workforce to 100,000, doubling the current workforce.
- **Distribute More PPE and Ventilators:** To increase the availability of personal protective equipment (PPE) and ventilators, President-elect Biden has said that he will more aggressively use the Defense Production Act, which requires manufacturers to prioritize the federal government's supply chain needs.
- **Ensure a Safe and Free COVID Vaccine:** President-elect Biden has promised another \$25 billion to ensure the rapid and safe development of a COVID-19 vaccine. As part of the vaccine development, the administration has also promised that the vaccine will be free for all Americans.

### *ACA Regulation*

Beyond the COVID pandemic response, one of the earliest health care priorities for a Biden administration will be shoring up the Affordable Care Act. While large-scale legislative expansions of the ACA are unlikely, there are considerable opportunities for executive action to bolster the health care law.

- President-elect Biden is expected to reallocate funding to the **ACA Navigator program** for outreach and enrollment assistance, which was largely eliminated under the Trump administration.

- The **ACA's open enrollment periods** could be extended, and the Biden Administration could also press forward with special enrollment periods during the COVID pandemic and future public health emergencies, options the Trump administration declined to offer.
- Democrats have opposed a long list of regulatory changes to the ACA's operation and administration implemented during President Trump's tenure, and many, if not all, of these regulations could be reversed by the Biden Administration, including regulatory adjustments to:
  - **Short-term, limited-duration health plans;**
  - The **public charge rule**, which impacts residency eligibility for low-income immigrants utilizing benefits like Medicaid; and
  - The ACA's **Section 1557** nondiscrimination provisions.

### *ACA Supreme Court Case*

On November 10, 2021, the Supreme Court heard oral arguments in *California v. Texas*, which could determine whether the ACA is upheld or struck down. A group of Republican governors and attorneys general sued to declare the entire law unconstitutional, due to the “zeroing out” by Congress in 2017 of the tax penalty for failure to comply with the individual insurance mandate. There are three issues to be decided in the case: (1) plaintiffs' standing to bring the case, (2) the constitutionality of the individual mandate under Congress' taxing authority, and (3) the “severability” of the mandate from the full ACA if it is struck down. Oral arguments indicated to some court watchers that at least two traditionally conservative justices may side with the three liberal justices to preserve the law.

Some commentators believe that the ACA will withstand these challenges on the legal merits of the case; however, others believe it is possible the Court will decide to strike down the entire ACA. If the ACA is struck down, President-elect Biden and Democrats in Congress signaled that they would immediately seek to fill the gap in coverage for over 21 million Americans currently covered under the law would likely become the top priority for Democrats in Congress and the Biden administration. A decision from the Court is not expected until spring or summer 2021.

### *Impact of Divided Government*

The Biden campaign has laid out a variety of health care priorities and policy recommendations, including those advanced by the Biden-Sanders Unity Task Force, convened to bridge the gap between the supporters of President-elect Biden and former Democratic candidate, Senator Bernie Sanders (I-VT). However, with a divided Congress likely, or a razor-thin Democrat-led Senate, many of the most sweeping proposals are unlikely to reach the White House through the legislative process. However, there are a variety of changes to current health care policies that could be advanced in other ways, including through regulation and Executive Orders. Such policy efforts that are less likely to advance in Congress include:

- **Public Option Health Benefit** - the creation of a “public option” health insurance plan, administered by the Centers for Medicare and Medicaid Services (CMS) to compete against the private plans participating in the Affordable Care Act through the exchange.
- **Medicare Eligibility** - Lowering the Medicare-eligible age of enrollment to age 60 (as opposed to 65 currently).

- Government Negotiation of Drug Prices – Allowing the government to directly negotiate the cost of prescription drugs in Medicare Part D.

### *Further Health Agenda*

The Biden Administration has also signaled that it would seek to expand investment in community health centers, other rural providers, and the broader health care workforce; expand competitive bidding in the Medicare program; expand federal data collection and analysis to identify and help address health care disparities faced by racial and ethnic minorities and people with disabilities; combat health care marketplace consolidation; and advance demonstration programs to test innovative models and expand access to post-acute care and long-term services and supports.

There are also identifiable areas of overlap in terms of Biden and Trump Administration health care priorities, including: improving transparency on the pricing of health care costs, including drug pricing; and improving the health care supply chain and supporting “Buy American” policies.

***For more information, please contact the attorney or government relations professional at Powers with whom you typically work.***