

# STATE EFFORTS TO ADDRESS HEALTH CARE CONSOLIDATION AND COSTS

Connecticut Office of Health Strategy  
March 9, 2021

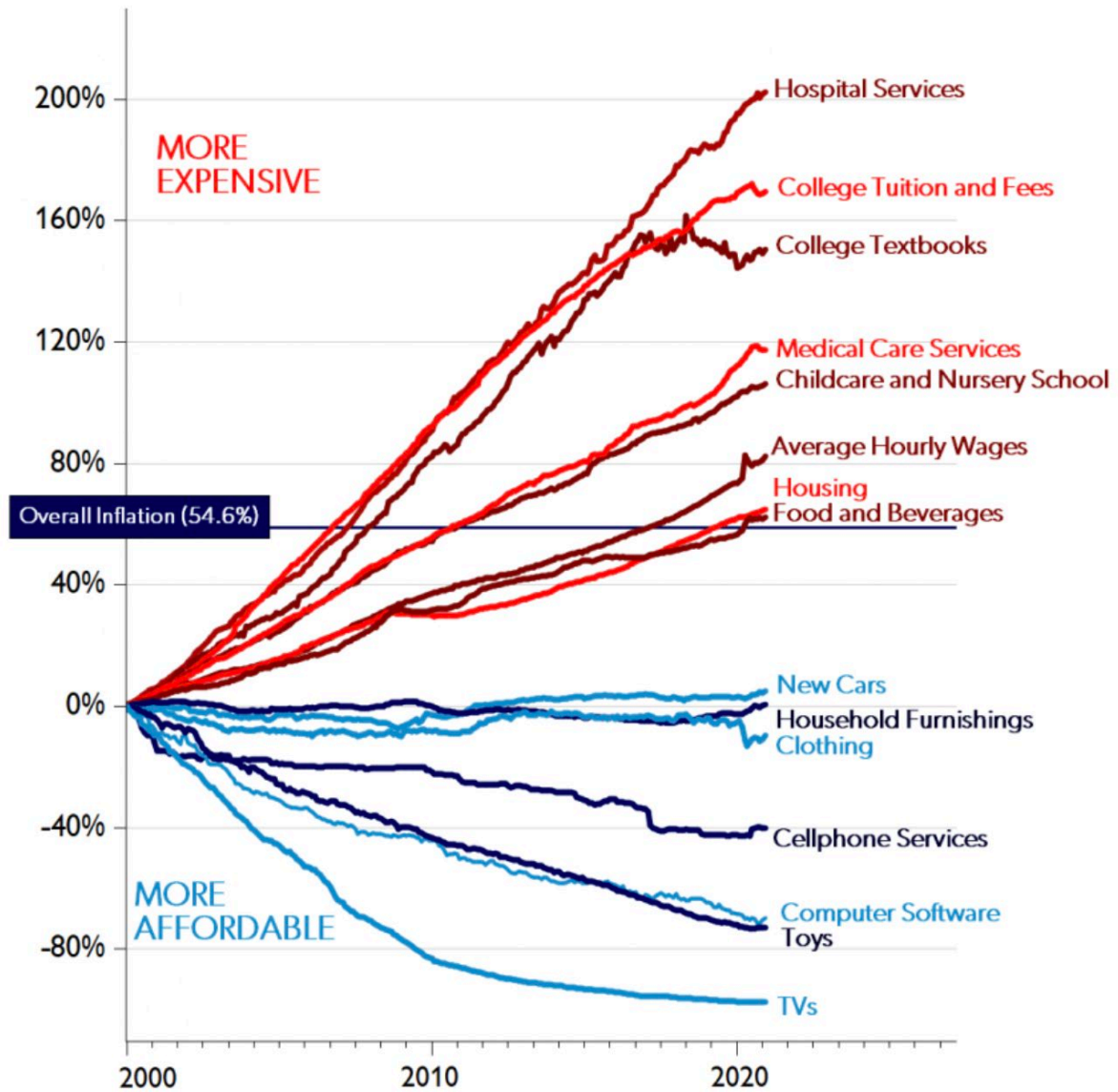
Katherine L. Gudiksen, Ph.D., M.S.

THE SOURCE  
ON HEALTHCARE PRICE & COMPETITION



PRICES FOR  
HEALTH CARE  
HAVE  
INCREASED  
MUCH FASTER  
THAN  
INFLATION

Selected US Consumer Goods and Services, Wages



Source: Bureau of Labor Statistics

Carpe Diem 



**\$57**



**\$65**



**\$160**

Source: Institute of Medicine, Best Care at Lower Cost: The Path to Continuously Learning Health Care in America (2013)

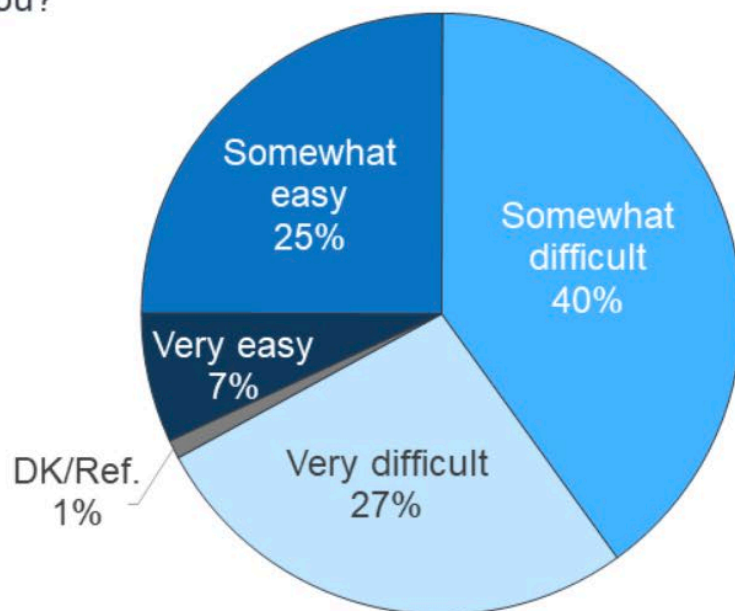
**WHAT IF THE PRICE OF FOOD INCREASED LIKE THE PRICE OF HEALTH CARE?**

# WHY ARE U.S. HEALTHCARE PRICES SO HIGH?

- Failure to protect a free market – lack of transparency
- Failure to protect competition and rigorously enforce antitrust laws
- Failure of policymakers to act when competition no longer exists

# TWO-THIRDS OF AMERICANS FIND IT DIFFICULT TO FIND OUT THE COST OF CARE

In general, how easy or difficult would you say it is to find out how much medical treatments and procedures provided by different doctors or hospitals would cost you?



Percent who say they have ever had the following problems with their current health insurance plan:

Difficulty understanding how much they will have to pay out of their own pocket when they use health care

44%

Difficulty understanding what their plan will and will not cover

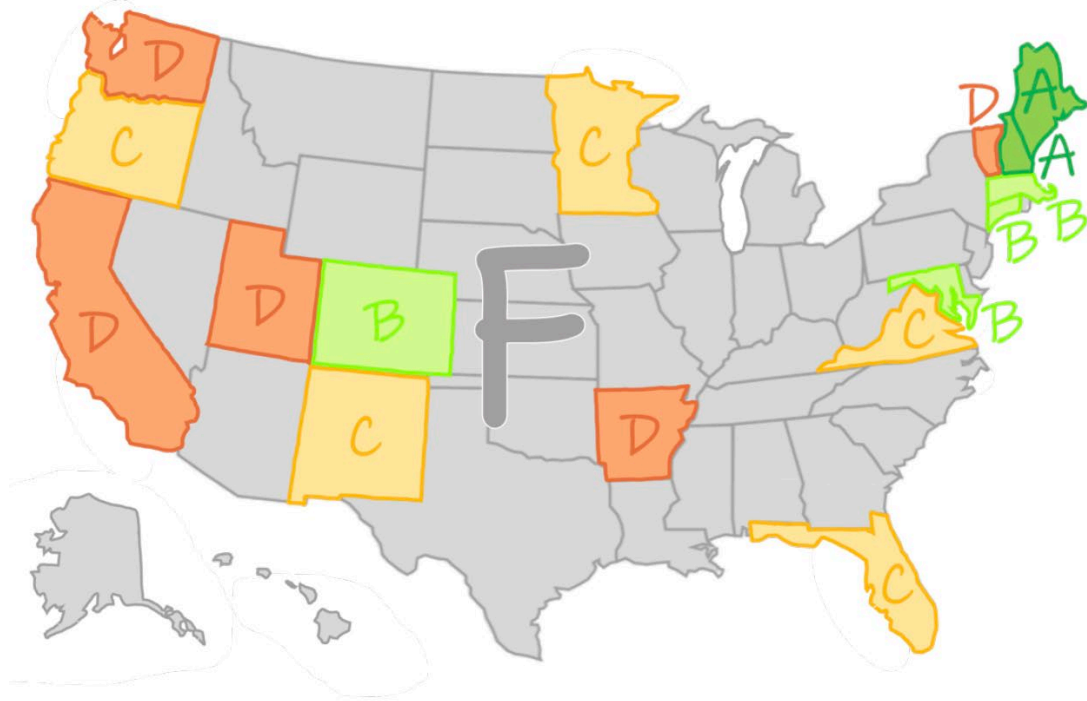
40%

SOURCE: KFF/LA Times Survey of Adults with Employer-Sponsored Health Insurance (Sept. 25-Oct. 9, 2018). See topline for full question wording.



**FAILURE TO PROTECT A FREE MARKET**

# THE 2020 REPORT CARD ON STATE PRICE TRANSPARENCY LAWS

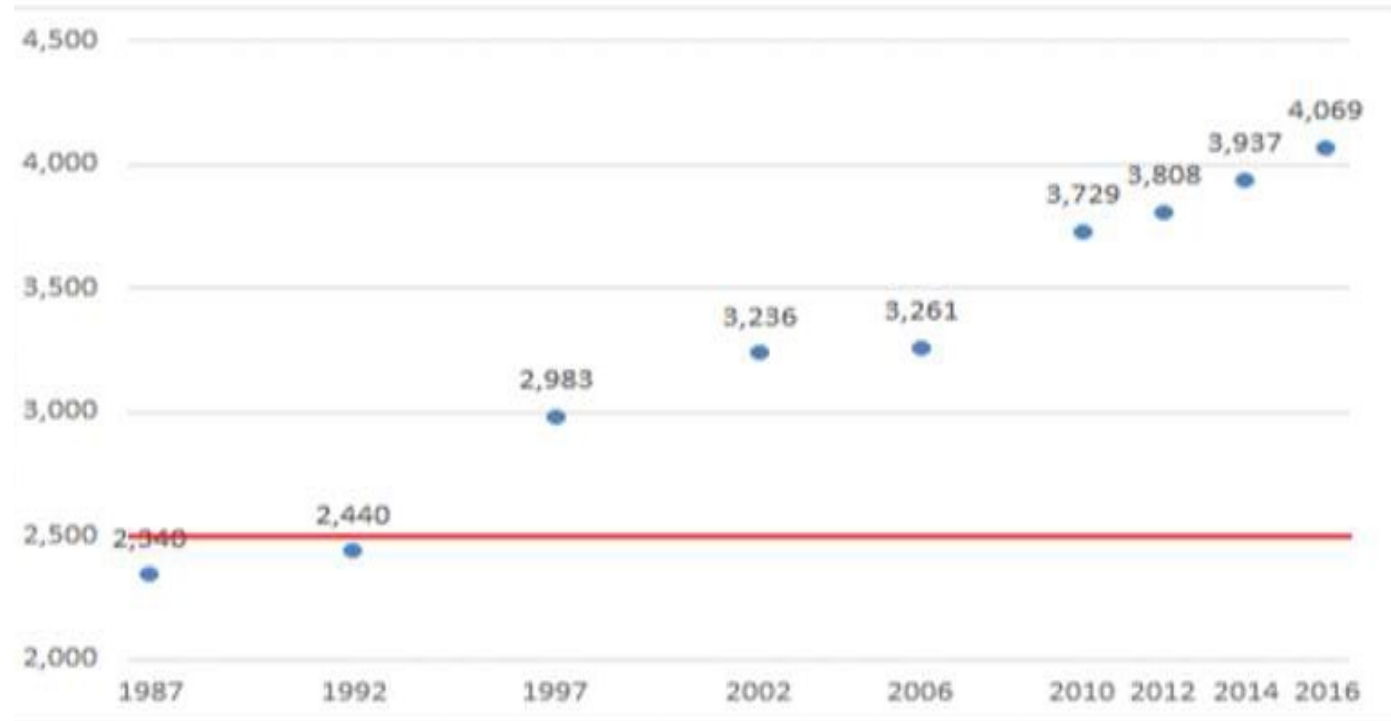


GRADE	STATES
A	Maine New Hampshire
B	Colorado Connecticut Maryland Massachusetts
C	Florida Minnesota New Mexico Oregon Virginia
D	Arkansas California Utah Vermont Washington
F	Alabama Alaska Arizona Delaware Georgia Hawaii Idaho Illinois Indiana Iowa Kansas Kentucky Louisiana Michigan Mississippi Missouri Montana Nebraska Nevada New Jersey New York North Carolina North Dakota Ohio Oklahoma Pennsylvania Rhode Island South Carolina South Dakota Tennessee Texas West Virginia Wisconsin Wyoming

Source: <https://www.catalyze.org/product/2020-price-transparency-report-card/>

# FAILURE TO PROTECT COMPETITION AND RIGOROUSLY ENFORCE ANTITRUST LAWS

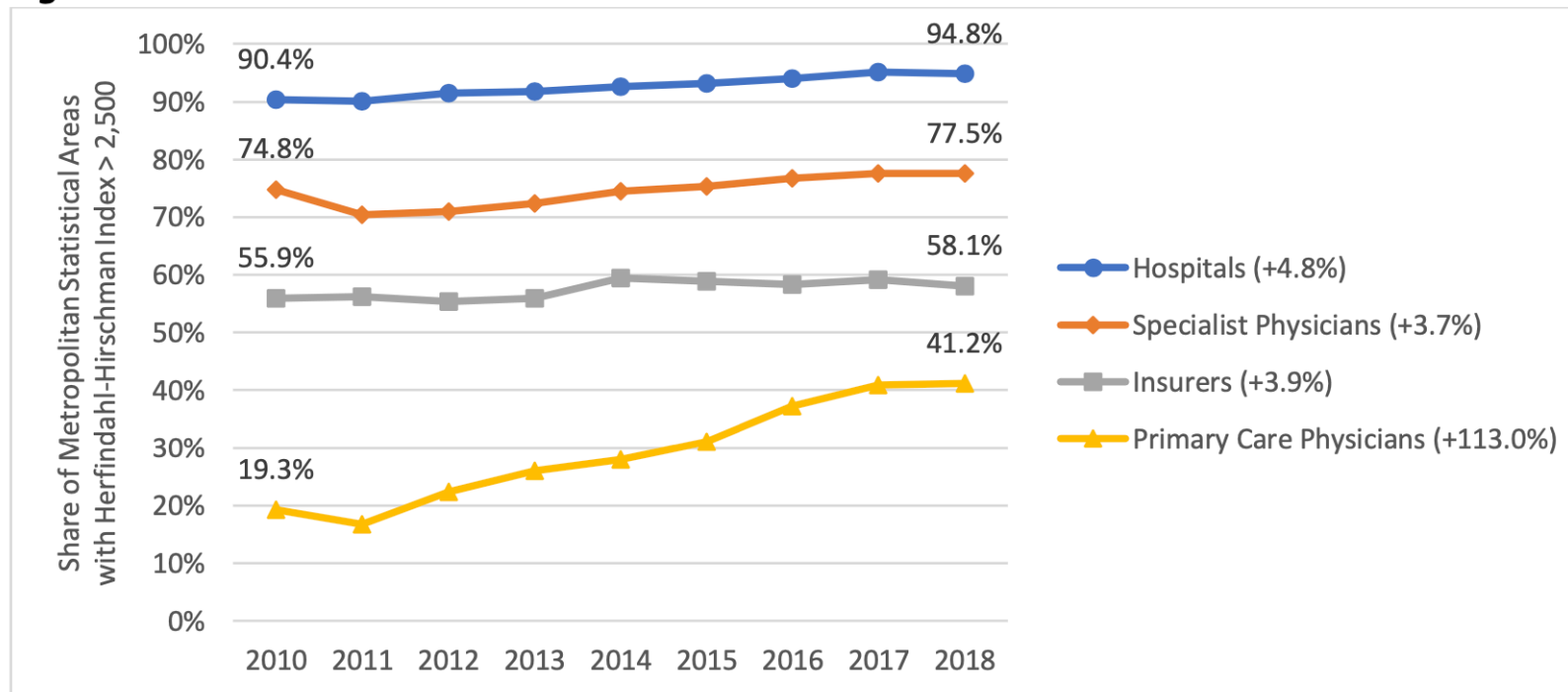
Mean Hospital Admissions HHI  
(population weighted)



Source: King et al. "Preventing Anticompetitive Healthcare Consolidation: Lessons from Five States" The Source, June 2020 ; Nicholas C. Petris Center on Health Care Markets and Consumer Welfare (petris.org), University of California, Berkeley, analysis of data from the American Hospital Association's Annual Survey Databases, using MSA definitions from Brent Fulton

# CONSOLIDATION IS INDUSTRY-WIDE

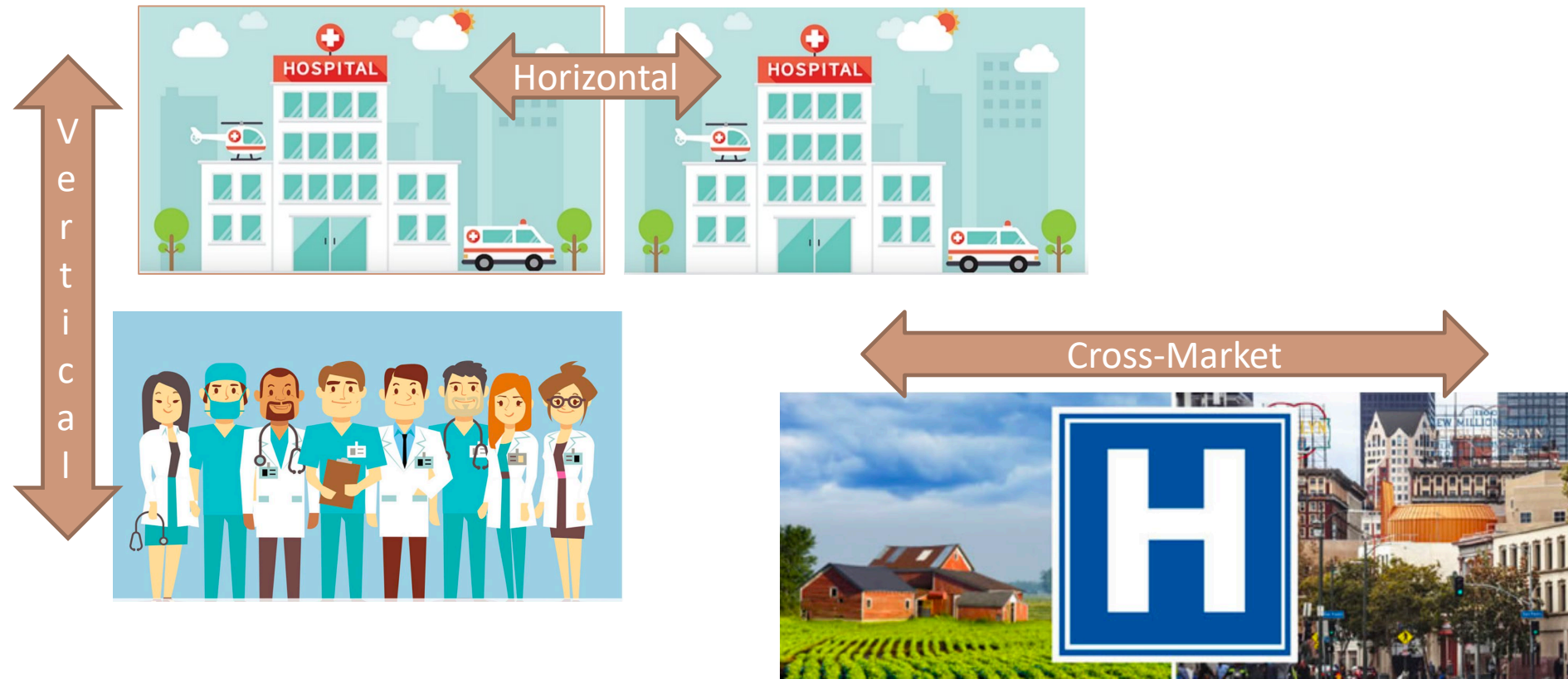
**Figure 1: Healthcare Market Concentration Levels 2010-2018**



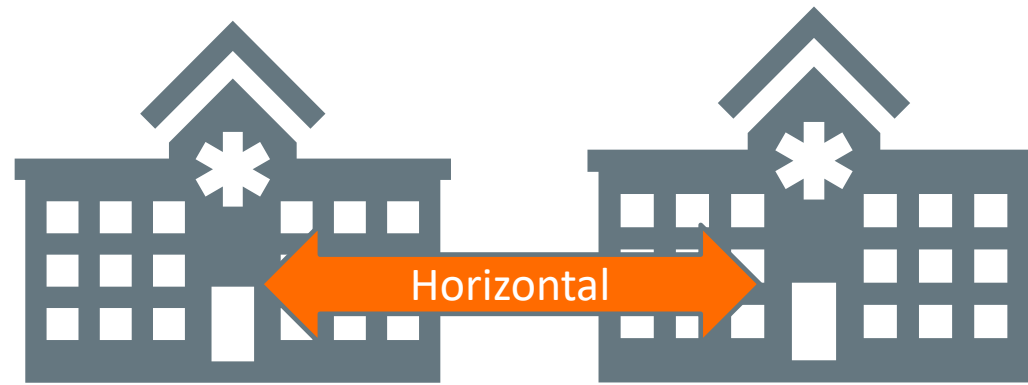
Source: Nicholas C. Petris Center on Health Care Markets and Consumer Welfare ([petris.org](http://petris.org)), University of California, Berkeley, analysis of data from the American Hospital Association Annual Survey, SK&A Office Based Physicians Database from IQVIA, and Managed Market Surveyor File from HealthLeaders InterStudy (Decision Resources Group).



# HEALTHCARE MERGER MANIA



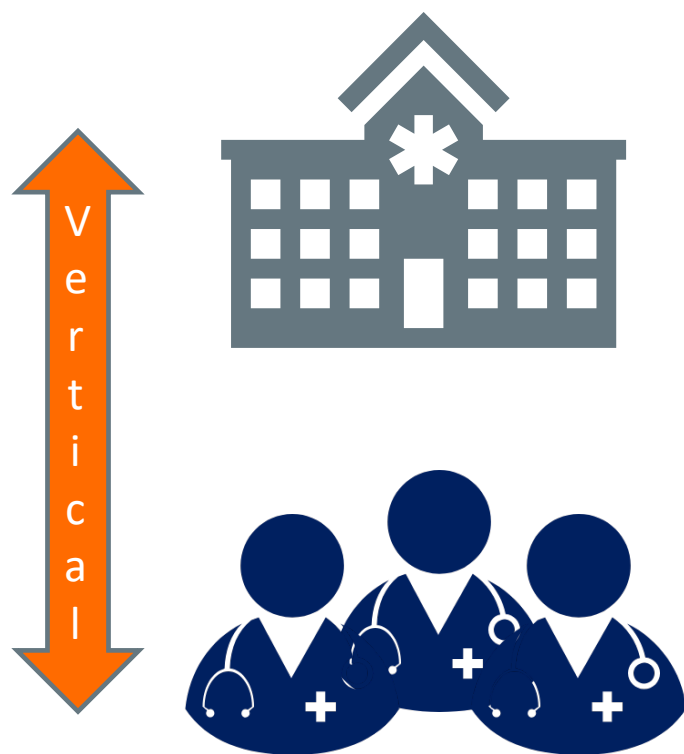
# DATA ON RESULTS FROM HEALTHCARE MERGERS



## Horizontal Mergers

- **Increased Prices:** Post-merger hospital prices increased 20-44% (Dafny, 2009; Haas-Wilson & Garmon, 2011; Tenn, 2011; Gaynor & Town, 2012)
- **Increased Premiums:** Higher hospital concentration associated with higher ACA premiums (Boozary, et al., 2019)
- **Reduced Wage Growth:** Hospital mergers reduced wage growth by 6.3% for nurses and pharmacists (Prager and Schmitt, 2019)
- **Mixed to Negative on Quality:** Hospital acquisition associated with modestly worse patient experiences, reduced quality, or no effect (Gaynor et al. 2013; Koch et al. 2018; Short and Ho, 2019; Beaulieu, Dafny, et al., 2020)

# DATA ON RESULTS FROM HEALTHCARE MERGERS



## Vertical Mergers

- **Higher Physician Prices:** Physician prices increase post-merger by an average of 14% (Capps, Dranove, & Ody, 2018)
  - Cardiologist prices increased by 33.5% (*Id.*)
  - Orthopedist prices increased by 12-20% (Koch and Ulrick, 2017)
- **Higher Clinic Prices:** Hospital-acquired clinic prices increased 32–47% within four years (Carlin, Feldman & Dowd, 2017)
- **Higher Hospital Prices** (Baker, Bundorf, Kessler, 2014)
- **Little to no quality improvements** (McWilliams et al. 2013; Neprash et al. 2015; Short and Ho, 2019)

# DATA ON RESULTS FROM HEALTHCARE MERGERS

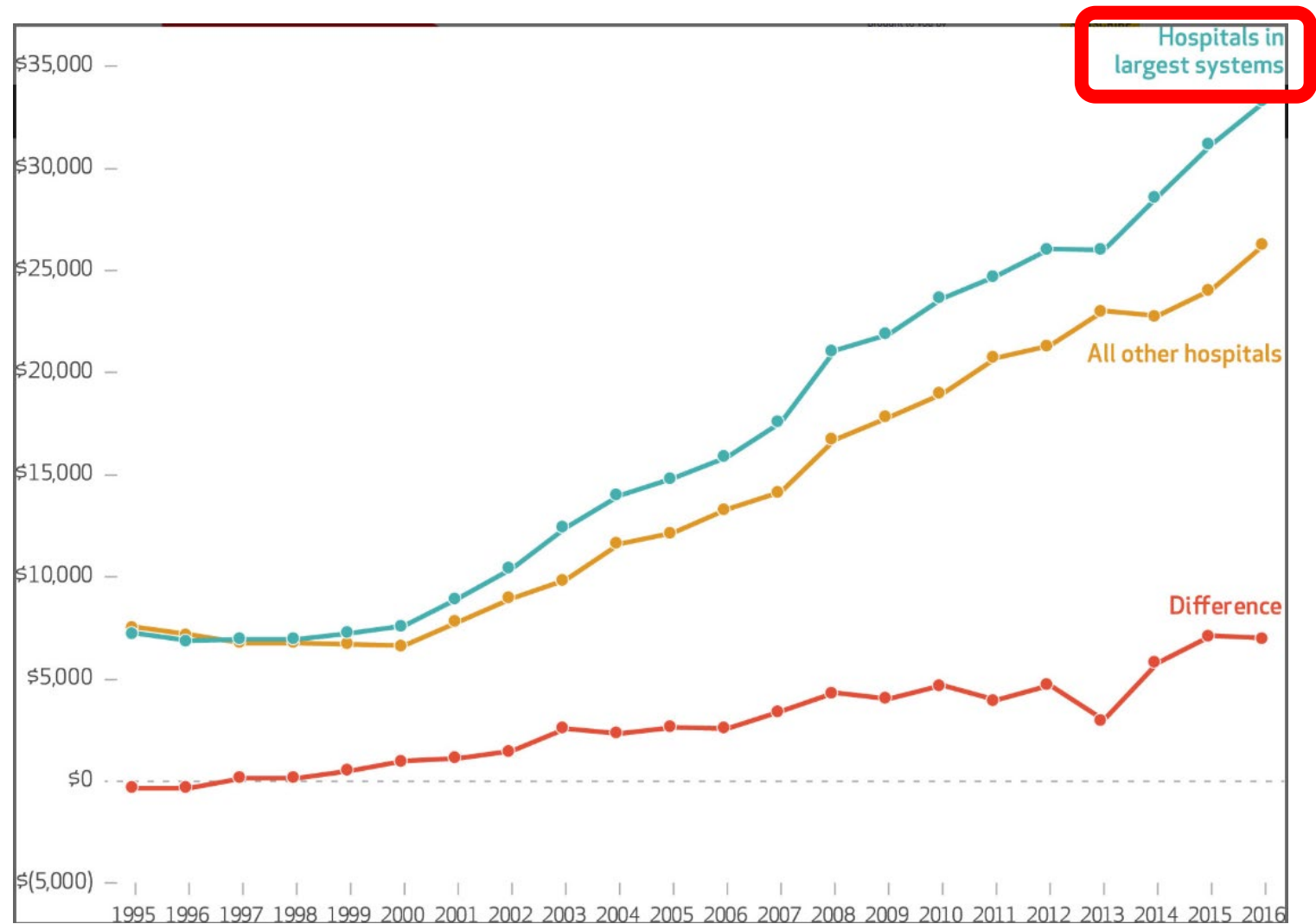
## Cross-Market Mergers

- **Increased Prices at Acquired Hospital:**  
7-17% increases in prices for hospitals purchased by out-of-market systems (Lewis & Pflum, 2016; Dafny, Ho, & Lee 2019)
- **Increased Prices at Acquiring Hospital:**  
7-9% increase after merging with a hospital in a different market in same state (Schmitt M, 2018; Dafny, Ho, & Lee 2019)
- **Increased Prices at Other Hospitals:**  
Price increases by 7.8% in nearby rival hospitals (Lewis & Pflum, 2016)



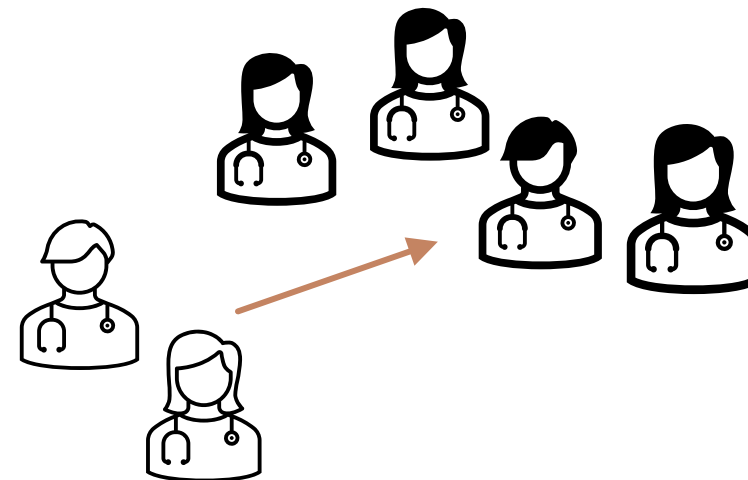
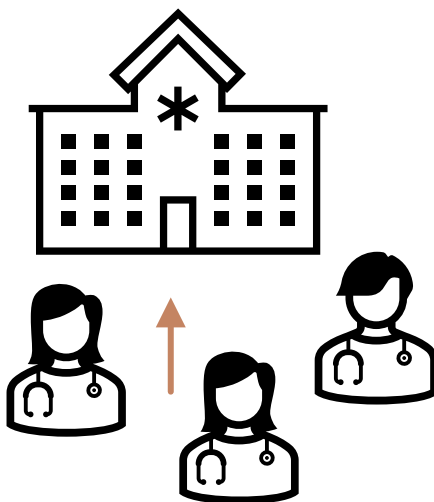
HIGHER  
CONCENTRATION  
LEADS TO HIGHER  
PRICES

## Hospital Prices in California



Source: Glenn A. Melnick, Katya Fonkych, and Jack Zwanziger, The California Competitive Model: How Has It Fared, And What's Next?, 37 Health Affairs 1417 (Sept. 2018)

## PHYSICIAN CONSOLIDATION ALSO LIKELY LEADS TO PRICE INCREASES

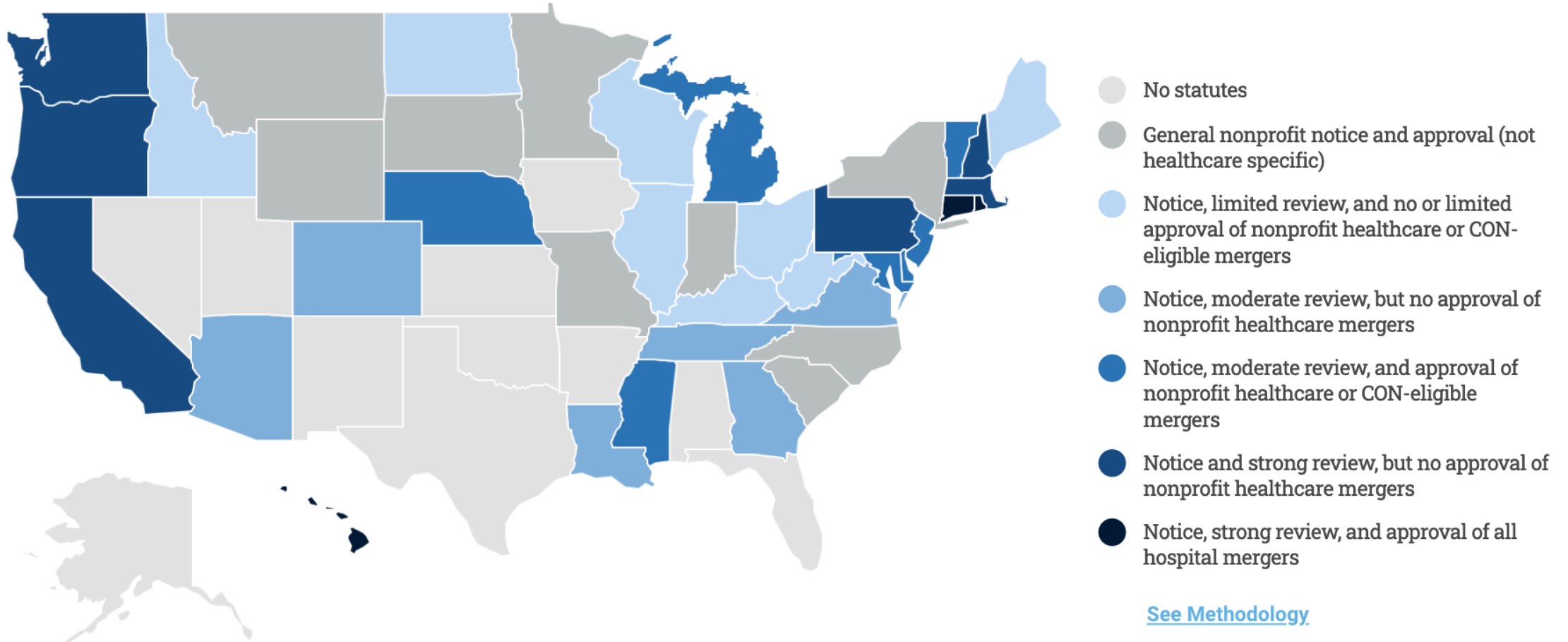


- Generalist and specialist prices are higher when in integrated practices. (Baker 2020)
- FTC announced a retrospective study about physician group and facility mergers
- House Energy and Commerce Committee launched an investigation into acquisitions of hospital-based physician groups by private equity firms and their billing practices

# WHAT CAN STATES DO TO PROTECT REMAINING COMPETITION?

- Antitrust enforcers should consider unwinding problematic mergers, but “unscrambling the egg” is very difficult
- Improved merger review is critical to prevent additional consolidation
  - AG unable to challenge mergers they don’t know about

# 50-STATE SURVEY OF STATE LAWS ON HOSPITAL MERGER REVIEW

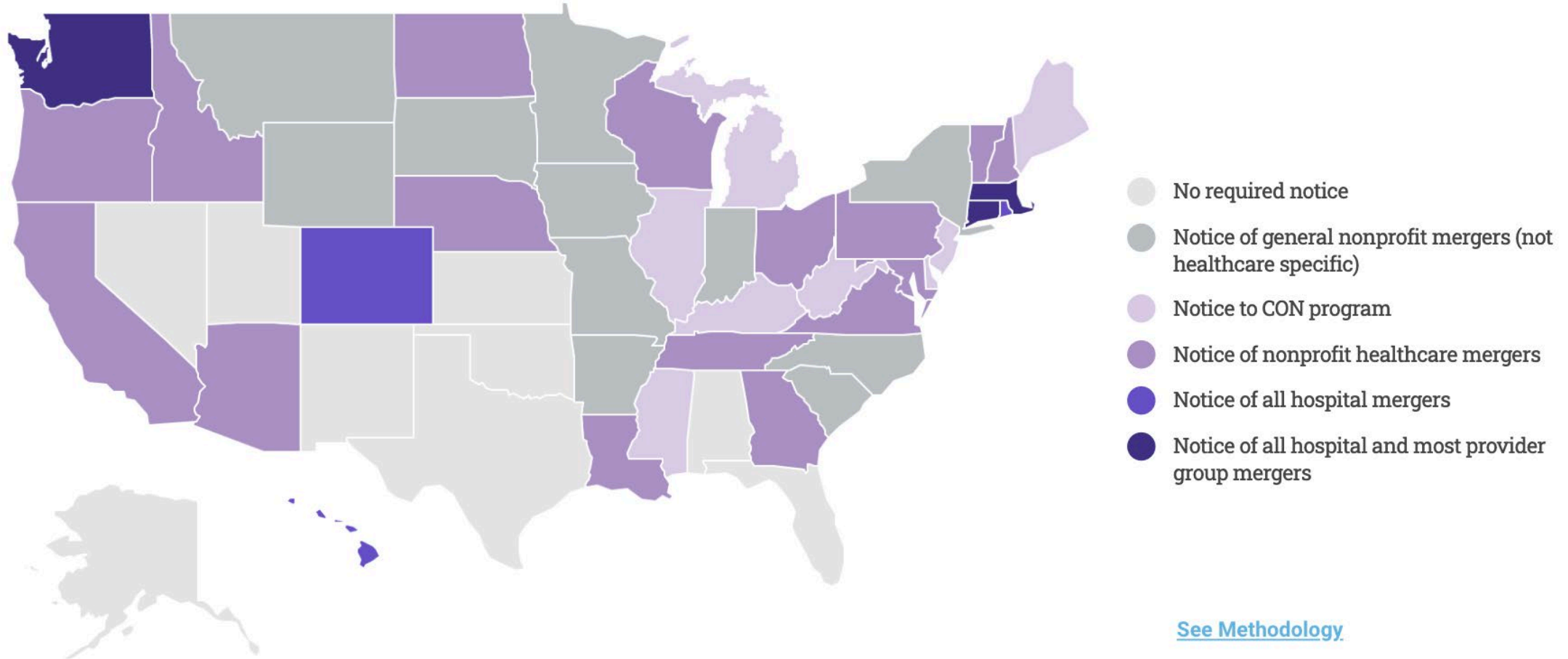


[See Methodology](#)

Statutes current through 2019



# MOST STATE NOTICE REQUIREMENTS ALLOW STEALTH CONSOLIDATION OF PHYSICIAN PRACTICES



# Statutory Authority: Ideal Provider Merger Review

Notice	Review	Approval and Conditions	Post Transaction Monitoring
<b>Broad Scope of Entities</b> (hospitals, physicians, clinics, etc)	<b>Substantive Review Criteria</b> <ul style="list-style-type: none"> <li>- Competition</li> <li>- Affordability/Prices</li> <li>- Public Interest</li> </ul>	<b>Require Pre-Transaction Approval</b> (tacit or actual)	<b>Independent Monitors</b> Paid for by merging entities
<b>Broad Scope of Transactions</b> (affiliations and “any material change”)	<b>Tiered Level of Review</b>		<b>Require Annual Compliance Reports</b>
<b>Waiting Period</b>			

Source: Jaime S. King et al. “Preventing Anticompetitive Healthcare Consolidation: Lessons from Five States” The Source. June 2020.

# ACTION IN STATE LEGISLATURES IN 2021

- Indiana (HB 1421)
- California (AB 1132)
  - AG gets notice of and can approve, conditionally approve, or deny mergers above \$3 million
- Florida (HB 1219 / SB 1064)
  - Parties with combined revenues over \$50 million must give 90 days notice to AG
- Nevada (AB 47)
  - Parties with combined assets above \$25 million must give notice to AG 180 days before merger
- New York (AB 3583)
  - Limits price increases for certain entities post-merger to CPI Urban for 5 years post-merger
- Oregon (HB 2079 and HB 2362)
  - Parties with combined patient revenues over \$25 million must be approval before merging

STATE EFFORTS TO ADDRESS HEALTH CARE CONSOLIDATION AND COSTS, MARCH 9, 2021





**UNFORTUNATELY, IN MANY MARKETS...**

FAILURE TO  
ACT WHEN  
COMPETITION  
BECOMES  
INSUFFICIENT

## The Boston Globe

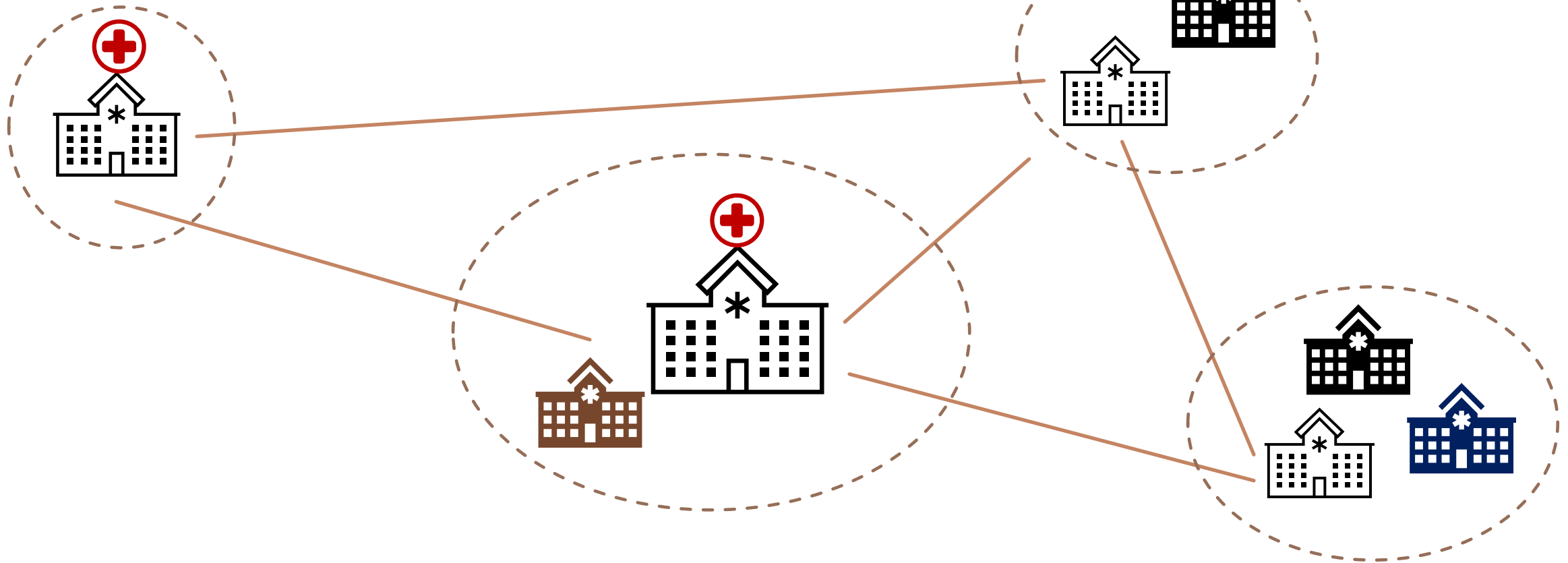
### A handshake that made healthcare history

Partners HealthCare was born in 1993, but its powerhouse potential didn't fully hit home until 2000. That's when the emerging giant cut a quiet deal with Blue Cross to ratchet up insurance costs across the state. Nothing in Massachusetts healthcare has been the same since.

THE WALL STREET JOURNAL.

### Behind Your Rising Health-Care Bills: Secret Hospital Deals That Squelch Competition

Contracts with insurers allow hospitals to hide prices from consumers, add fees and discourage use of less-expensive rivals



# ANTICOMPETITIVE CONTRACTING PRACTICES ALLOW HEALTH SYSTEMS TO SPREAD MARKET POWER THROUGH A SYSTEM

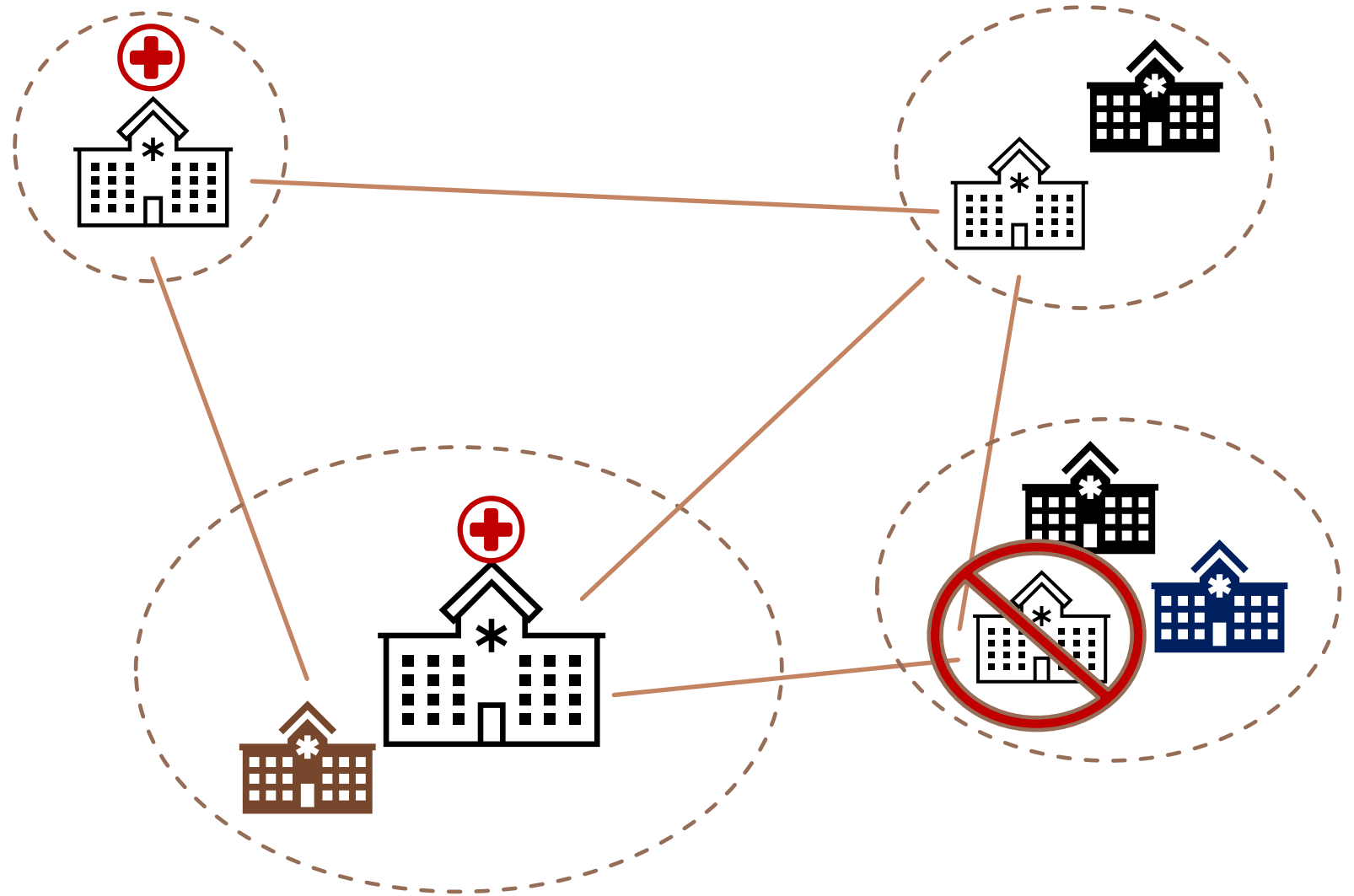


# ANTICOMPETITIVE CONTRACTING PRACTICES

- Anti-Tiering/Anti-Steering Clauses
- All-or-Nothing or Affiliate Contracting
- Most-Favored-Nation Clauses
- Gag Clauses
- Exclusive Contracting
- Non-Compete Clauses

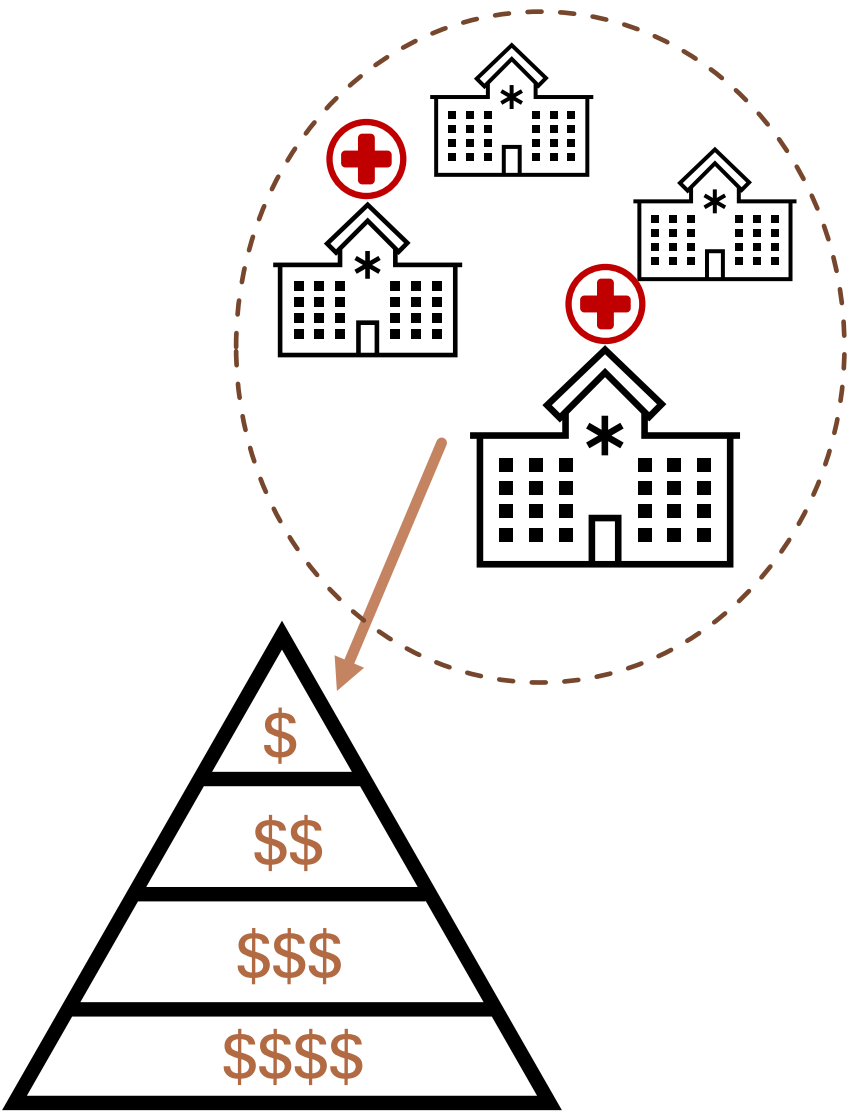
## ALL OR NOTHING CONTRACTING (AFFILIATE CONTRACTING)

- ❖ Health system demands an insurer include all facilities in the network
- ❖ Landmark lawsuits:
  - *UEBT and State of CA v. Sutter Health*
  - *Sidibe v. Sutter Health*





# ANTI-TIERING AND ANTI-STEERING CLAUSES



- Agreements in which an insurer agrees to place all hospitals in a health system in the most favorable tier with the lowest cost-sharing tier
- Landmark lawsuits:
  - *United States and the State of North Carolina v. The Charlotte-Mecklenburg Hospital Authority*
  - *UEBT and State of CA v. Sutter Health; Sidibe v. Sutter Health*



Atrium Health



Sutter Health

# MOST-FAVORED-NATION CLAUSES



- Agreements in which a hospital agrees with an insurer to give it the best price or to not to give a lower provider payment rate to any rival
- Landmark lawsuit:
  - *United States and the State of Michigan v. Blue Cross Blue Shield of Michigan*



# USE OF LITIGATION TO ADDRESS ANTICOMPETITIVE CONTRACTING

## Benefits

- Situations addressed on case-specific basis, but have market-wide effects
- Can be brought by private parties (for treble damages)
- Can demonstrate harm from new contract provisions

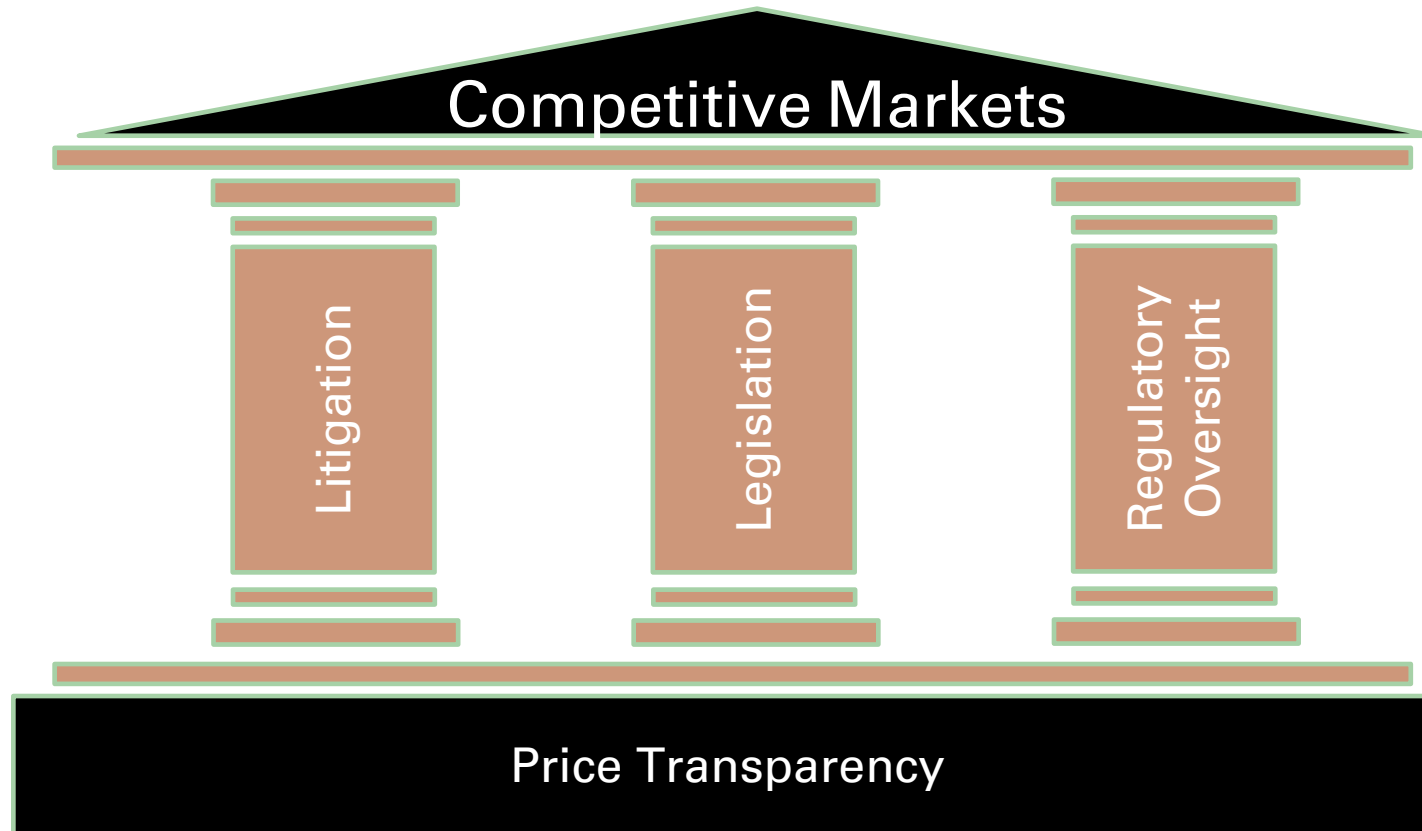
## Drawbacks

- Resource intensive
  - Cases can take many years
- Case-by-case enforcement doesn't assure widespread compliance
- Legal uncertainties
  - Market definition can come down to dueling economists



# ANTITRUST ENFORCEMENT SEEDS OTHER INTERVENTIONS

# COMPETITIVE MARKETS NEED SUPPORT



# USE OF LEGISLATION TO SUPPORT COMPETITIVE MARKETS

- May prohibit use of specific contract terms
- Declare use of certain contract terms presumptively illegal by firms with market power
- May require insurance commissioner or attorney general to approve contract with specific terms



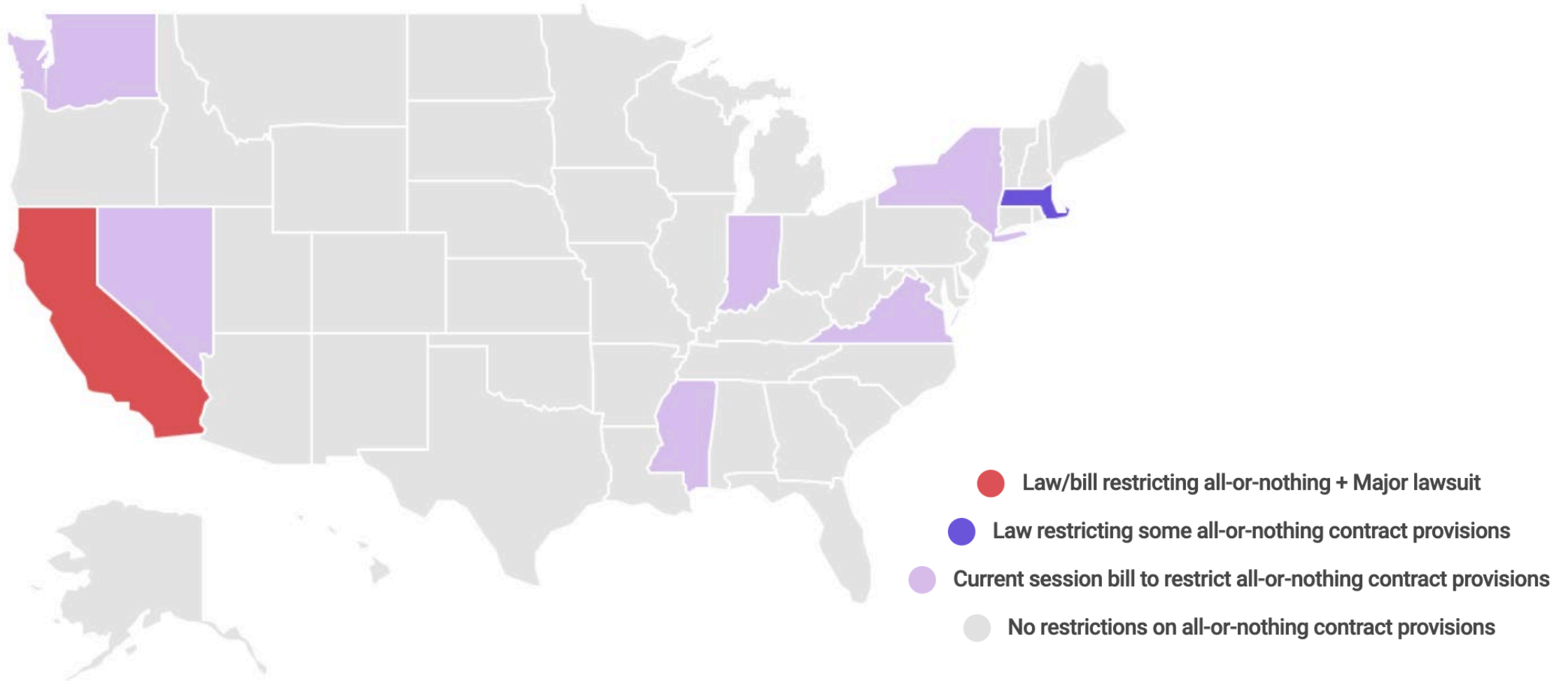
# THE LOWER HEALTH CARE COSTS ACT OF 2019 (S. 1895)

- Would have prohibited specific clauses in health insurance contracts
  - All-or-Nothing Contracting
  - Anti-Tiering or Anti-Steering provisions (except within value-based arrangements)
  - Most-Favored-Nation clauses
  - Gag Clauses

STATE EFFORTS TO ADDRESS HEALTH CARE CONSOLIDATION AND COSTS, MARCH 9, 2021

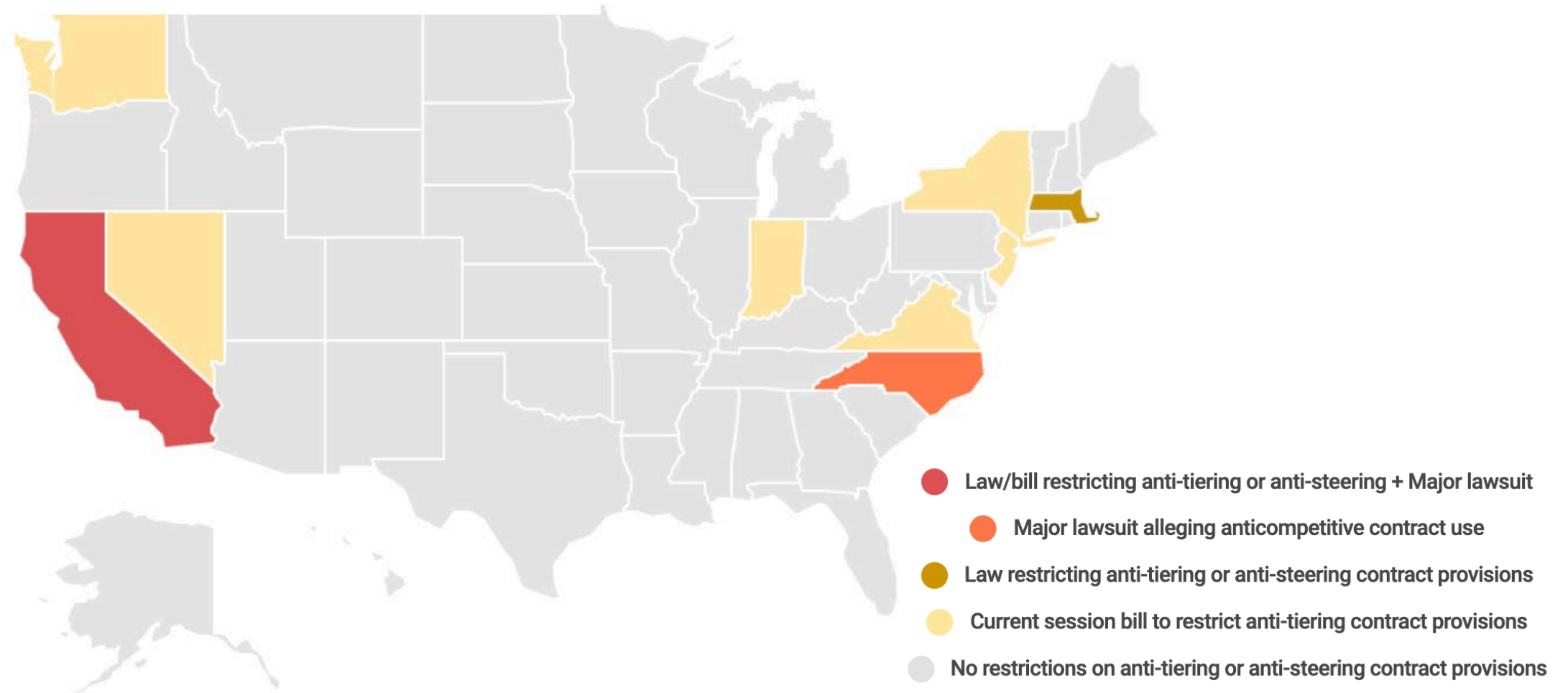


# RESTRICTION OF ALL-OR-NOTHING PROVISIONS IN PROVIDER CONTRACTS

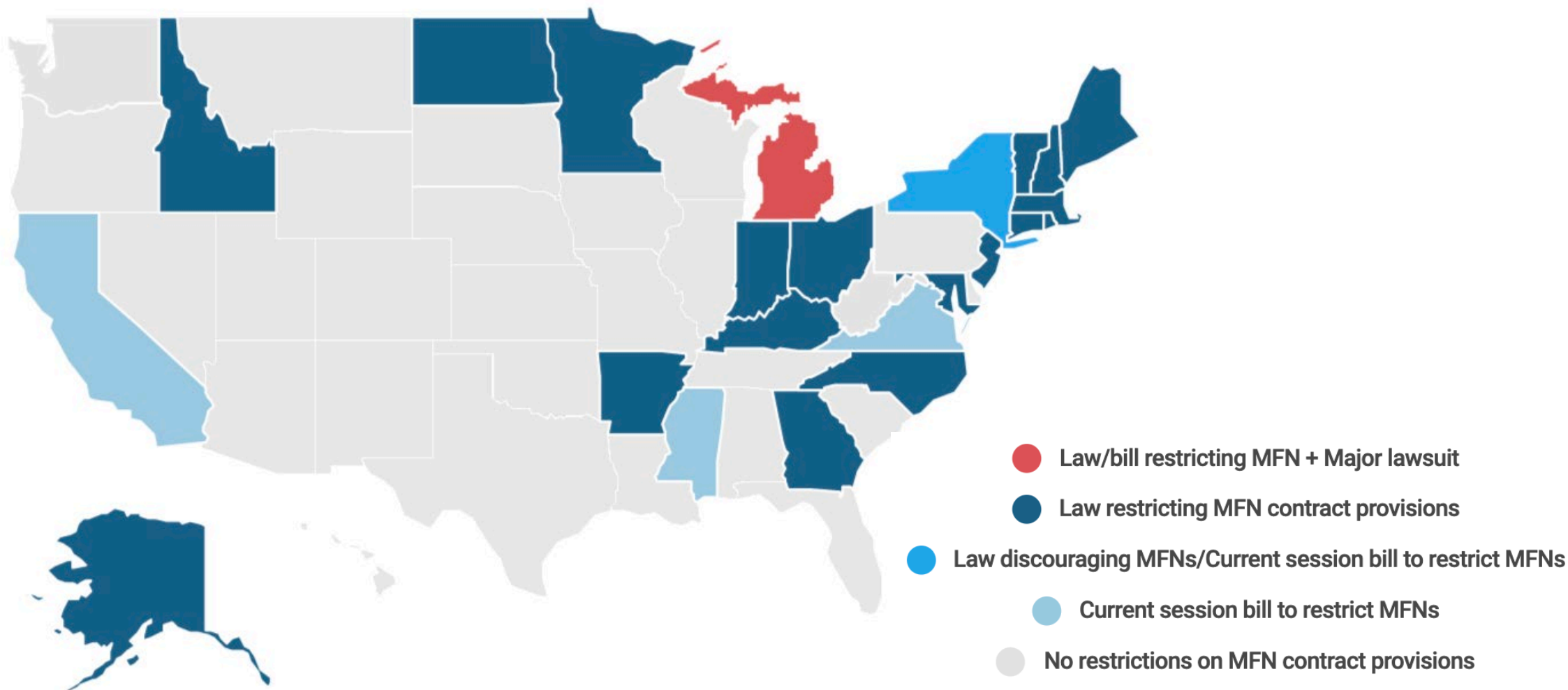




# RESTRICTION OF ANTI-TIERING OR ANTI-STEERING PROVISIONS IN PROVIDER CONTRACTS



# RESTRICTION OF MOST-FAVORED NATION PROVISIONS IN PROVIDER CONTRACTS



# ACTION IN STATE LEGISLATURES IN 2021

- California AB 1132
- Indiana HB 1421
- Nevada AB 47
- New Jersey AB 3527 / SB 1108
- New York AB 3659
- Mississippi HB 1203 / SB 2775
- Virginia HB 2275
- Washington HB 1160



# USE OF LEGISLATION TO ADDRESS ANTICOMPETITIVE CONTRACTING

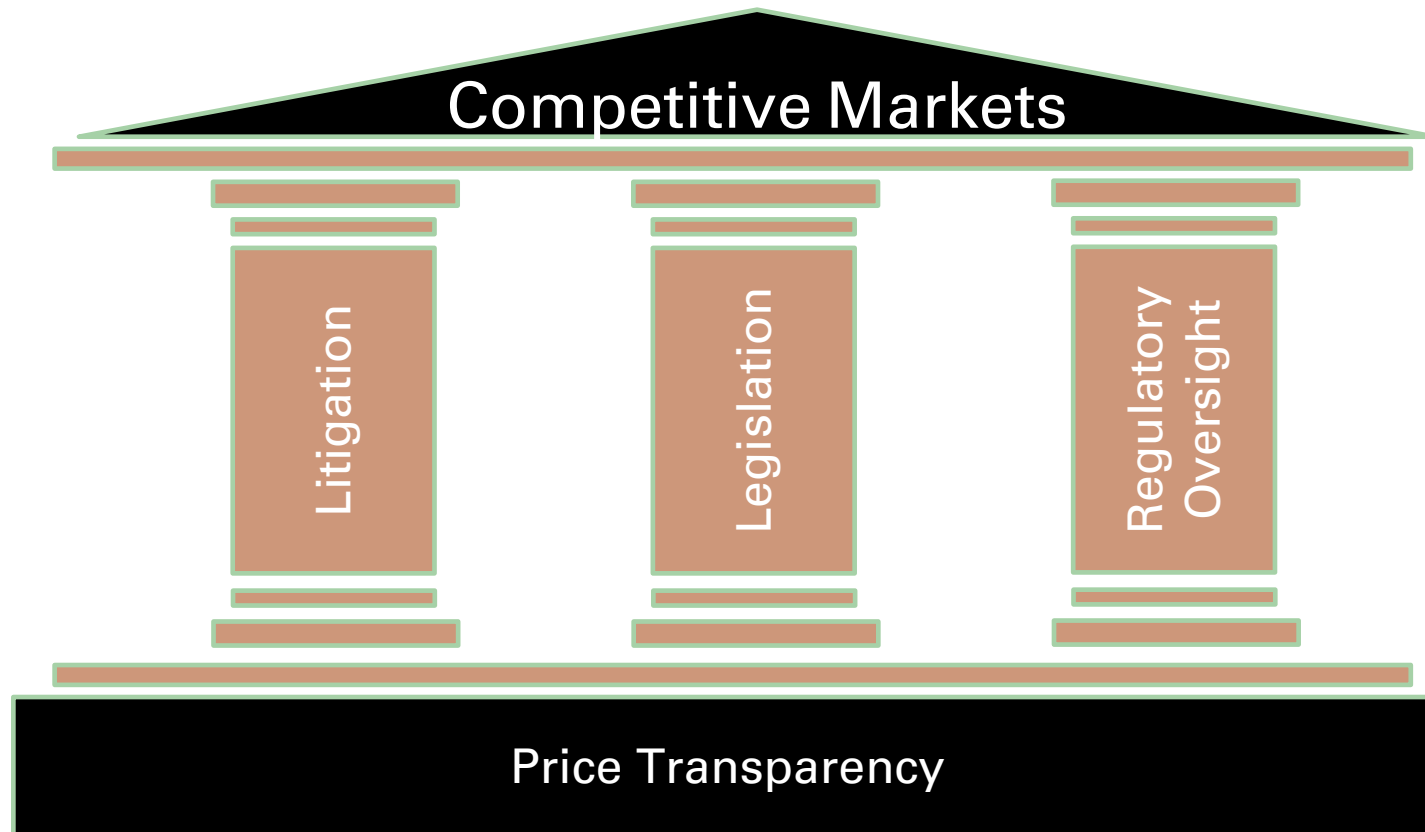
## Benefits

- Industry-wide regulation
- Does not require fact-specific determination of market-power by economic experts
- Eases burden on antitrust enforcers and reduces required resources for enforcement

## Drawbacks

- Procompetitive uses require waivers
- “Contract Provisions” are not “Contracting Practices”
- Requires action by the state legislature for each term

# COMPETITIVE MARKETS NEED SUPPORT



# REGULATORY OVERSIGHT

- Proactive approach
- Need someone tracking and analyzing what's happening in healthcare markets and contracting
  - Health Policy Commission
  - Insurance Commissioner
  - Attorney General
- Review of contracts and rates
  - Can create triggered responses
  - Excessive rates trigger further Review



# USE OF REGULATORY OVERSIGHT TO ADDRESS ANTICOMPETITIVE CONTRACTING

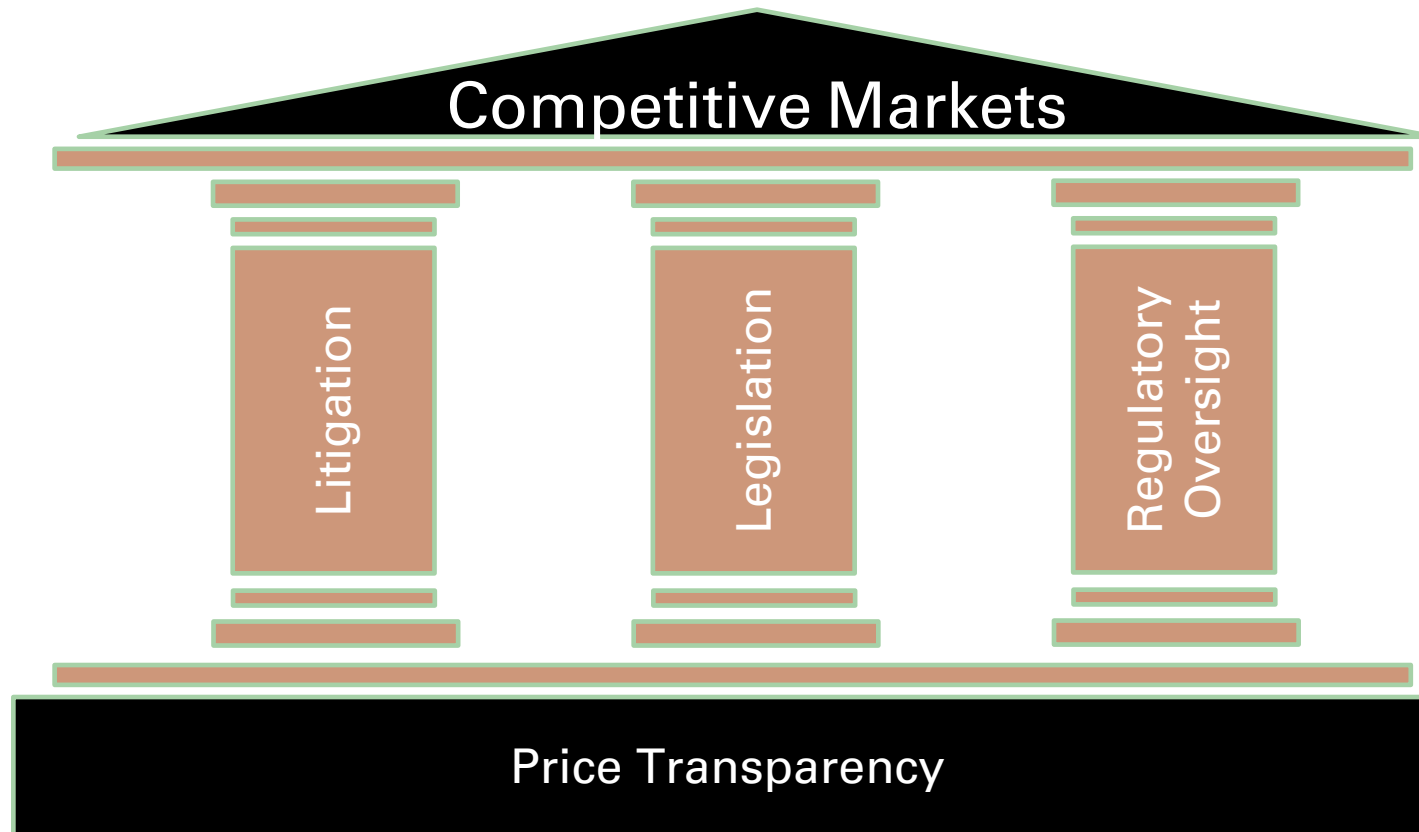
## Benefits

- Proactive
- Coordinated Oversight
  - Allows monitoring of practices (beyond provisions)
- Works with existing agencies and processes
  - May need additional authority for Insurance Commissioner

## Drawbacks

- Enforcement may vary depending on administration
- Implementation requires financial support
- Scope of oversight (self-funded employers)

# COMPETITIVE MARKETS NEED SUPPORT





THANK YOU!

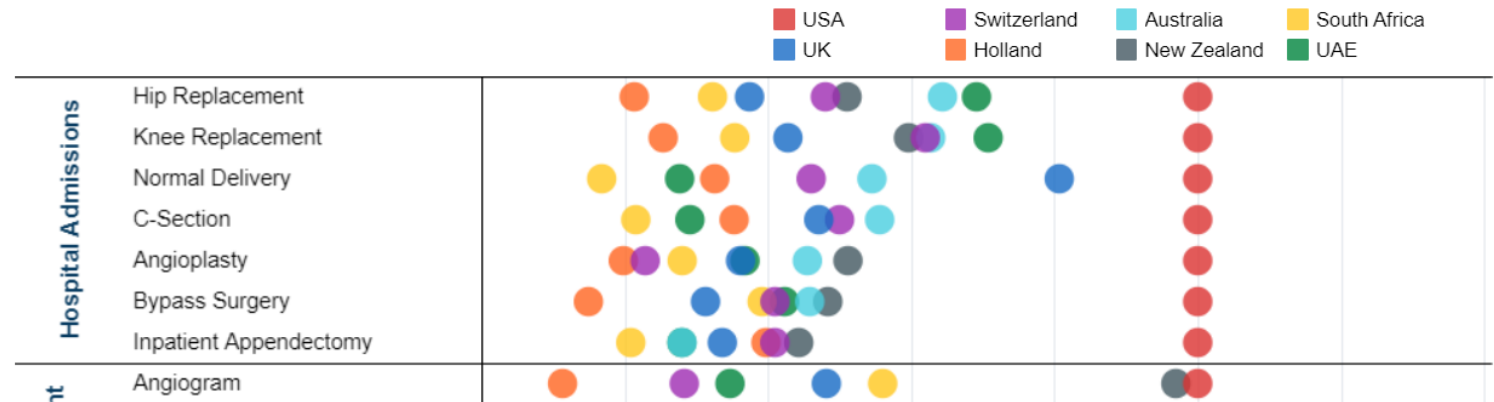
Katherine L. Gudiksen, Ph.D., M.S.  
[gudiksenkatherine@uchastings.edu](mailto:gudiksenkatherine@uchastings.edu)

<https://sourceonhealthcare.org/>

THE SOURCE  
ON HEALTHCARE PRICE & COMPETITION



# INTERNATIONAL COMPARISON OF PRICES FOR INPATIENT AND OUTPATIENT SERVICES (2017 DATA)



“Prices are the **primary** reason why US spends more on health care than any other country”

- Gerard F. Anderson, Peter Hussey, and Varduhi Petrosyan, *It's Still The Prices, Stupid: Why The US Spends So Much On Health Care, And A Tribute To Uwe Reinhardt*, Health Affairs 38:1 (2019)

Source: John Hargraves and Aaron Bloschichak, International comparisons of health care prices from the 2017 iFHP survey, Health Care Cost Institute's #HealthyBytes Blog (Dec. 17, 2019), <https://healthcostinstitute.org/blog/entry/international-comparisons-of-health-care-prices-2017-ifhp-survey>

# USE OF LITIGATION TO ADDRESS ANTICOMPETITIVE CONTRACTING



**United States and the State of Michigan v. Blue Cross Blue Shield of Michigan**  
Filed 2010; settled 2013



**United States and the State of North Carolina v. The Charlotte-Mecklenburg Hospital Authority**  
Filed 2016 ; settled 2019



**UBET and State of California v. Sutter Health**  
Filed 2014; cases consolidated 2019; proposed settlement 2020

**Sidibe v. Sutter Health**  
First filed in 2012; class certified July 2020; trial set for October 2021