

# STATE APPROACHES TO MITIGATING THE HARMS OF PROVIDER CONSOLIDATION

October 21, 2021

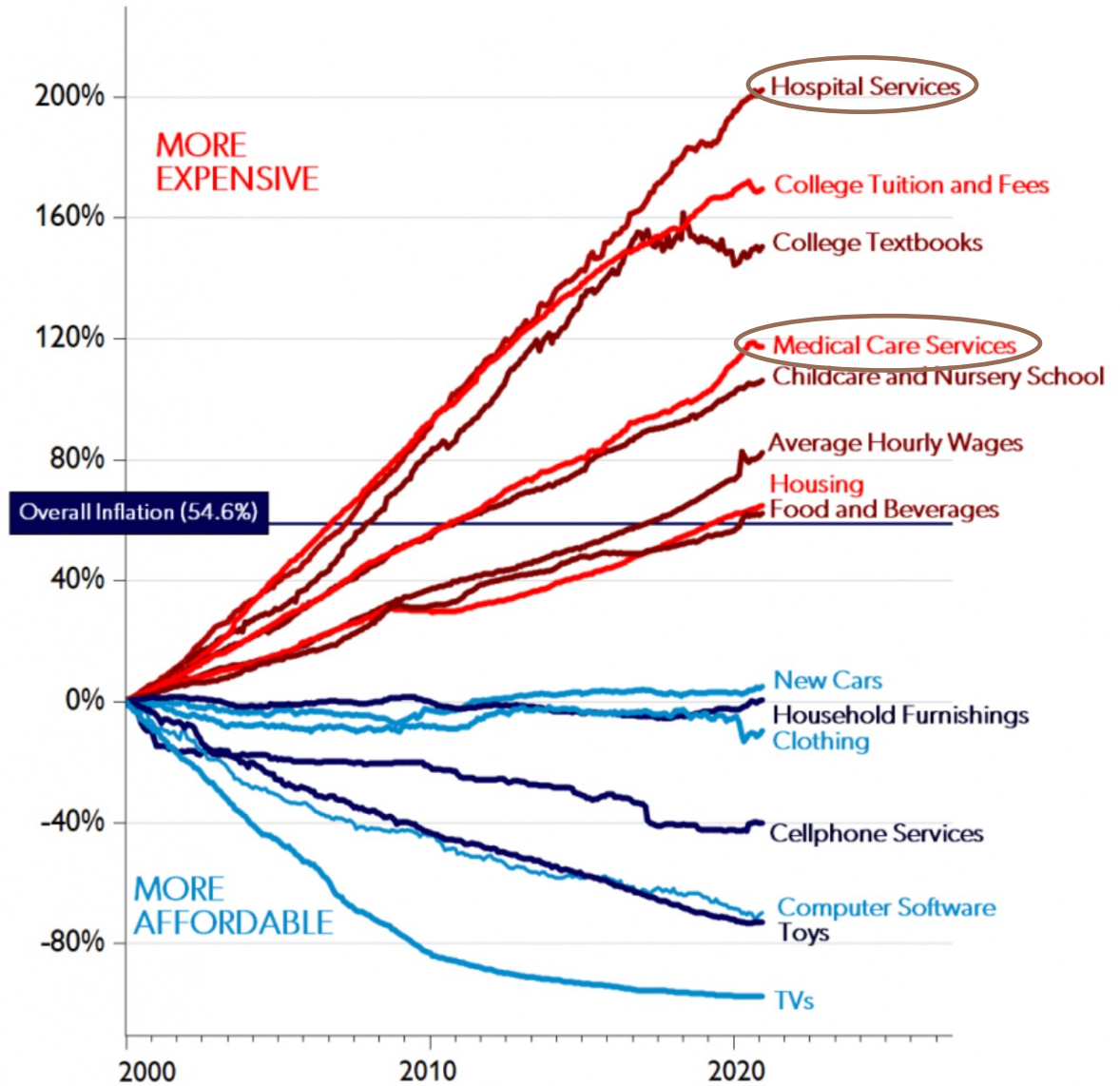
Katherine L. Gudiksen, Ph.D., M.S.

THE SOURCE  
ON HEALTHCARE PRICE & COMPETITION



COST OF HEALTH CARE INCREASED MUCH FASTER THAN INFLATION

Selected US Consumer Goods and Services, Wages



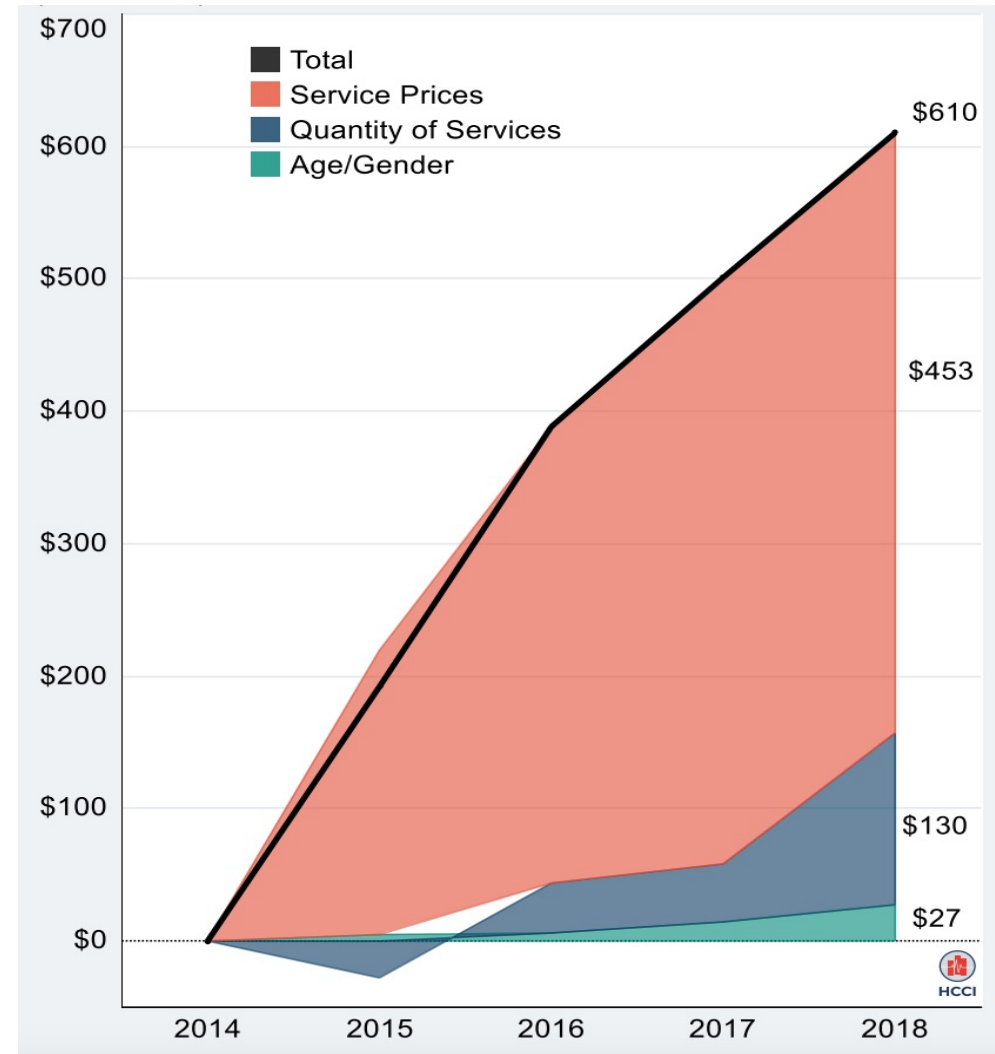
Source: Bureau of Labor Statistics

Carpe Diem

“PRICES ARE THE **PRIMARY** REASON WHY US SPENDS MORE ON HEALTH CARE THAN ANY OTHER COUNTRY”

Gerard Anderson et al. *It's Still The Prices, Stupid: Why The US Spends So Much On Health Care*. Health Affairs 38:1 (2019)

## Growth in Health Care Spending per Person (2018 dollars)



Source: Health Care Cost Institute, 2018 HEALTH CARE COST AND UTILIZATION REPORT, [https://healthcostinstitute.org/images/pdfs/HCCI\\_2018\\_Health\\_Care\\_Cost\\_and\\_Utilization\\_Report.pdf](https://healthcostinstitute.org/images/pdfs/HCCI_2018_Health_Care_Cost_and_Utilization_Report.pdf).



\$57



\$65



\$160

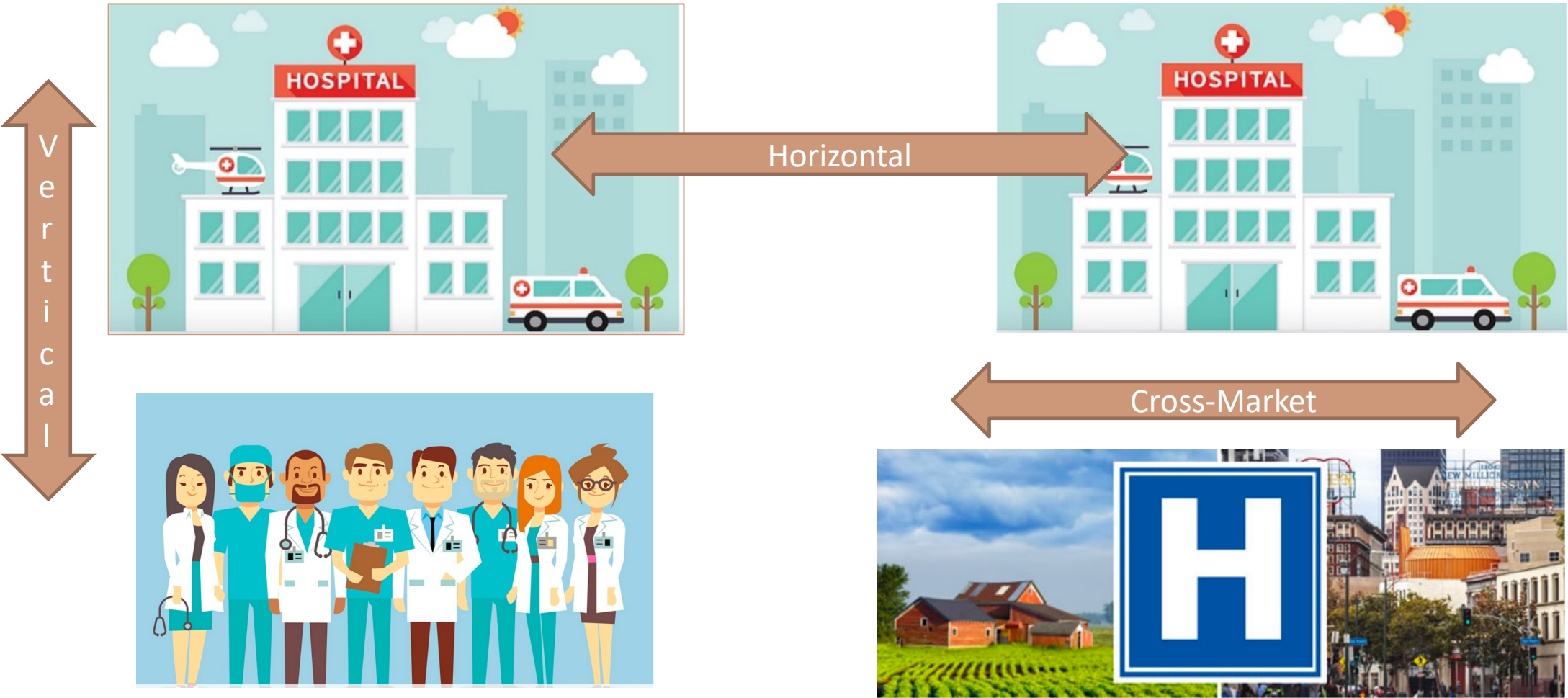
Source: Institute of Medicine, Best Care at Lower Cost: The Path to Continuously Learning Health Care in America (2013) updated to 2019 dollars with the Federal Reserve Bank Consumer Price Index Inflation Calculator.

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

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

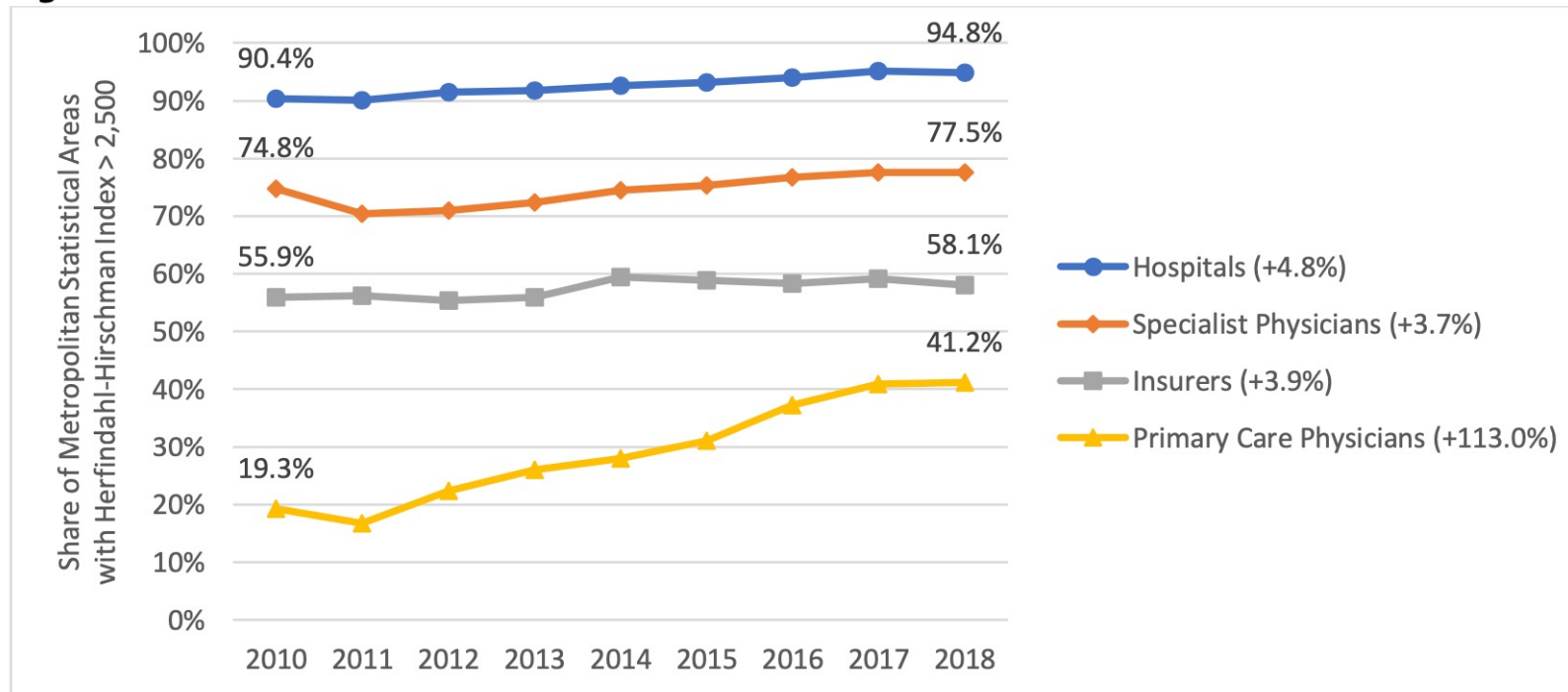
- Failure to protect to competition and rigorously enforce antitrust laws
- Failure of policymakers to act when competition no longer restrains prices

# HEALTHCARE MERGER MANIA



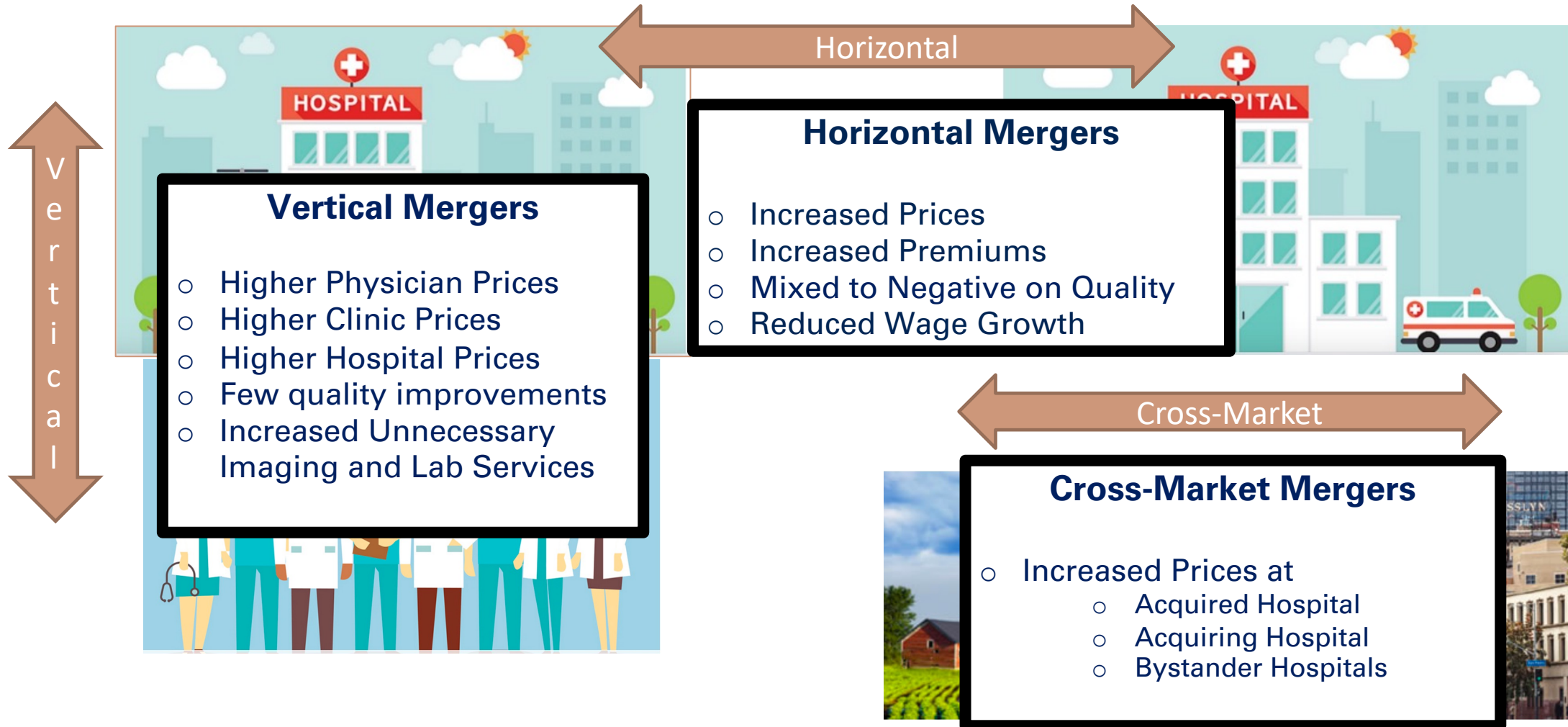
# CONSOLIDATION IS INDUSTRY-WIDE

**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).

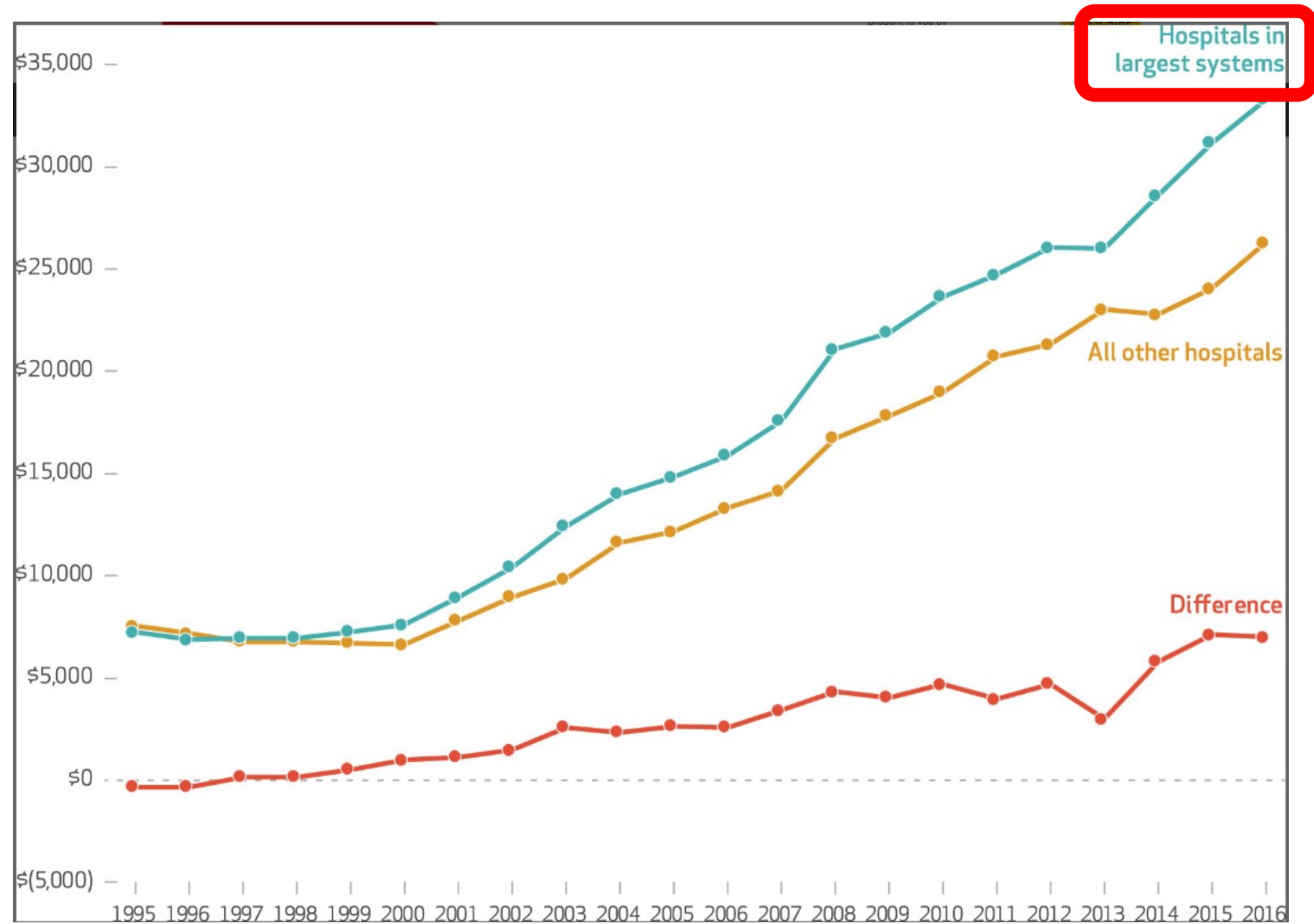
# THE EFFECTS OF MERGER MANIA





HIGHER  
CONCENTRATION  
LEADS TO HIGHER  
PRICES

## Hospital Prices in California

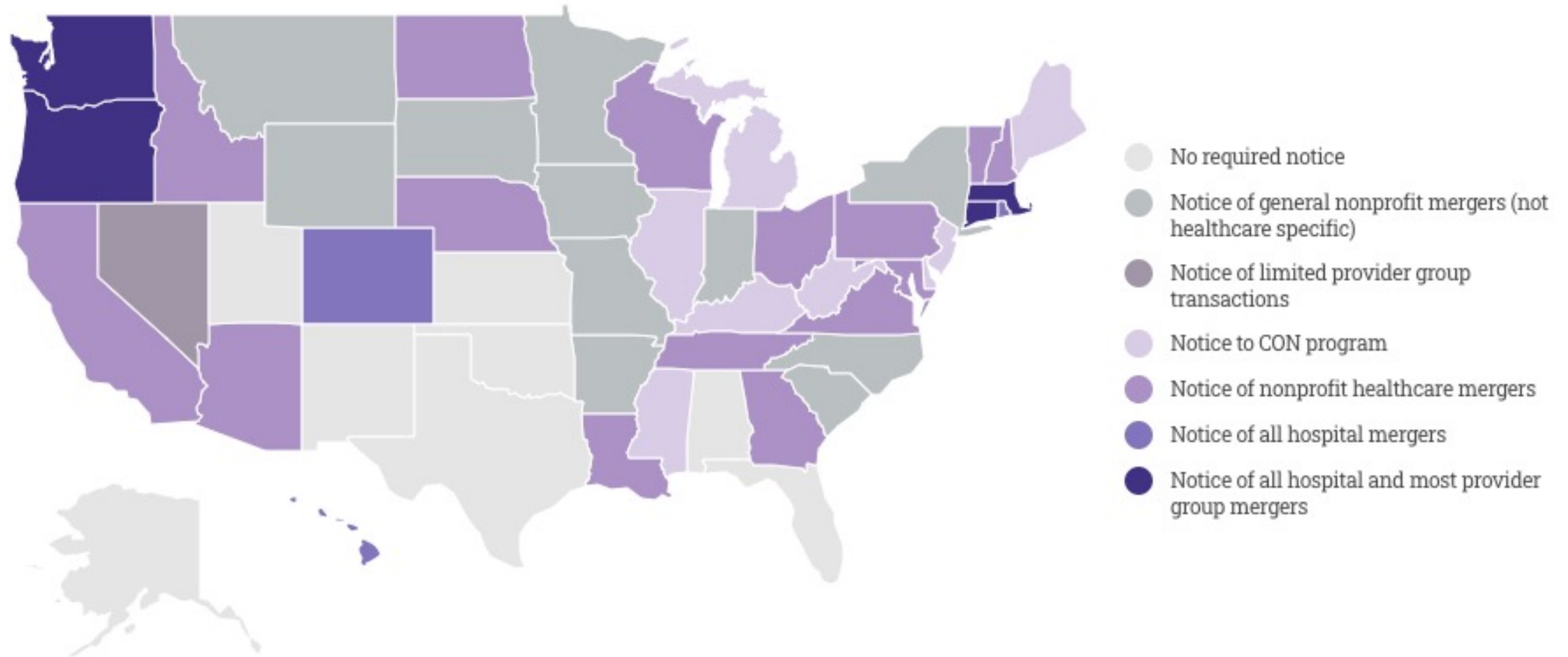


Source: Glenn A. Melnick, Katya Fonkych, and Jack Zwanziger, *The California Competitive Model: How Has It Fared, And What's Next?*, 37 *Health Affairs* 1417 (Sept. 2018)

# WHAT CAN POLICYMAKERS DO TO PROTECT REMAINING COMPETITION?

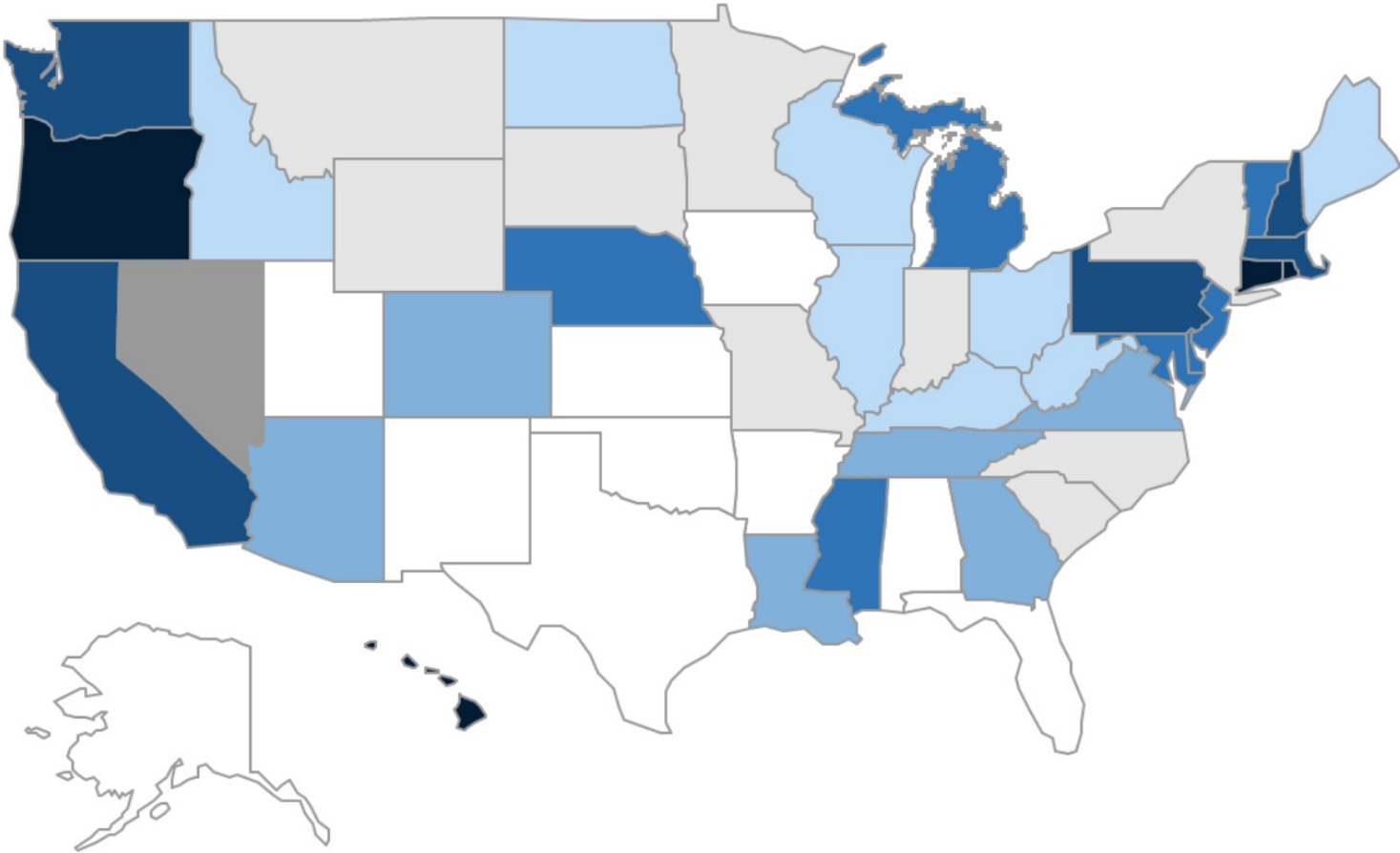
- Antitrust enforcers should consider unwinding problematic mergers, but “unscrambling the egg” is very difficult
- Antitrust enforcers need additional tools to improve merger review and block harmful mergers

# STATE NOTICE REQUIREMENTS FOR PROVIDER MERGERS



Source: <https://sourceonhealthcare.org/market-consolidation/>

# STATE LAWS ON MERGER REVIEW AUTHORITY



- General nonprofit notice and approval (not healthcare specific)
- Notice of limited provider group transactions with no review or approval.
- Notice, limited review, and no or limited approval of nonprofit healthcare or CON-eligible transactions
- Notice, moderate review, but no approval of nonprofit healthcare transactions
- Notice, moderate review, and approval of nonprofit healthcare or CON-eligible transactions
- Notice, strong review, and approval of nonprofit healthcare transactions
- Notice, strong review, and approval of all hospital transactions

Statutes current through 2021 ([Click to download](#))

Source: [The State Database of Laws Impacting Healthcare Cost & Quality \(SLIHCO\)](#)

# Statutory Authority: Ideal Provider Merger Review

Notice	Review	Approval	Post Transaction Monitoring
<p><b>Broad Scope of Entities</b></p> <ul style="list-style-type: none"> <li>• All Provider Types</li> <li>• Non-profit and for-profit</li> </ul>	<p><b>Waiting Period</b></p> <ul style="list-style-type: none"> <li>• Ability to compel additional information</li> </ul>	<p><b>AG or State Agency with Authority to</b></p> <ul style="list-style-type: none"> <li>• Approve</li> <li>• Deny</li> <li>• Impose Conditions</li> </ul>	<p><b>Independent Monitors</b></p> <ul style="list-style-type: none"> <li>• Paid for by merging entities</li> </ul>
<p><b>Broad Scope of Transactions</b></p> <ul style="list-style-type: none"> <li>• Affiliations / Joint Ventures</li> <li>• Material change</li> </ul>	<p><b>Substantive Review Criteria</b></p> <ul style="list-style-type: none"> <li>• Competition</li> <li>• Affordability/Prices</li> <li>• Public Interest</li> </ul>		<p><b>Require Annual Reports</b></p> <ul style="list-style-type: none"> <li>• Compliance</li> <li>• Effect on Market</li> </ul>





# IN MANY HEALTH CARE MARKETS...

# FAILURE TO ACT WHEN COMPETITION BECOMES INSUFFICIENT



Mitigating the Price Impacts of Health Care  
Provider Consolidation

SEPTEMBER 2021 | KATHERINE L. GUDIJKSEN, ALEXANDRA D. MONTAGUE,  
JAIME S. KING

## 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

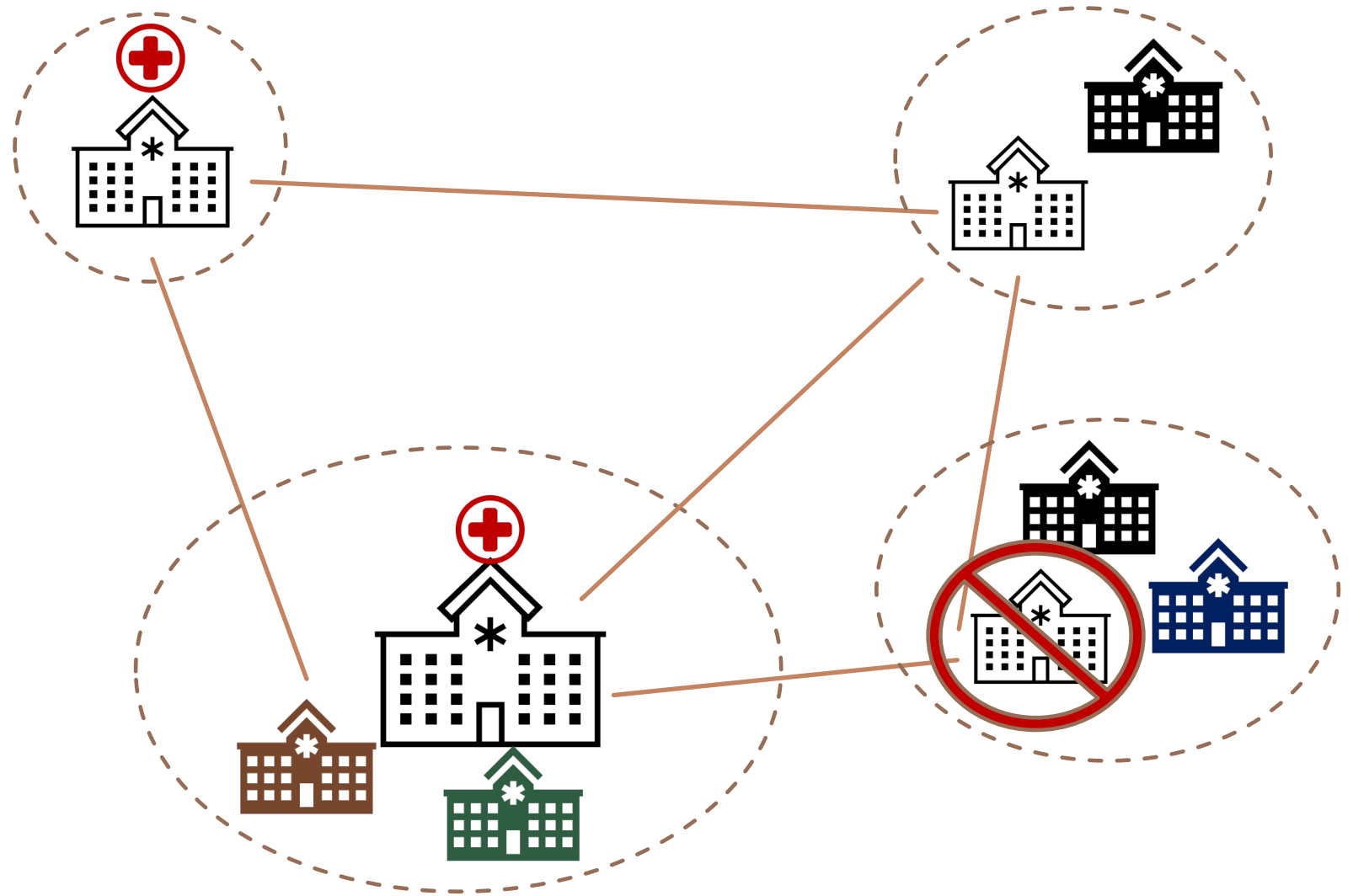
# ANTICOMPETITIVE CONTRACT CLAUSES

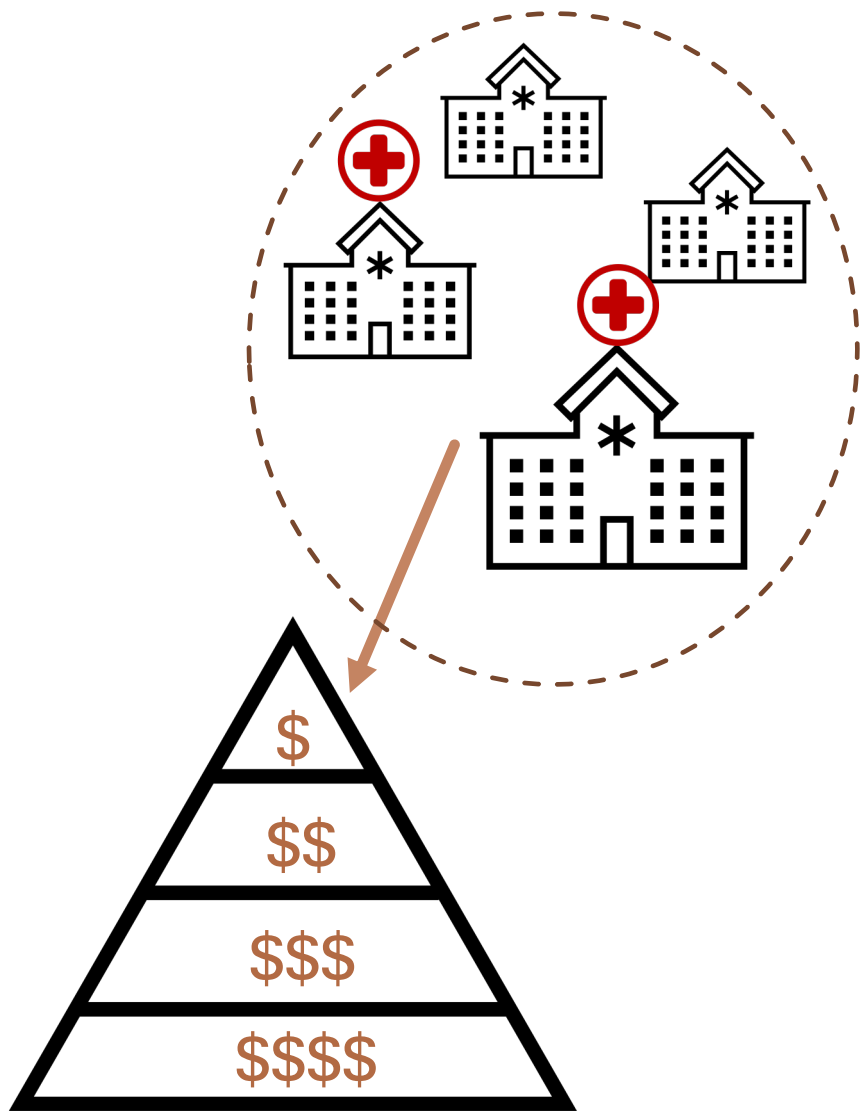
- All-or-Nothing or Affiliate Contracting
- Anti-Tiering/Anti-Steering Clauses
- Most-Favored-Nation Clauses
- Gag Clauses



## ALL OR NOTHING CONTRACTING (AFFILIATE CONTRACTING)

- ❖ Health system demands an insurer include all facilities in the network





# ANTI-TIERING AND ANTI-STEERING CLAUSES

- Agreements in which an insurer agrees to place all facilities of a health system in the most favorable tier with the lowest cost-sharing

# 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

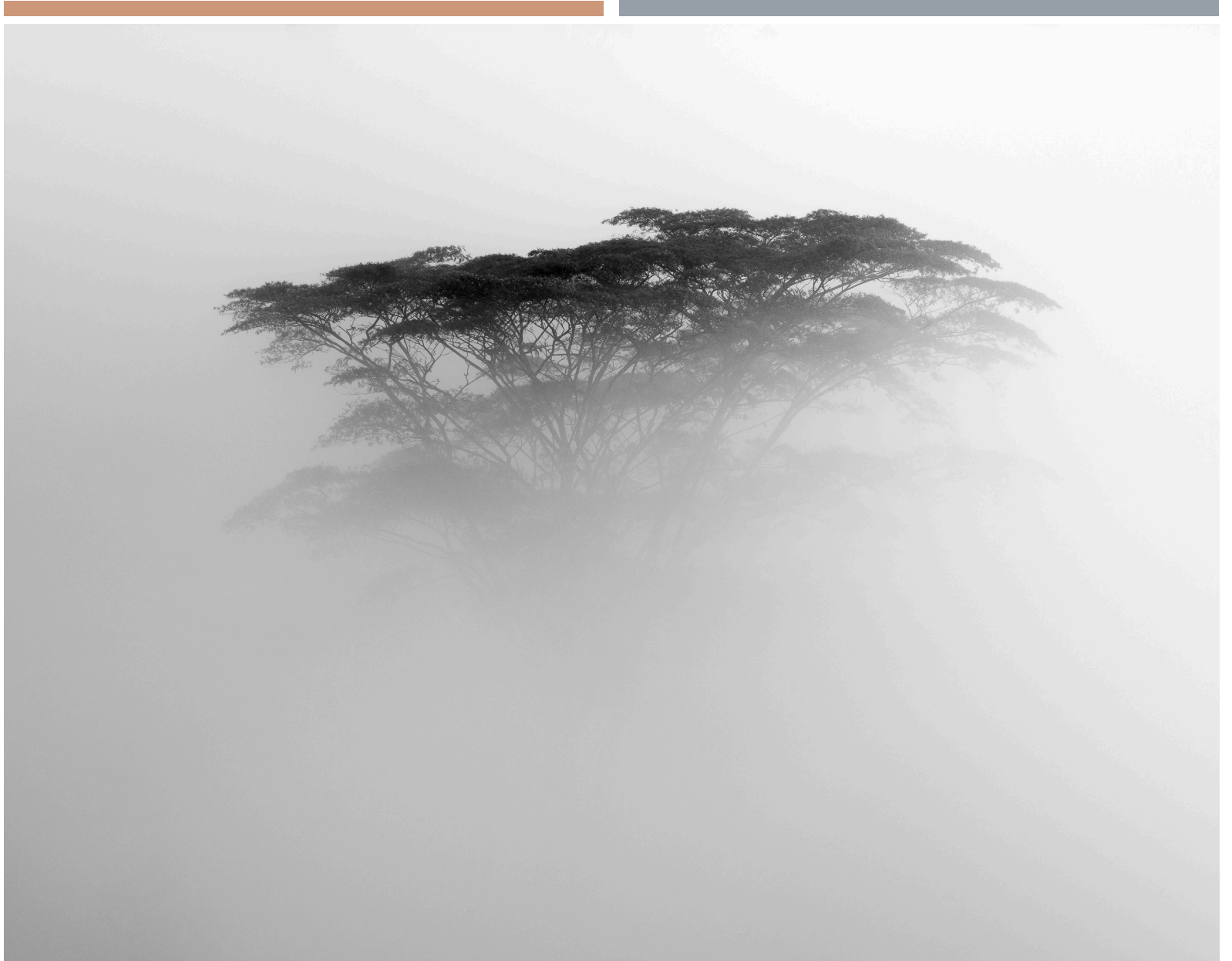
## *The Boston Globe*

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# GAG CLAUSES

- Agreements in which both parties agree to keep the terms of the agreement, including price information, confidential from any person or entity not party to that agreement





**Sutter Health**  
Sutter Medical Center

**ALLEGED ABUSE OF  
MARKET POWER:**

*UEBT AND THE STATE OF CA  
V. SUTTER HEALTH*

*SIDIBE V. SUTTER HEALTH*

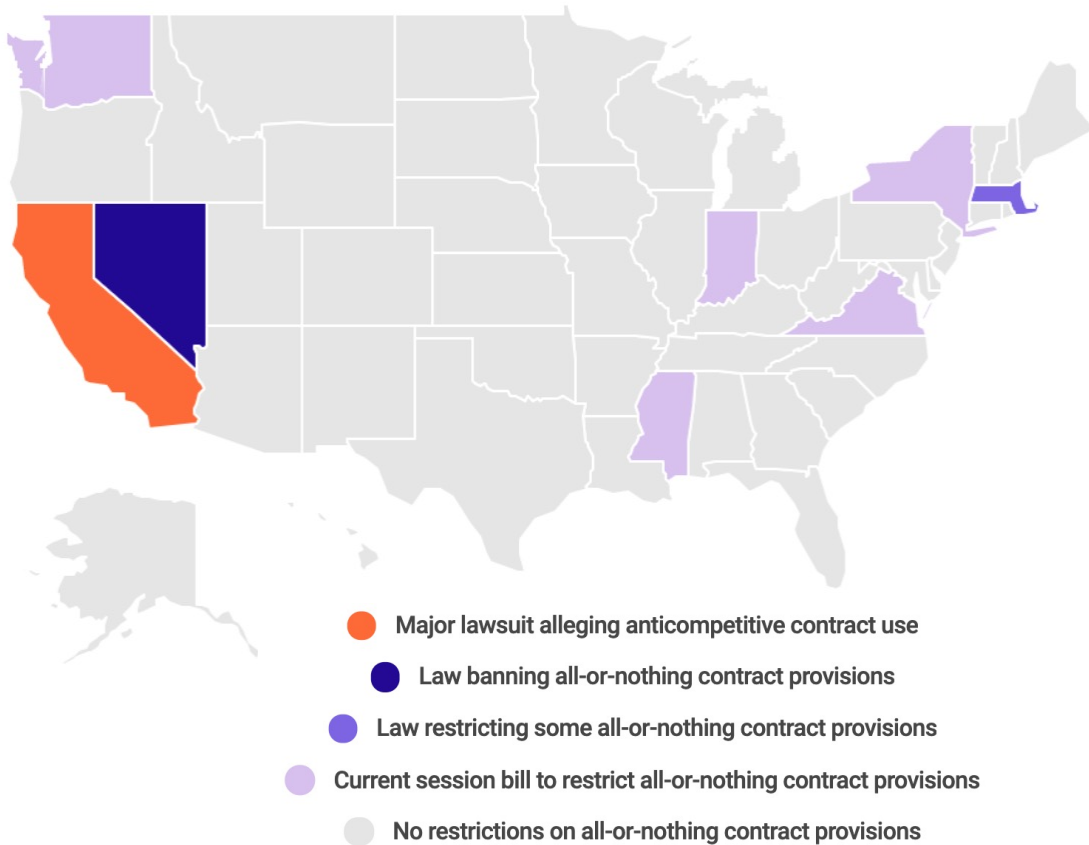
McChetti  
Children's Center



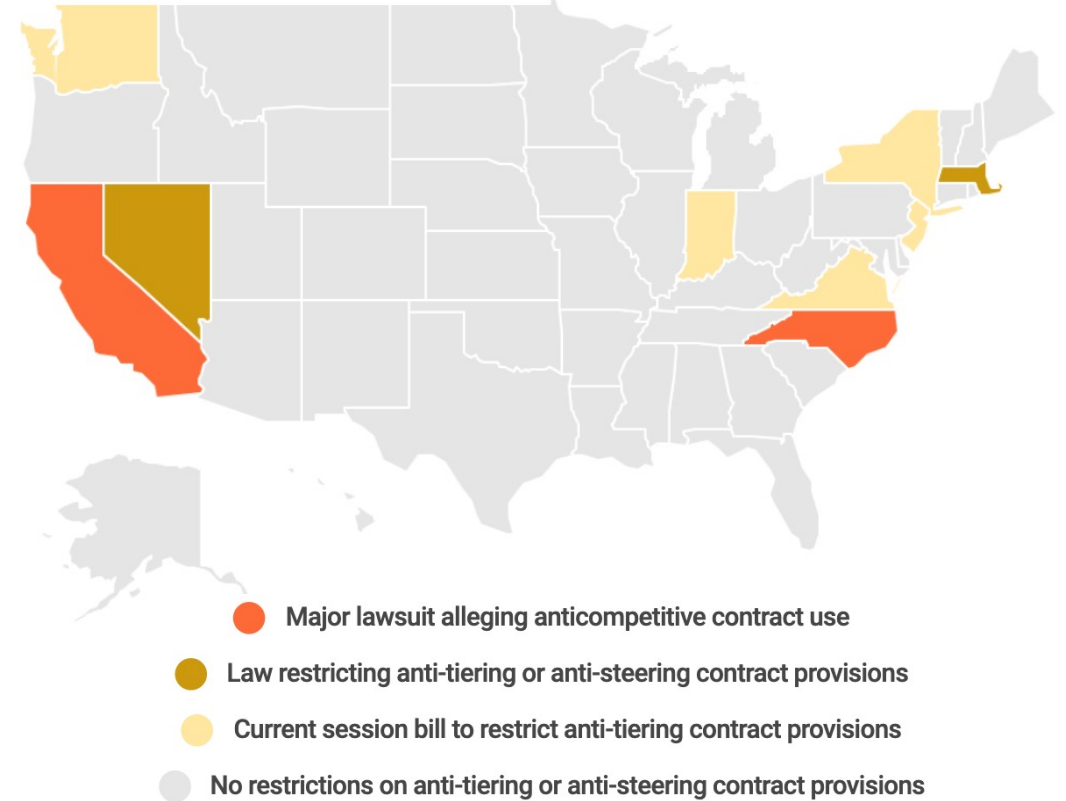
# ANTITRUST ENFORCEMENT SEEDS OTHER INTERVENTIONS

# STATES WITH LAWS RESTRICTING USE OF SPECIFIC CONTRACT TERMS

## All-or-nothing or Affiliate Contracting Restrictions

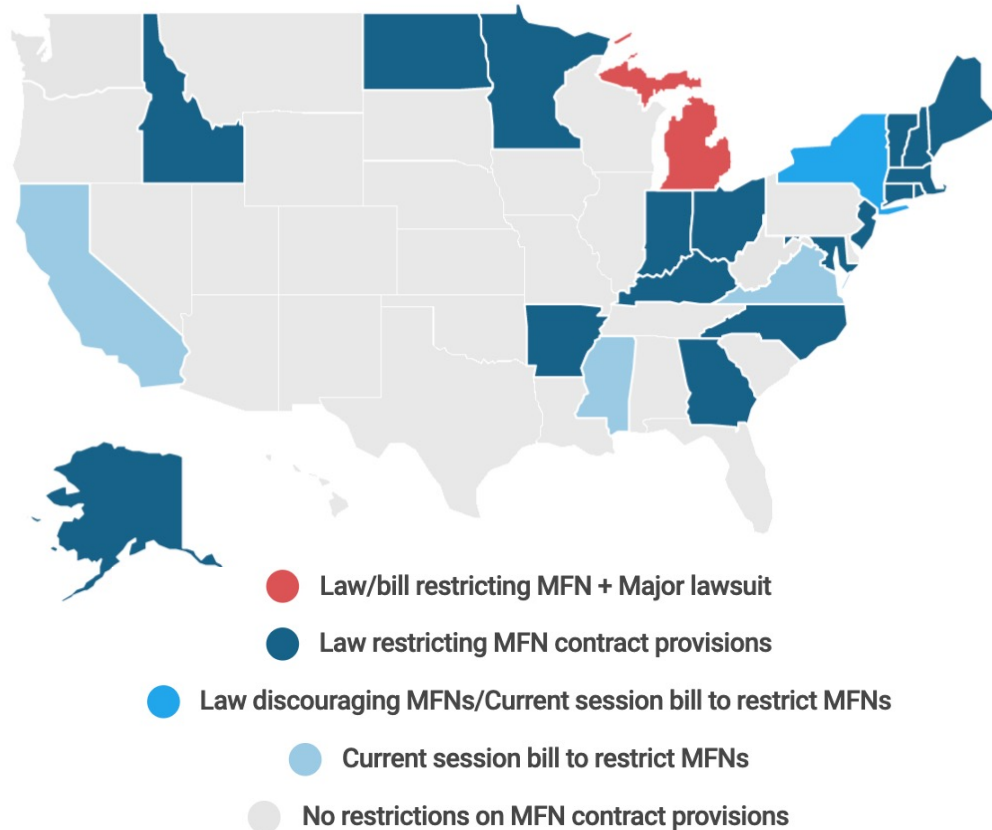


## Anti-tiering/anti-steering Restrictions

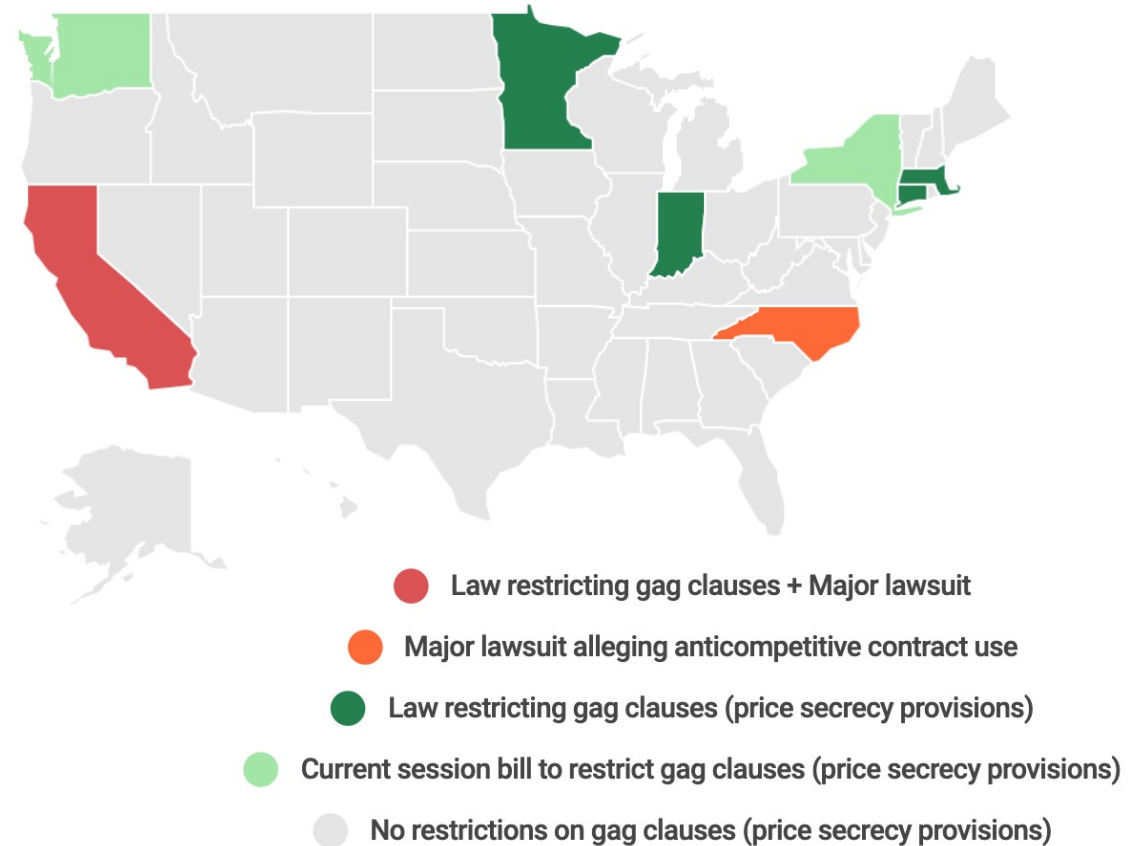


# STATES WITH LAWS RESTRICTING USE OF SPECIFIC CONTRACT TERMS

## Most-favored Nation Restrictions



## Gag Clause or Price Secrecy Restrictions





# COMPREHENSIVE REGULATORY OVERSIGHT

- **Increased Agency Oversight**
  - Review all proposed mergers of health care entities
  - Cost-growth benchmarks
  - Insurance Affordability Standards
- **Provider Rate Regulation**
  - Market-based caps
  - Inflationary caps
  - Out-of-network caps





## PROVIDER MARKET POWER: A PROBLEM THAT IS NOT GOING AWAY

- Increased merger review is critical to protect remaining competition
- States need multipronged approach to restricting anticompetitive contract practices by dominant health systems
  - Litigation
  - Legislation
  - Regulatory Oversight

# THANK YOU!

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<https://sourceonhealthcare.org/>

THE SOURCE  
ON HEALTHCARE PRICE & COMPETITION

