

# State Efforts to Address Health Care Consolidation and Costs

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Employers Forum of Indiana  
August 19, 2020

THE SOURCE  
ON HEALTHCARE PRICE & COMPETITION



UC Hastings Law  
SAN FRANCISCO

✍️ The Source Blog



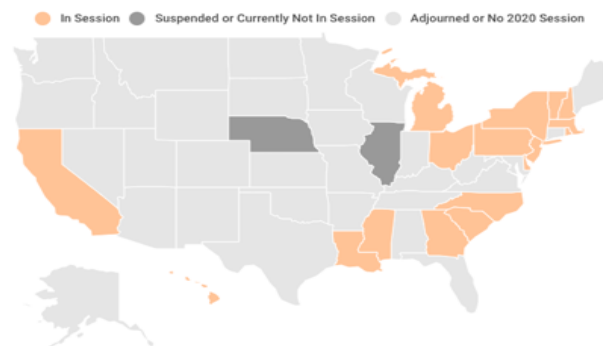
## [Sutter Case Watch] Sutter Health Preliminary Approval of Settlement Agreement Held up by Compliance Monitor Selection

👤 Amy Y. Gu, Managing Editor 📅 August 13, 2020



### Latest Legislative Activities

Click on states below for more details on recent legislation and enacted statutes. \*Note: 2020 session updates are currently in progress, check back weekly for updates.



### 📰 News & Opinions

## Modern Healthcare

Sentara, Cone Health plan merger

👤 Tara Bannow 📅 August 12, 2020

## HealthAffairsBlog

Getting It Done: Consensus On Surprise Billing Protections

👤 Jack Hoadley et al. 📅 August 12, 2020

## STAT+

Out-of-pocket spending on specialty drugs dropped dramatically after states capped costs

Patient and Plan Spending after State Specialty-Drug Out-of-Pocket Spending Caps

📰 NEJM 📅 August 6, 2020

Telemedicine: What Should the Post- Pandemic Regulatory and Payment Landscape Look Like?

📰 The Commonwealth Fund 📅 August 5, 2020

HHS Secretary's Report on: Addressing Surprise Medical Billing

📰 U.S. Department of Health & Human Services 📅 August 5, 2020

Next | See all Articles & Reports

# The Database of State Laws Impacting Healthcare Cost and Quality

## Search All Legislation

☒ **All**   ☐ **Bill**   ☐ **Statute**

☒ Enacted

☒ In Process

☒ Inactive / Dead

## Key Issues

- ☐ HEALTHCARE MARKETS
- ☐ Provider Network
- ☐ Telehealth or Telemedicine
- ☐ Scope of Practice
- ☐ Any Willing Provider
- ☐ Network Adequacy
- ☐ Tiered Network or Narrow Network
- ☐ Competition

## Jurisdiction



- ☐ Federal
- ☐ Alabama
- ☐ Alaska
- ☐ Arizona
- ☐ Arkansas
- ☐ California
- ☐ Colorado
- ☐ Connecticut

### HB 1011 – Indiana

 Introduced: **2017**   ☒ Status: **Inactive / Dead**

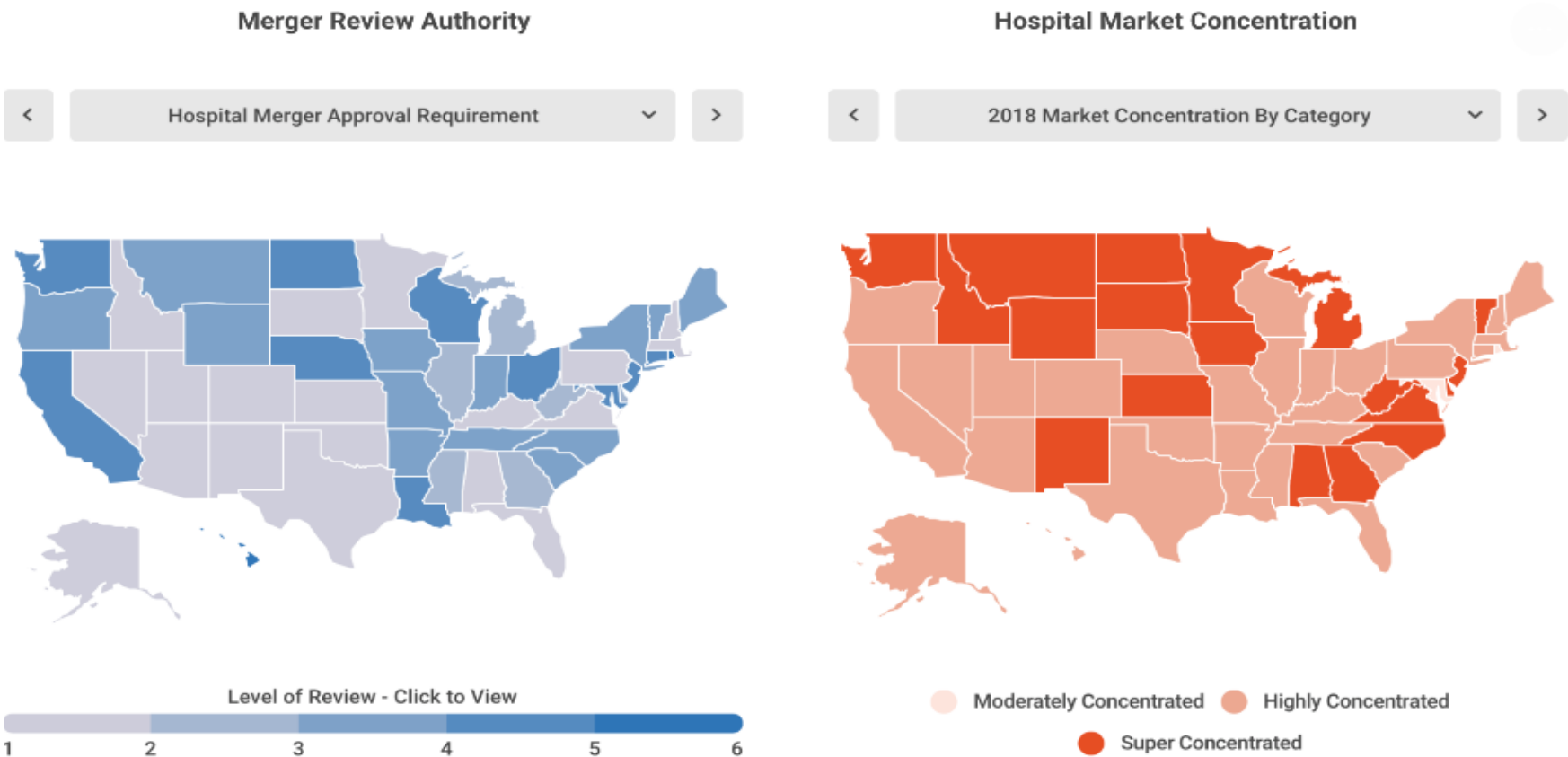
HEALTHCARE CHARGES: Beginning in 2018, requires healthcare providers to publish and provide to patients the chargers for procedures rendered by the health care provider. Beginning in 2020, requires healthcare providers to publish and provide to ...

### HB 1029 – Indiana

 Introduced: **2019**   ☒ Status: **Enacted**    Year Enacted: 2019

Prescription drug pricing study committee. Urges the legislative council to assign to the interim study committee on public health, behavioral health, and human services the task of studying issues consumers face related to prescription drug ...

# Interactive Features on Market Consolidation



# What if the price of food increased like the price of health care?

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**\$48**



**\$55**

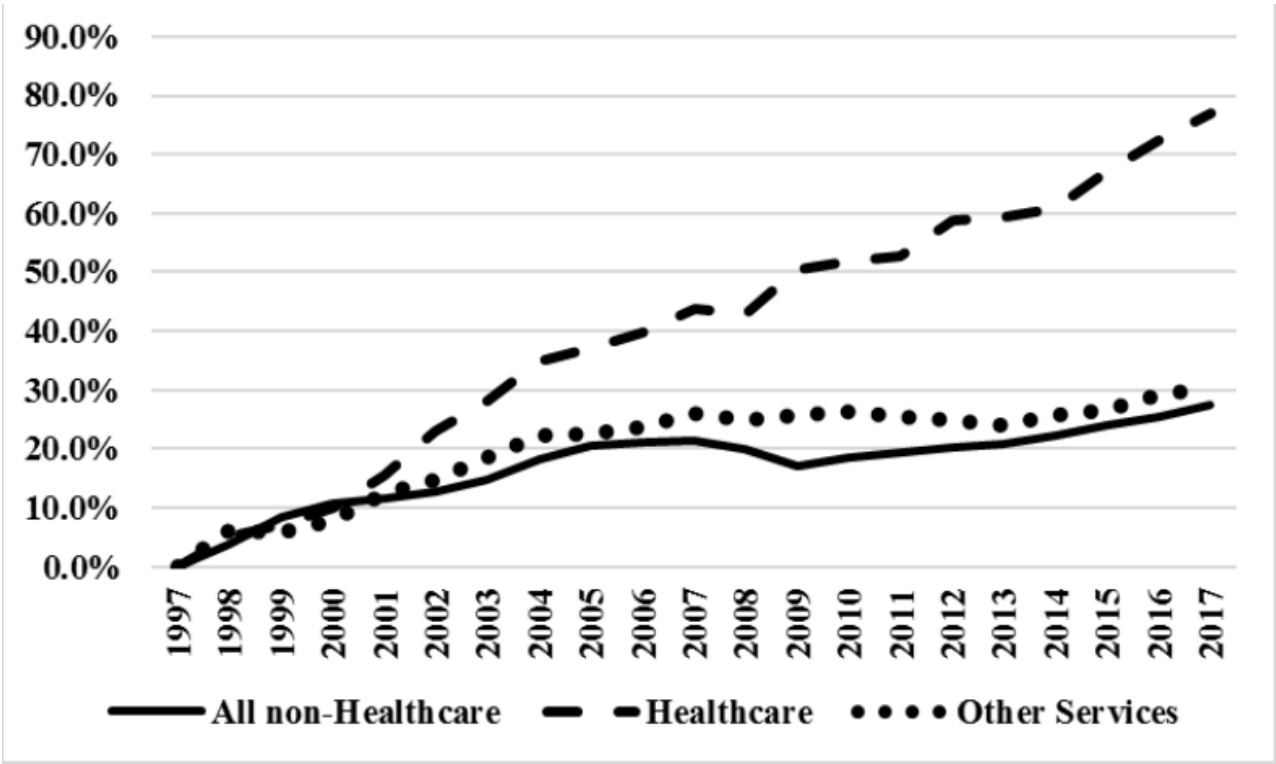


**\$134**

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

# Healthcare Costs in Indiana Are Growing Too

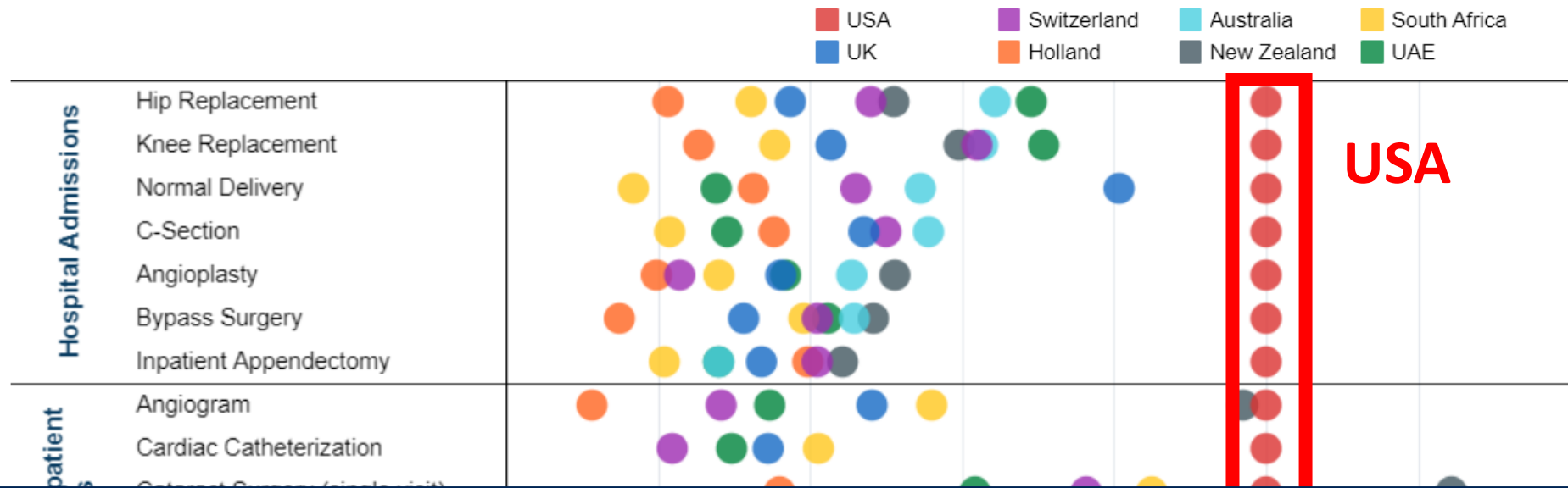
Cumulative change in Personal Consumption Expenditures, Indiana 1997-2017



Source: Michael J. Hicks "Indiana has a Monopoly Problem in Healthcare; Preliminary evidence and recommendations" Ball State University September 25, 2019



**Figure 1: Medical Prices in 2017 as a Percent of US Prices**



“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>

# What Happened to US Health Care Prices?

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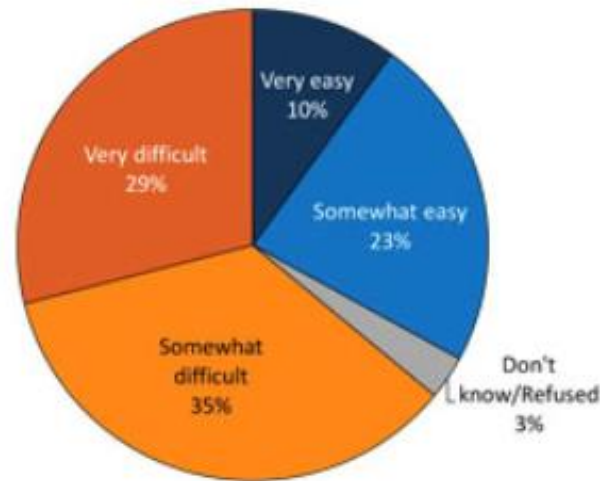
- *Failure to protect a free market system – lack of price transparency.*
- *Failure to protect competition and rigorously enforce antitrust laws.*
- *Failure of policymakers to act when competition no longer exists.*



# Failure to Protect Price Transparency

## Nearly Two-Thirds Say It Is Difficult To Find Out What Medical Care Will Cost

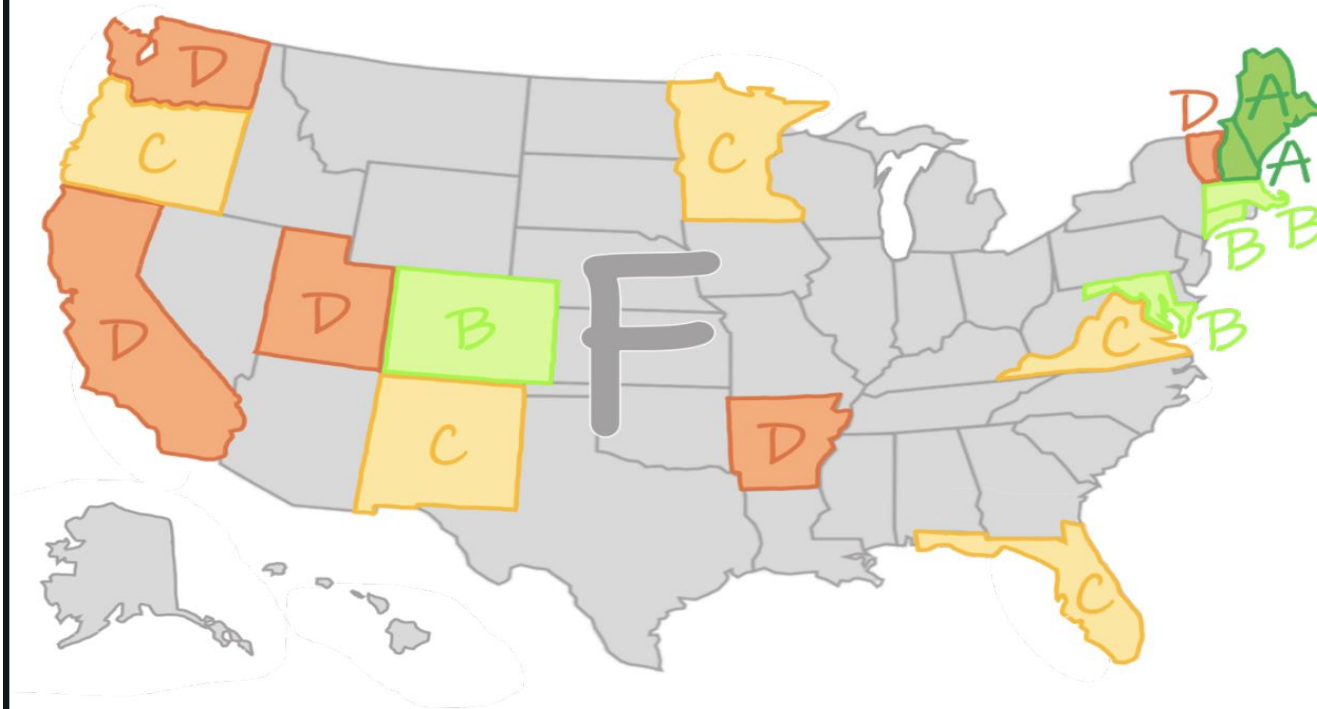
In general, how easy or difficult would you say it is to find out how much medical treatments and procedures provided by different doctors or hospitals would cost you?



SOURCE: Kaiser Family Foundation Health Tracking Poll (conducted April 8-14, 2015)



# THE 2020 REPORT CARD ON STATE PRICE TRANSPARENCY LAWS

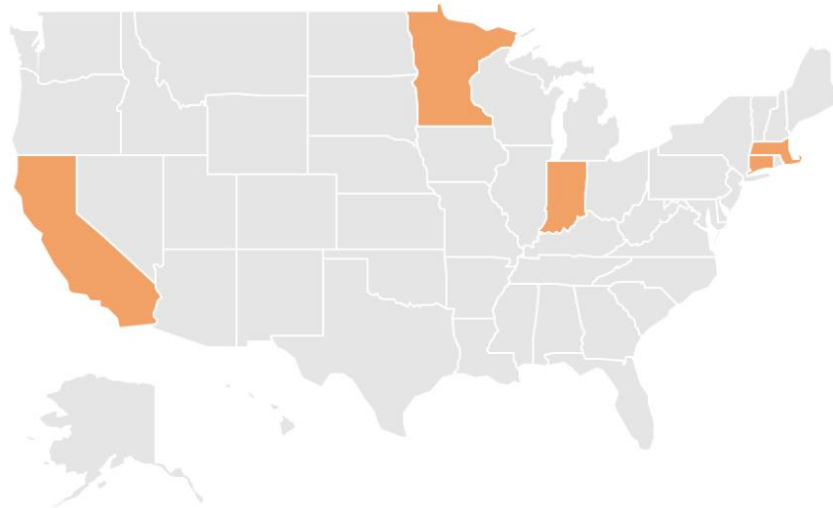


GRADE	STATES
A	Maine New Hampshire
B	Connecticut Maryland Massachusetts
C	Colorado Florida Minnesota New Mexico Oregon Virginia
D	Arkansas California Utah Vermont Washington
F	Alabama Alaska Arizona Delaware Georgia Hawaii Idaho Illinois Indiana Iowa Kansas Kentucky Louisiana Michigan Mississippi Missouri 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: Murray, et al, Report Card on State Price Transparency Laws (2020)

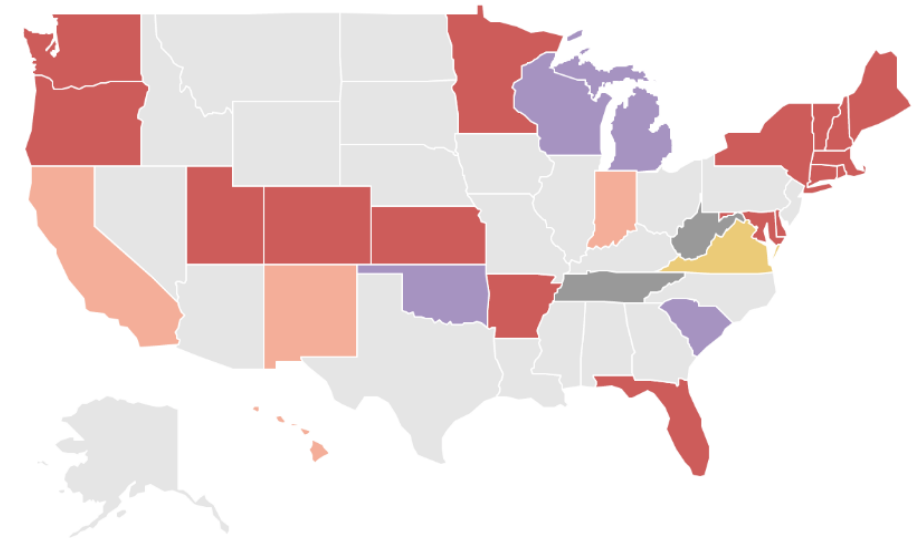
# Indiana Made Strides Towards Increasing Transparency in 2020

## Restrictions on Gag Clauses (Price Secrecy Provisions) in Provider Contracts



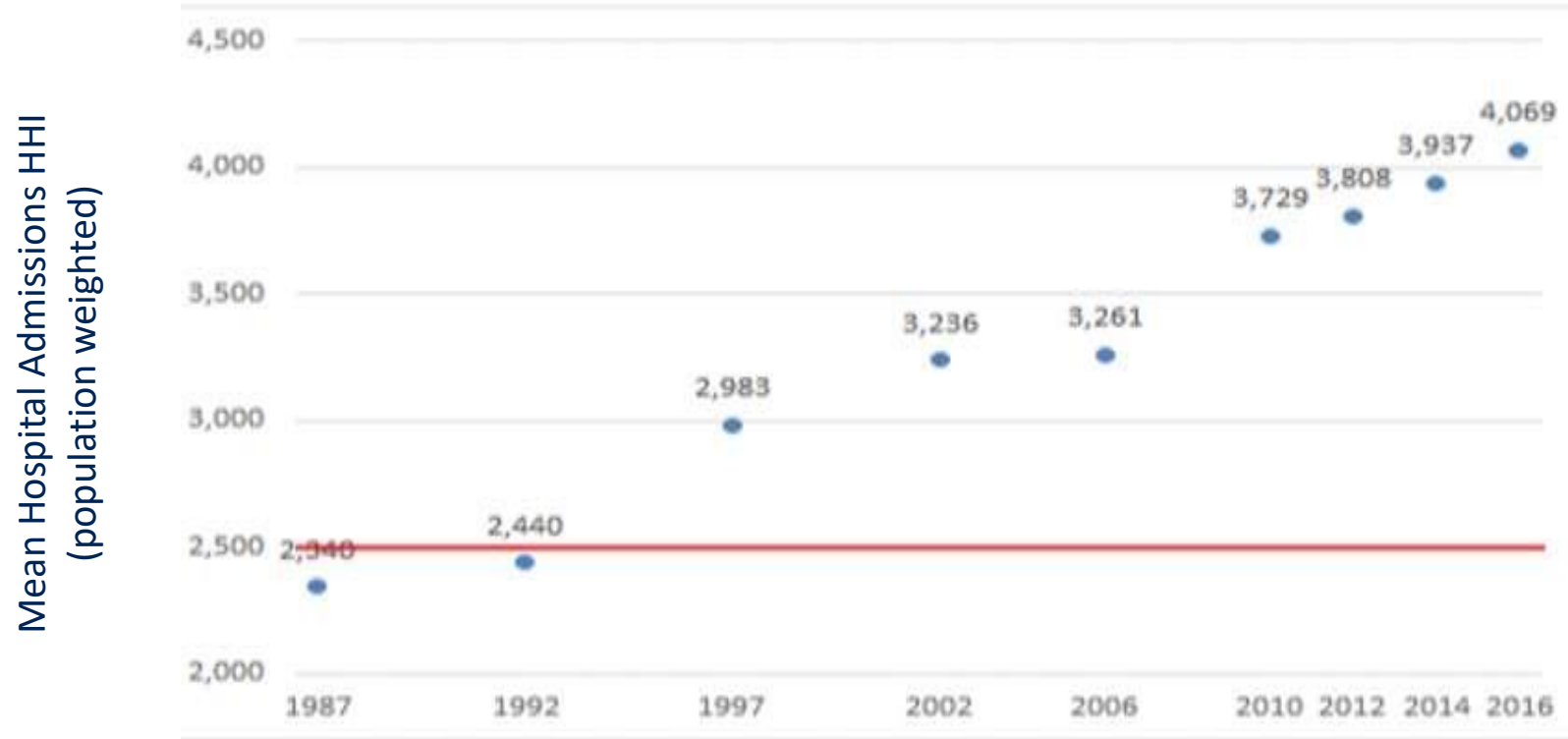
- Law restricting gag clauses (price secrecy provisions)
- No restrictions on gag clauses (price secrecy provisions)

## All-payer Claims Databases



- Mandatory, Active ● Mandatory, Implementing ● Mandatory, Suspended ● Voluntary ● Private, Active

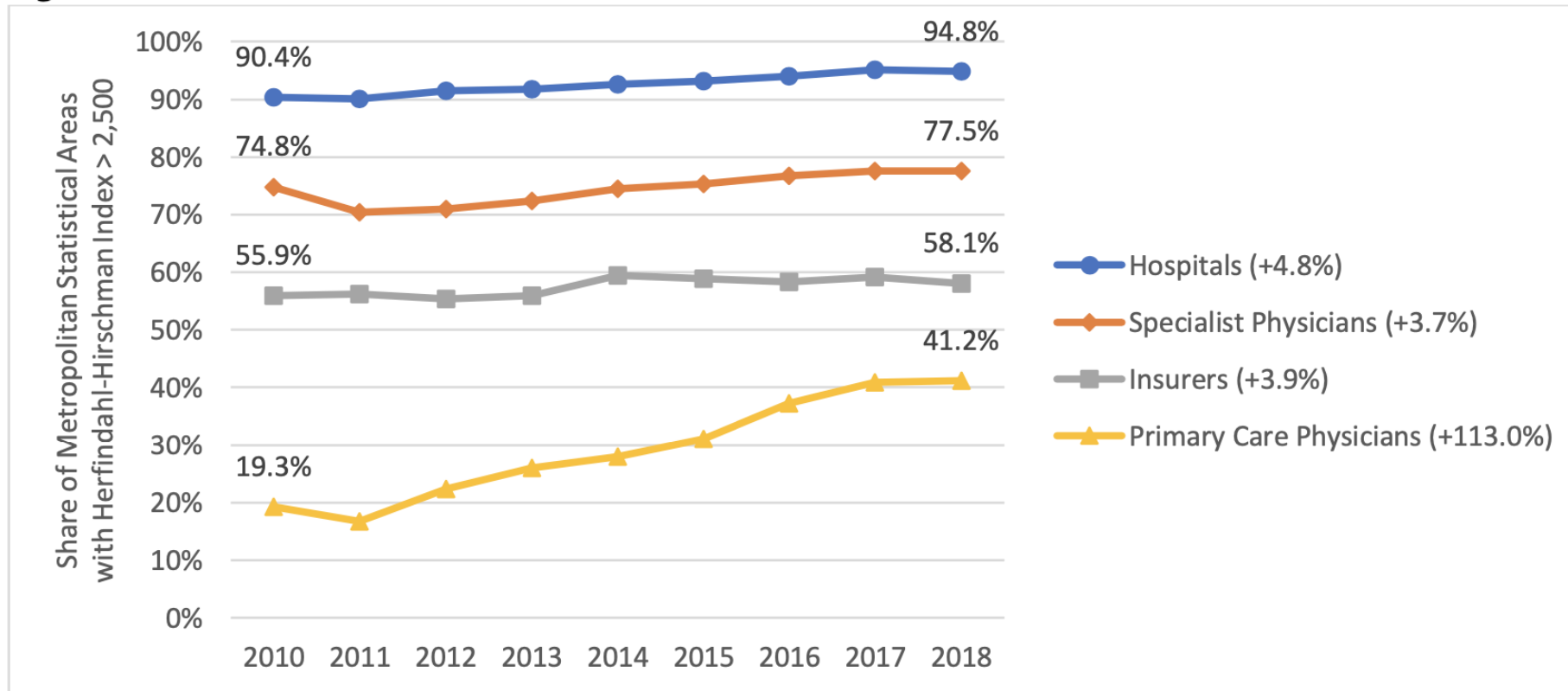
# Failure to Protect Competition



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

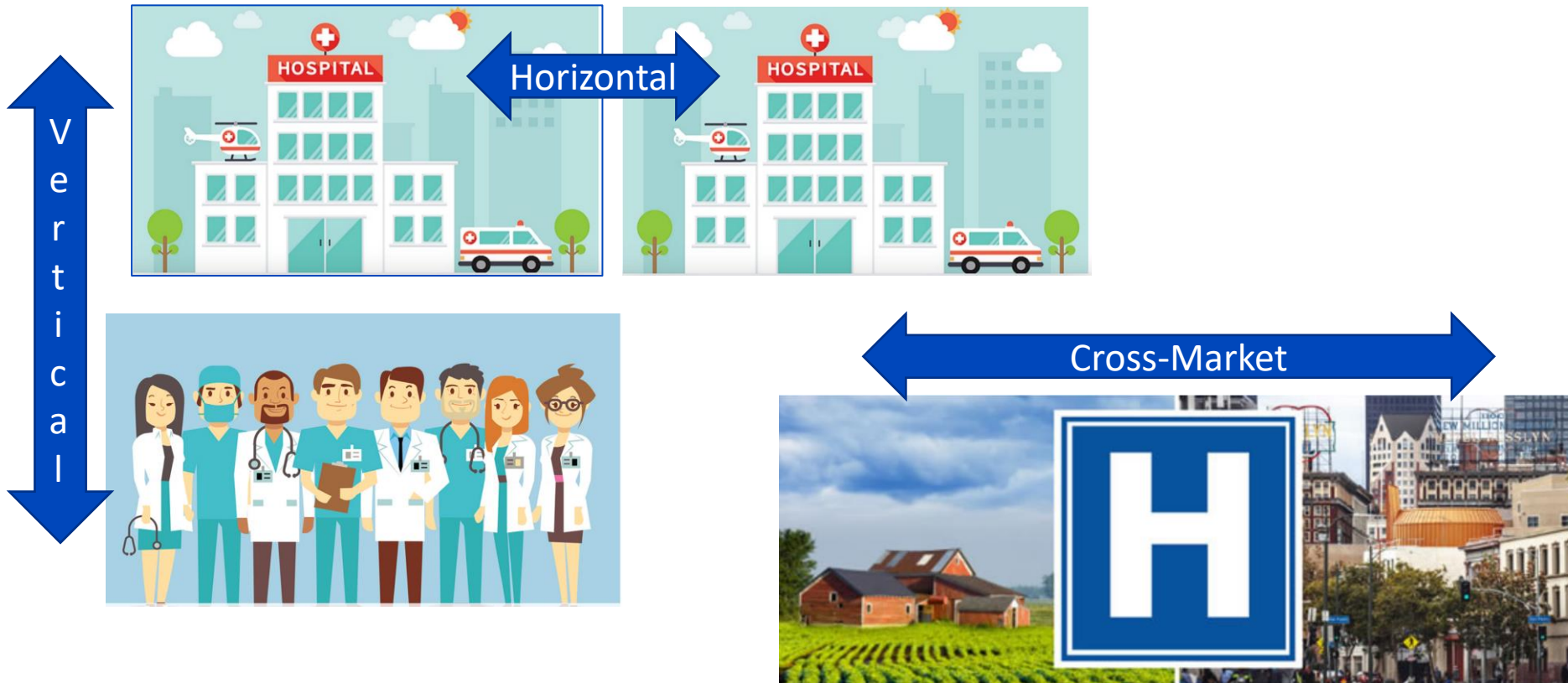
# Consolidation is Not Just for Hospitals

**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





# Healthcare Merger Mania

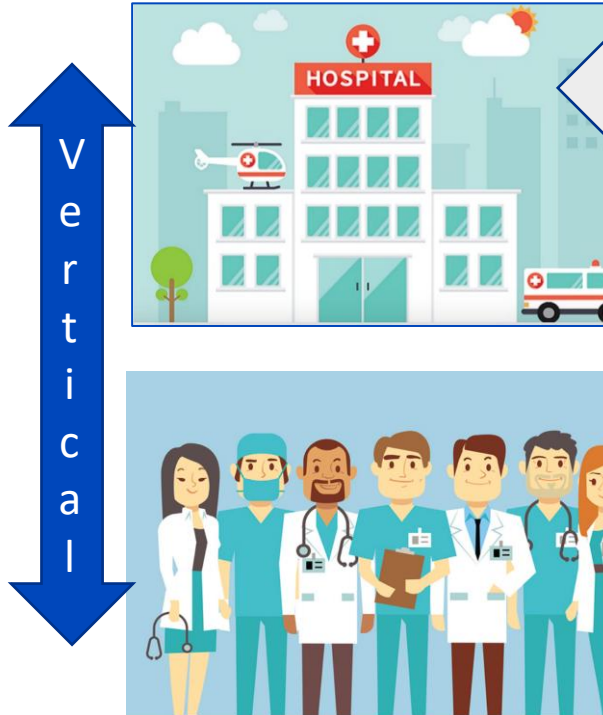


## Horizontal

- **Increased Prices:** Post-merger hospital prices increased 20-44%
- **Reduced Quality:** Hospital acquisition associated with modestly worse patient experiences or reduced quality California hospital mergers associated with higher inpatient mortality rates among heart disease patients
- **Increased Premiums:** Higher hospital concentration associated with higher ACA premiums
- **Reduced Wage Growth:** Hospital mergers reduced wage growth by 6.3% for nurses and pharmacists
- **Higher Costs:** Hospitals in larger systems have higher operating costs than hospitals in smaller systems

References: Dafny, 2009; Haas-Wilson & Garmon, 2011; Tenn, 2011; Gaynor & Town, 2012; Gaynor et al. 2013; Koch et al. 2018; Short and Ho, 2019; Beaulieu, Dafny, et al., 2020; Hayford, 2011; Boozary, et al., 2019; Prager and Schmitt, 2019; Burns et al. 2015

# Healthcare Merger Mania



## Vertical

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

# Healthcare Merger Mania

## Cross-Market

Rising number of cross-market mergers

**Increased Prices:** 7-17% increases in prices for independent hospitals purchased by out-of-market systems

**Increased Competing Hospital Prices:** Price increases by 7.8% in nearby rival hospitals

References: Lewis & Pflum, 2016; Dafny, Ho, & Lee 2019

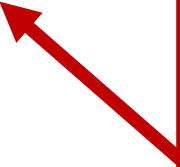


Cross-Market

# All Three Types of Mergers Drive Up Costs in Indiana

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- **Horizontal Mergers**



**“Historically, each of the four health systems carved out geographic ‘mini-monopolies’ within boundaries that were respected by the other health systems.”**

Source: Sabrina Corlette, Katie Keith, and Olivia Hoppe. “Case Study Analysis: The Indianapolis Health Care Market” Assessing Responses to Increased Provider Consolidation, Georgetown University Center on Health Insurance Reforms June 2019

# All Three Types of Mergers Drive Up Costs in Indiana

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- **Horizontal Mergers**
- **Vertical Mergers**

Indiana had “‘aggressive’ competition between the health systems to acquire physician practices before a competing system could do so.”


“Respondents estimate that about 80 percent of physicians, whether primary care physicians or specialists, are employed by the health systems.”

Source: Sabrina Corlette, Katie Keith, and Olivia Hoppe. “Case Study Analysis: The Indianapolis Health Care Market” Assessing Responses to Increased Provider Consolidation, Georgetown University Center on Health Insurance Reforms June 2019

# All Three Types of Mergers Drive Up Costs in Indiana

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- **Horizontal Mergers**
- **Vertical Mergers**
- **Cross-market Mergers**

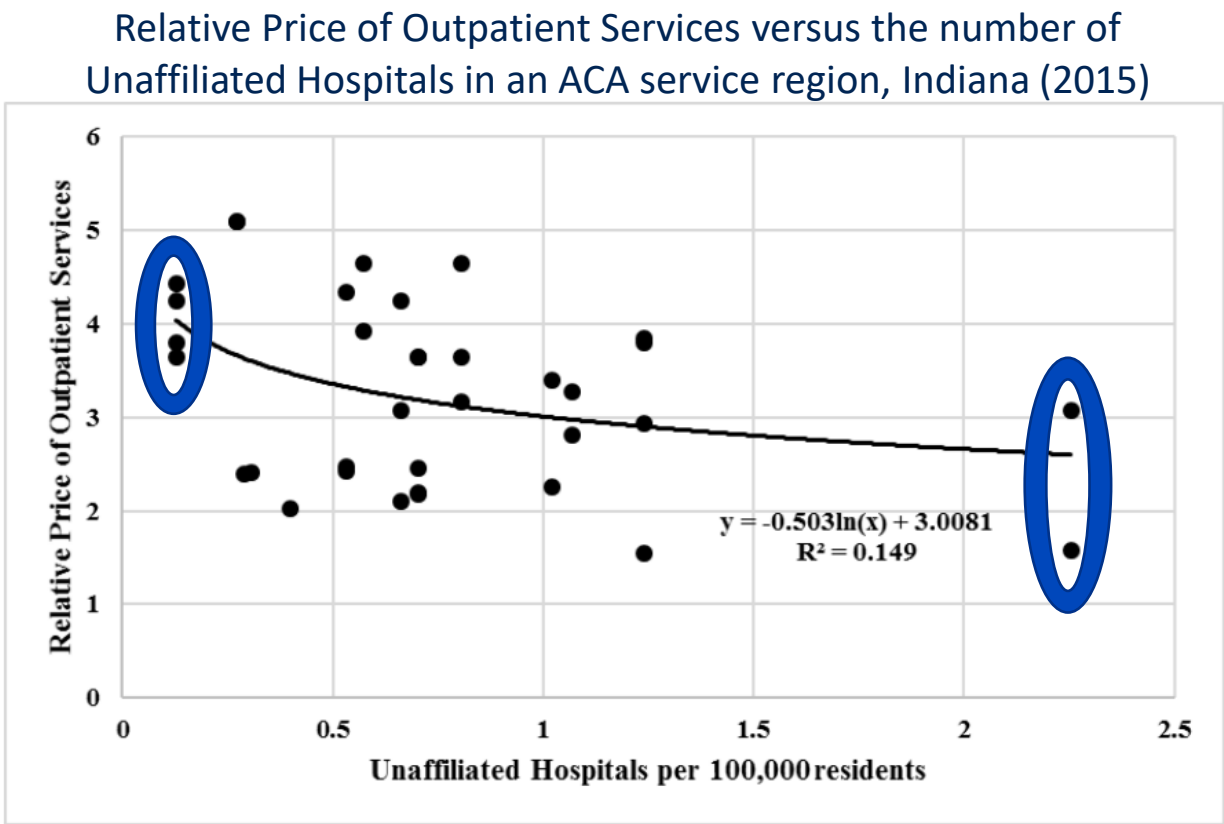


“Acquisitions of other Indiana hospitals outside the metropolitan region were strategic and communities where there was a hospital monopoly were targeted and then used to negotiate ‘tying contracts’ with payers”

Source: Sabrina Corlette, Katie Keith, and Olivia Hoppe. “Case Study Analysis: The Indianapolis Health Care Market” Assessing Responses to Increased Provider Consolidation, Georgetown University Center on Health Insurance Reforms June 2019



# Consolidation in Indiana Leads to Higher Prices



Source: Michael J. Hicks "Indiana has a Monopoly Problem in Healthcare; Preliminary evidence and recommendations" Ball State University September 25, 2019

# 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.

# Statutory Authority: Provider Merger Review

State	Pre-Merger Notice Required	Approval of Merger Required	Review of Health Access, Pricing, or Competition Required
Florida	—	—	—
Georgia	○	—	—
Hawaii	●	●	—
Idaho	○	—	—
Illinois	—	—	—
Indiana	○	—	—
Iowa	—	—	—
Kansas	—	—	—
Kentucky	—	—	—
Louisiana	○	○	○
Maine	○	○	○

 Download data

- All Hospitals and Physician Groups
- ◐ All Hospitals
- ◑ All Hospitals, Merger is Approved if AG Does Not Act
- Nonprofit Hospitals (Acquisition, Merger, or Conversion)
- Limited Review of Nonprofit Hospitals; AG or Court May Decide
- None

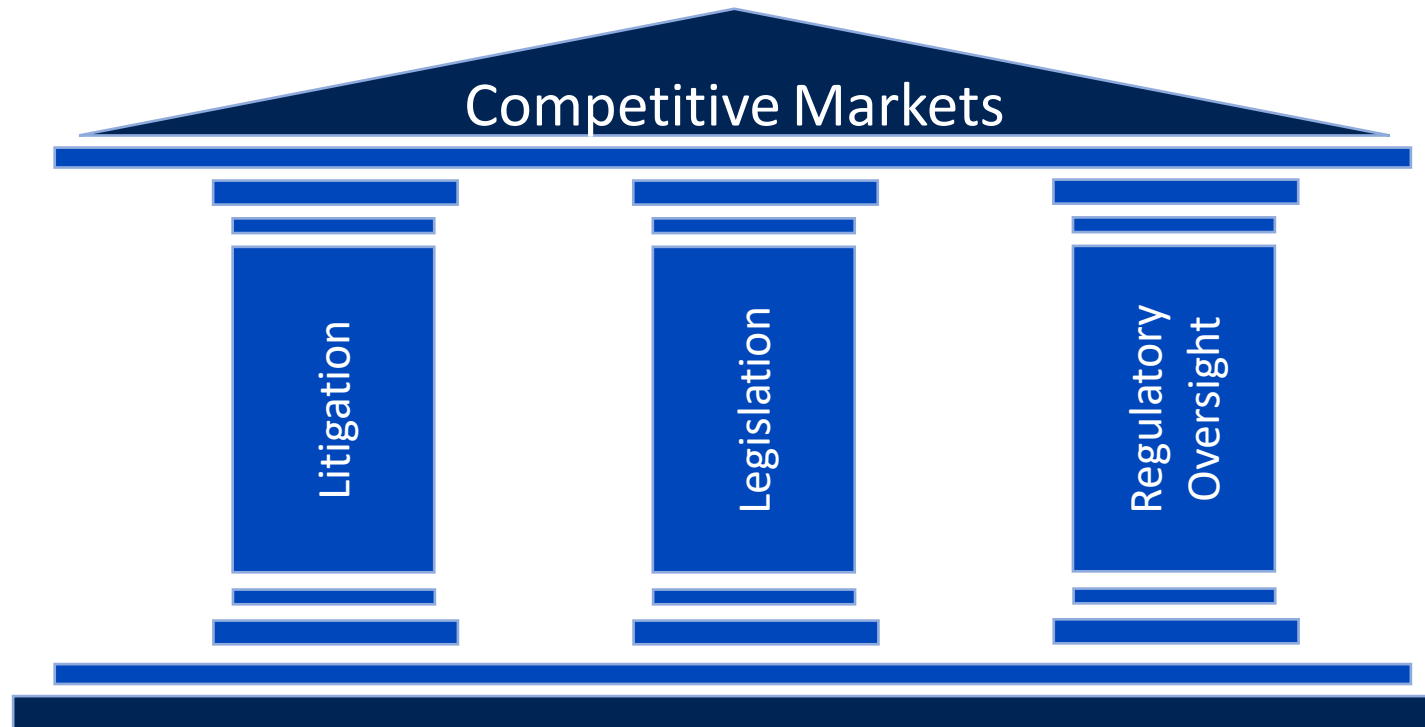
# Unfortunately, in many markets...

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# Competitive Markets Need Support

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# Use of Litigation to Address Anticompetitive Contracting

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United States and the State of Michigan  
v. Blue Cross Blue Shield of Michigan



United States and the State of North  
Carolina v. The Charlotte-Mecklenburg  
Hospital Authority



UFCW & Employers Benefit Trust v. Sutter Health



# Use of Litigation to Address Anticompetitive Contracting

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## **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



# Use of Legislation to Support Competitive Markets

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



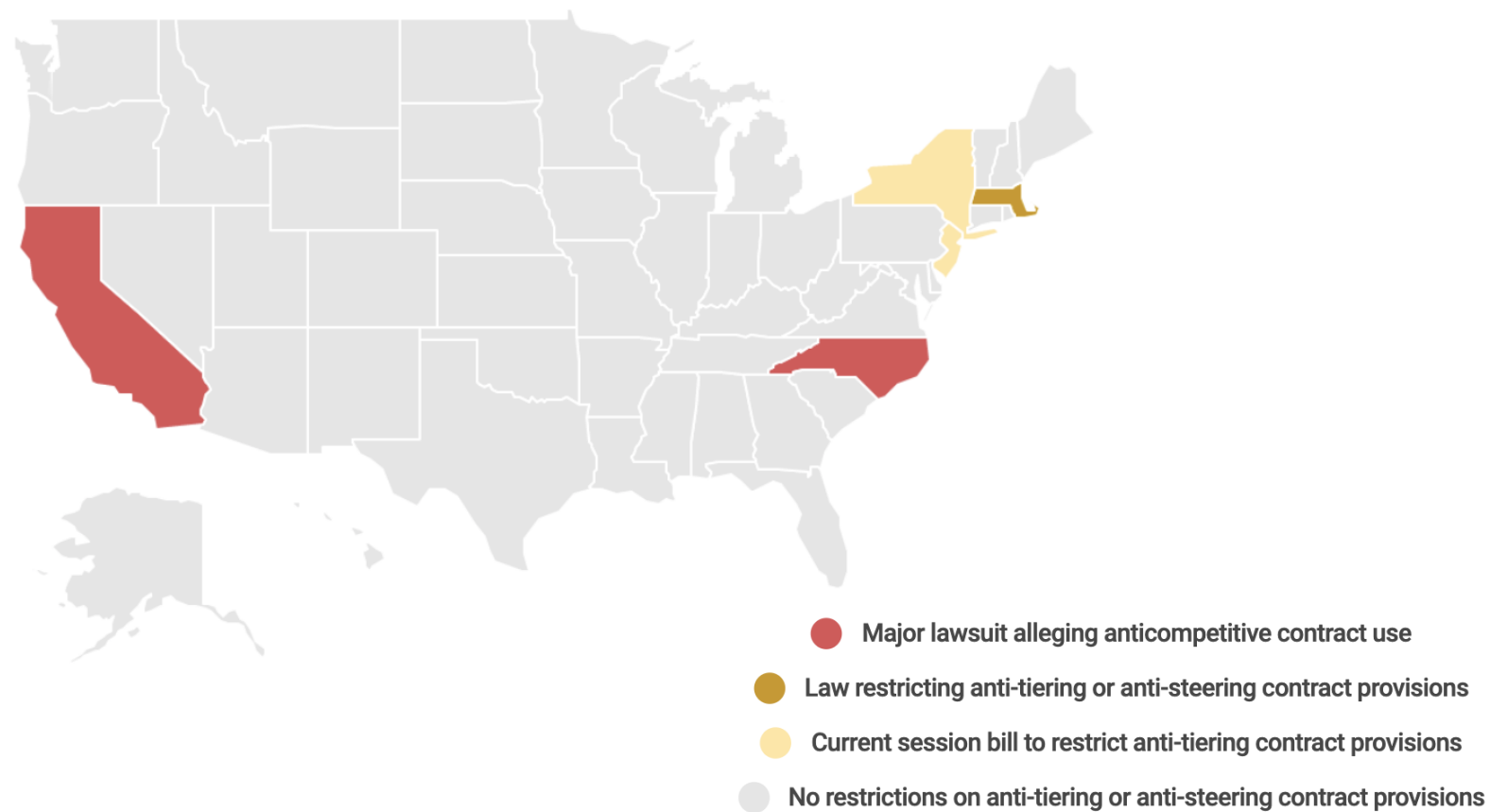
# State Laws Prohibiting use of Terms with Anticompetitive Effects

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- Anti-tiering or anti-steering clauses

# Restriction of Anti-tiering or Anti-steering Provisions in Provider Contracts

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# State Laws Prohibiting use of Terms with Anticompetitive Effects

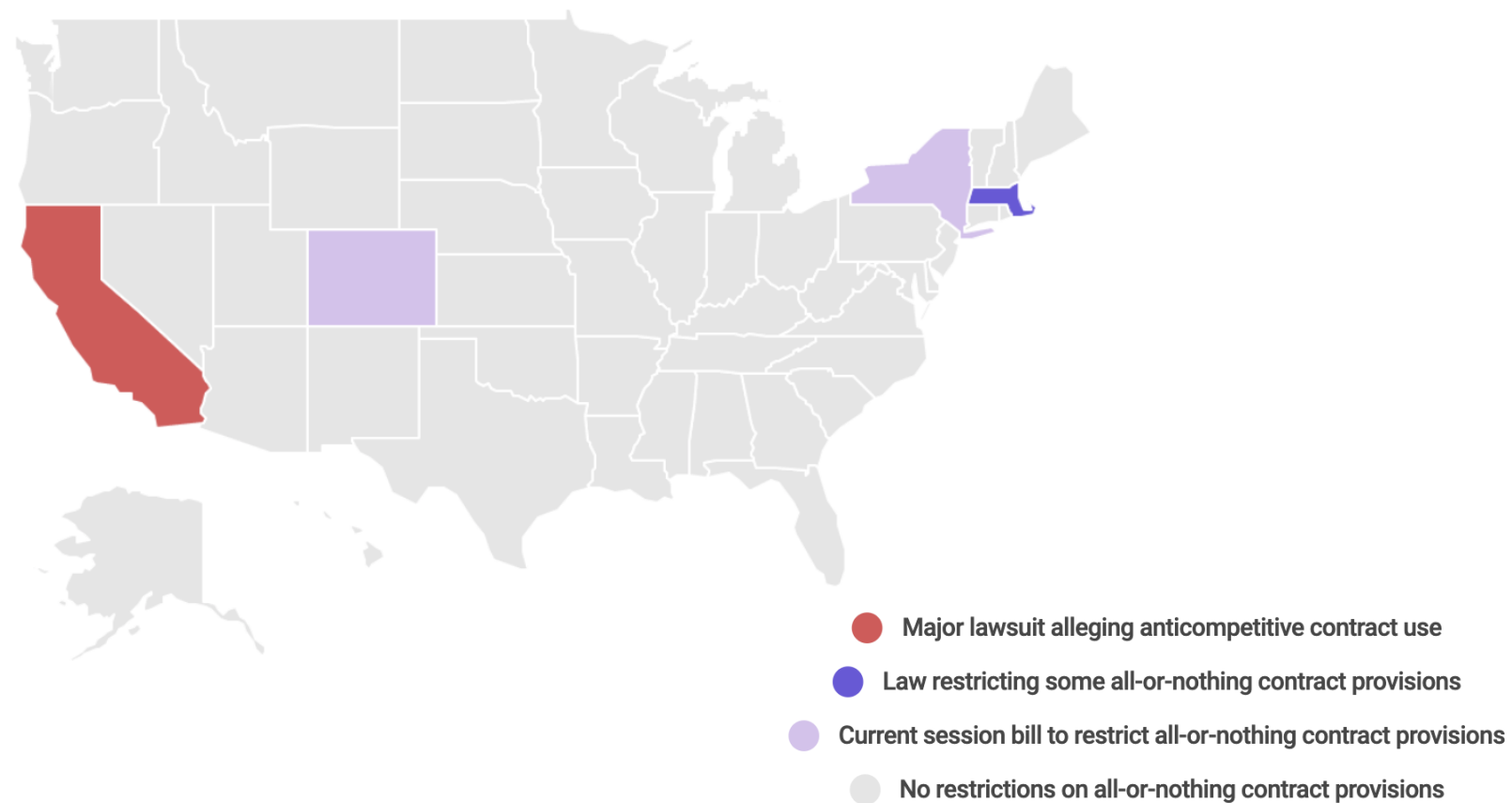
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- Anti-tiering or anti-steering clauses
- All-or-Nothing or affiliate contracting



# Restriction of All-or-Nothing Provisions in Provider Contracts

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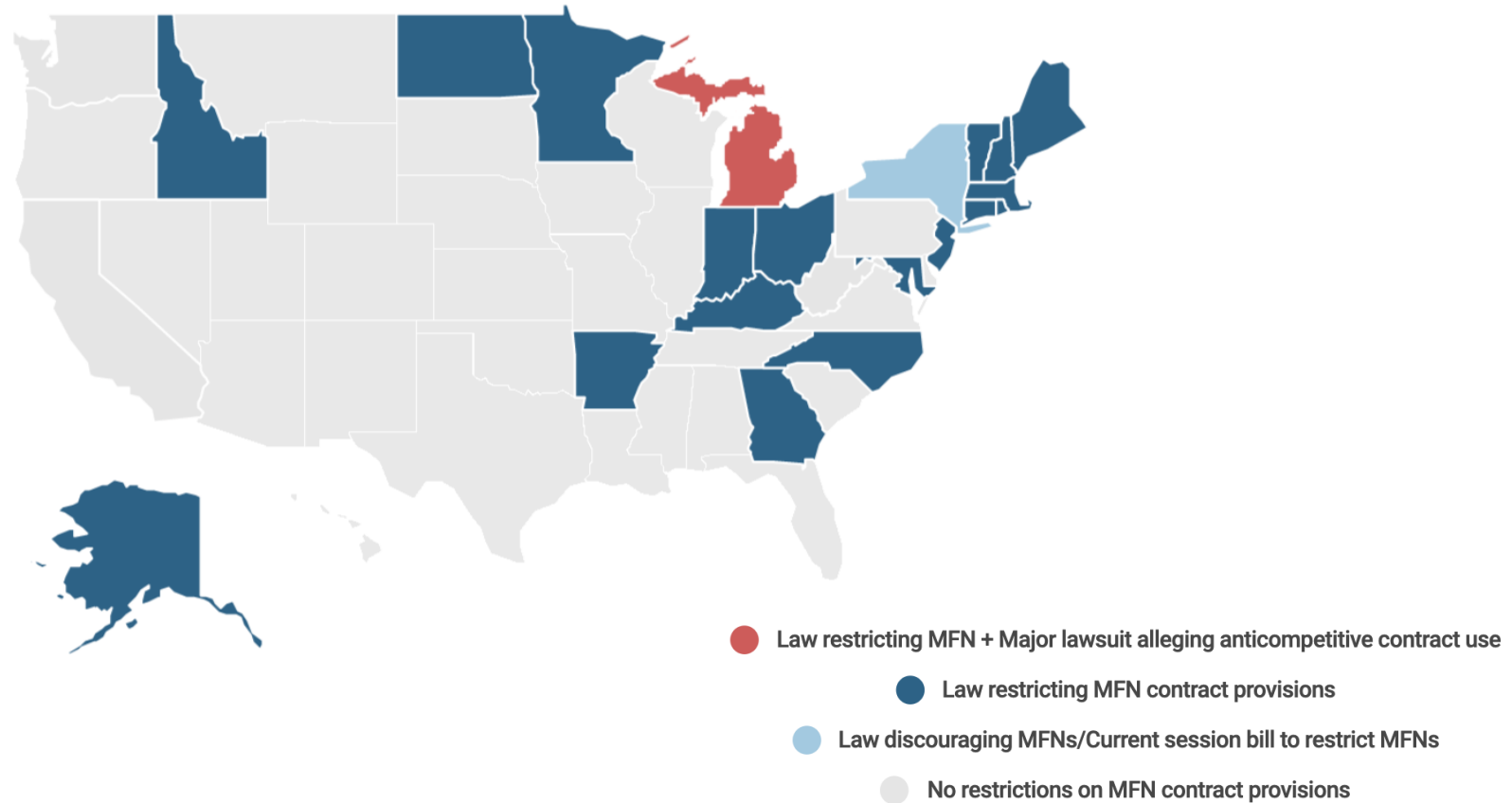


# State Laws Prohibiting use of Terms with Anticompetitive Effects

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- Anti-tiering or anti-steering clauses
- All-or-Nothing or affiliate contracting
- Most-favored nation clauses

# Restriction of Most-favored Nation Provisions



# Uses of Legislation to Address Anticompetitive Contracting

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## **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**

- “Provisions” are not “Contracting Practices”
- Requires action by the state legislature for each term

# 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



# Uses of Regulatory Oversight to Address Anticompetitive Contracting

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## **Benefits**

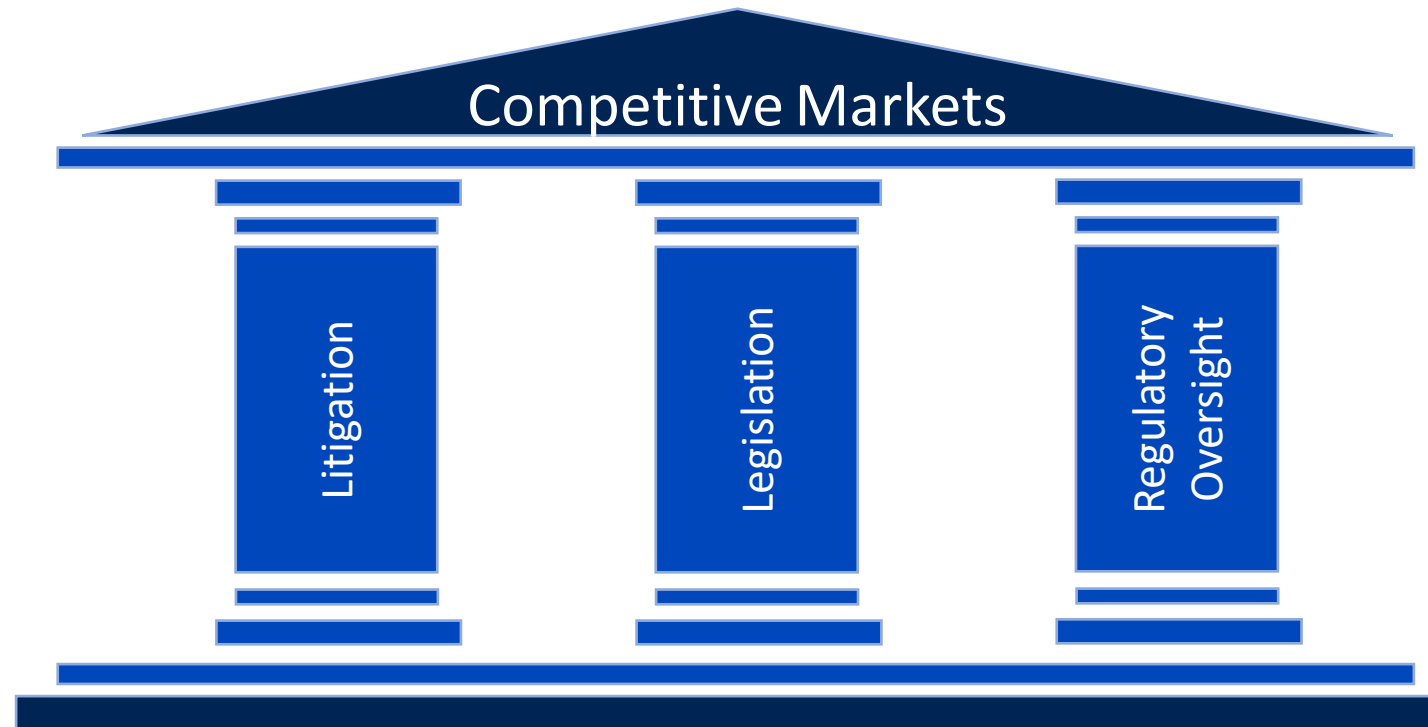
- Proactive
- Coordinated Oversight
  - Allows monitoring of practices (beyond provisions)
- Works with existing agencies and processes
  - May need additional authority for Insurance Commissioner

## **Drawbacks**

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

# Competitive Markets Need

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# Recommendations for Indiana

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- Enhance merger review processes
- Use legislation to address all-or-nothing or affiliate contracting and anti-tiering/anti-steering contract provisions.
- Authorize insurance commissioner to review contracts and pass any with concerning provisions to AG for review
- Consider rate caps as a backstop when markets are not working
  - Trigger additional review

# Thank You!

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