

STATE APPROACHES TO MITIGATING THE HARMS OF PROVIDER CONSOLIDATION

October 21, 2021

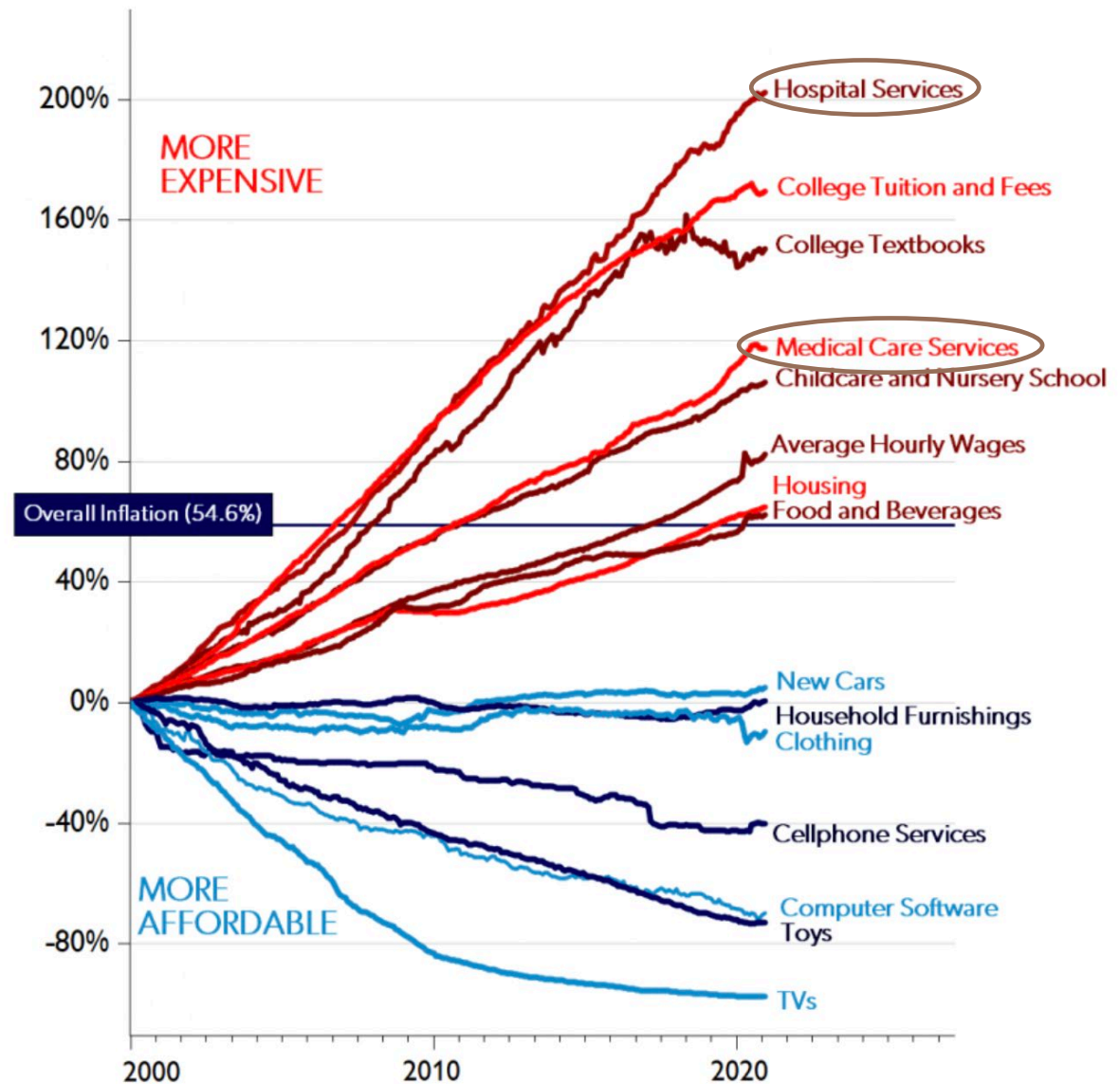
Katherine L. Gudiksen, Ph.D., M.S.

THE SOURCE
ON HEALTHCARE PRICE & COMPETITION



COST OF HEALTH CARE INCREASED MUCH FASTER THAN INFLATION

Selected US Consumer Goods and Services, Wages



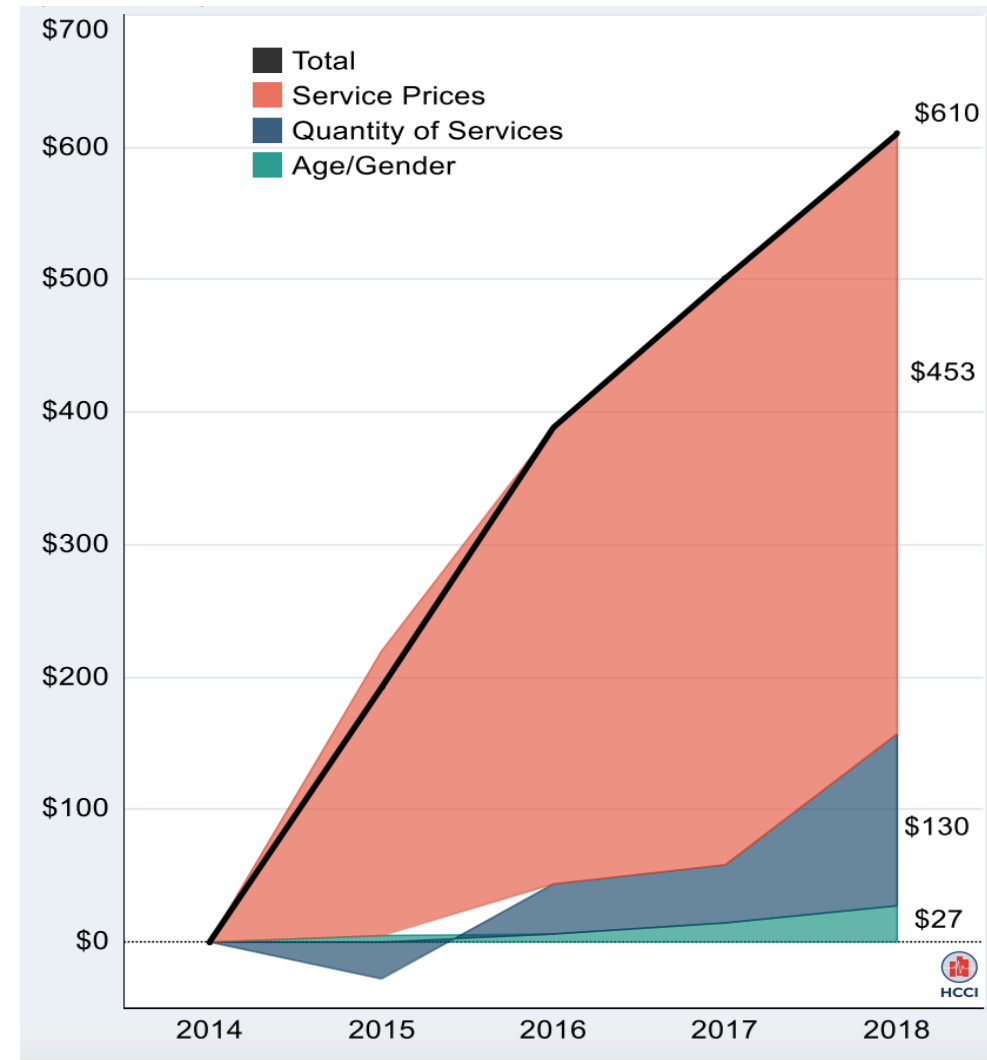
Source: Bureau of Labor Statistics

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.



\$57



\$65



\$160

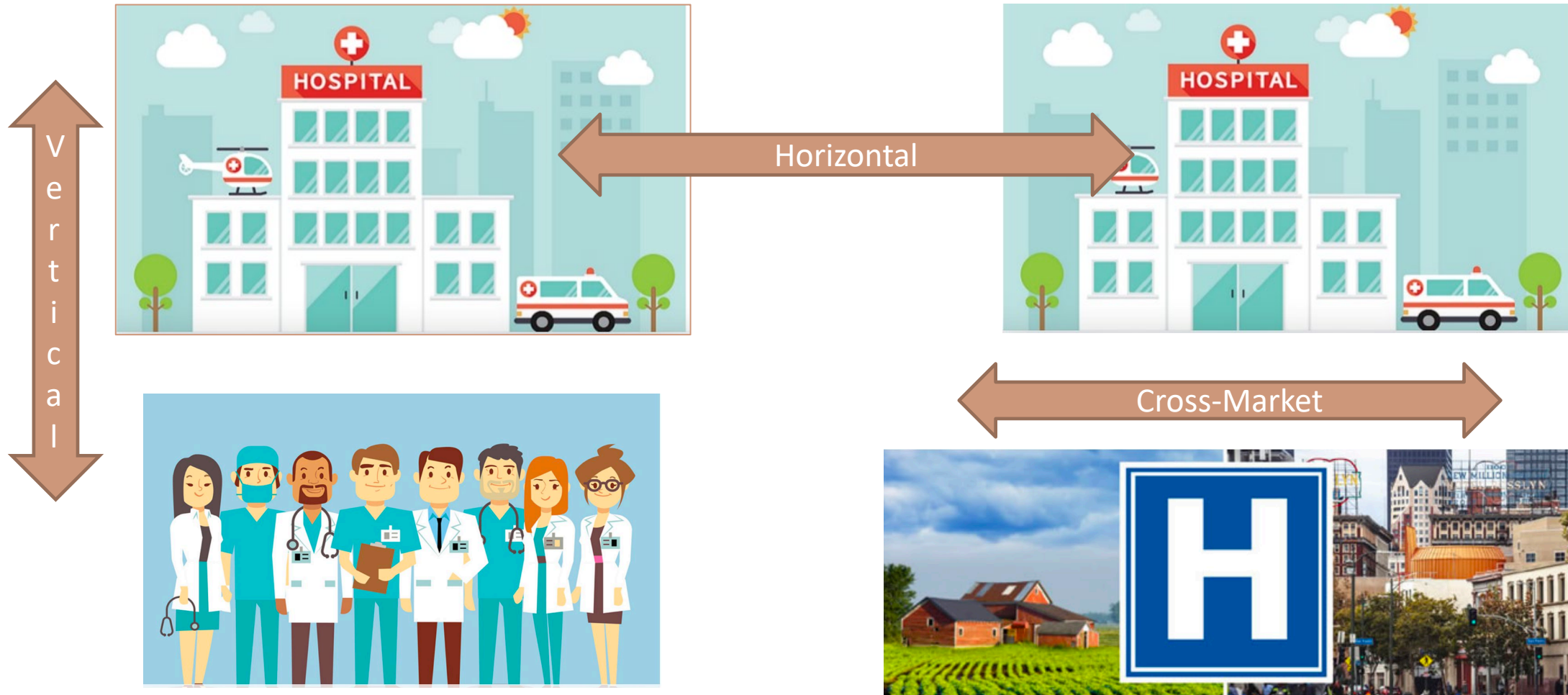
Source: Institute of Medicine, Best Care at Lower Cost: The Path to Continuously Learning Health Care in America (2013) updated to 2019 dollars with the Federal Reserve Bank Consumer Price Index Inflation Calculator.

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

WHY ARE U.S. HEALTHCARE PRICES SO HIGH?

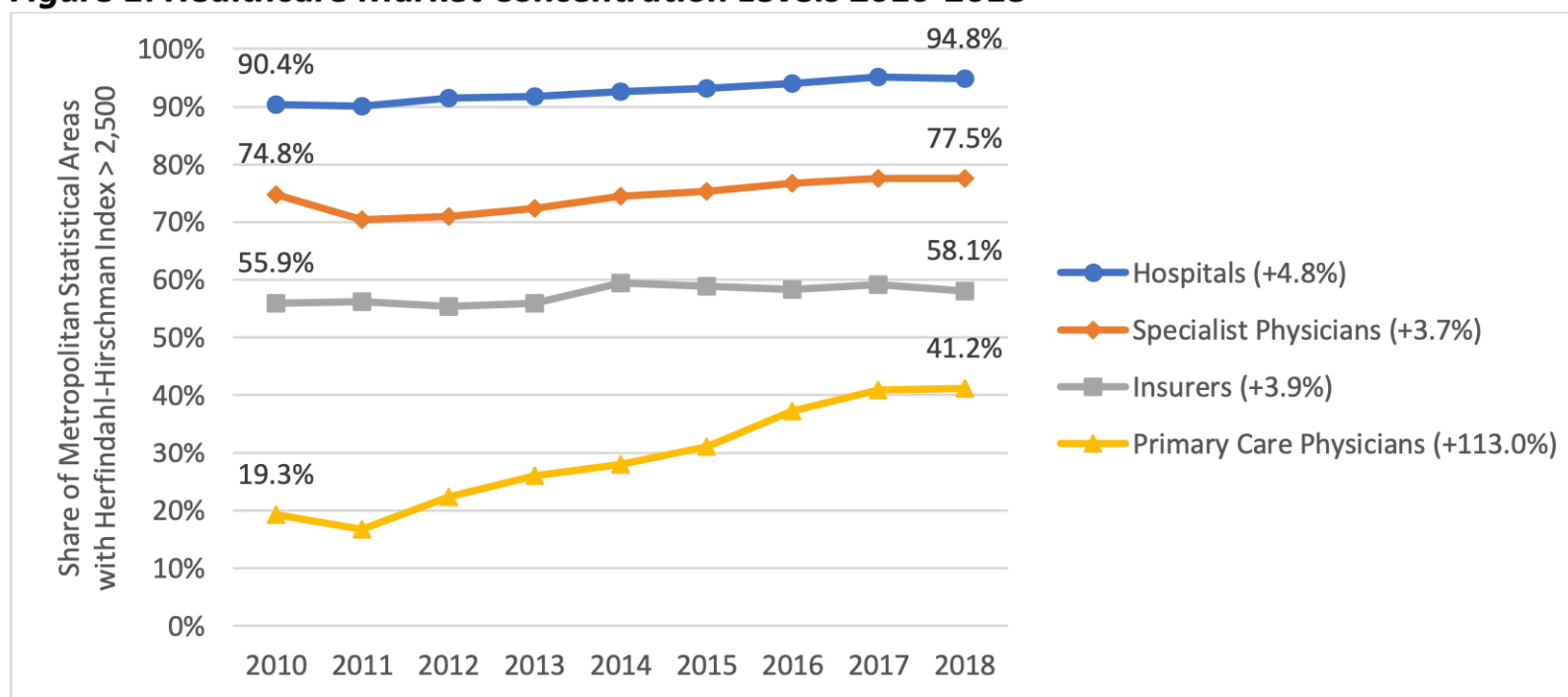
- Failure to protect to competition and rigorously enforce antitrust laws
- Failure of policymakers to act when competition no longer restrains prices

HEALTHCARE MERGER MANIA



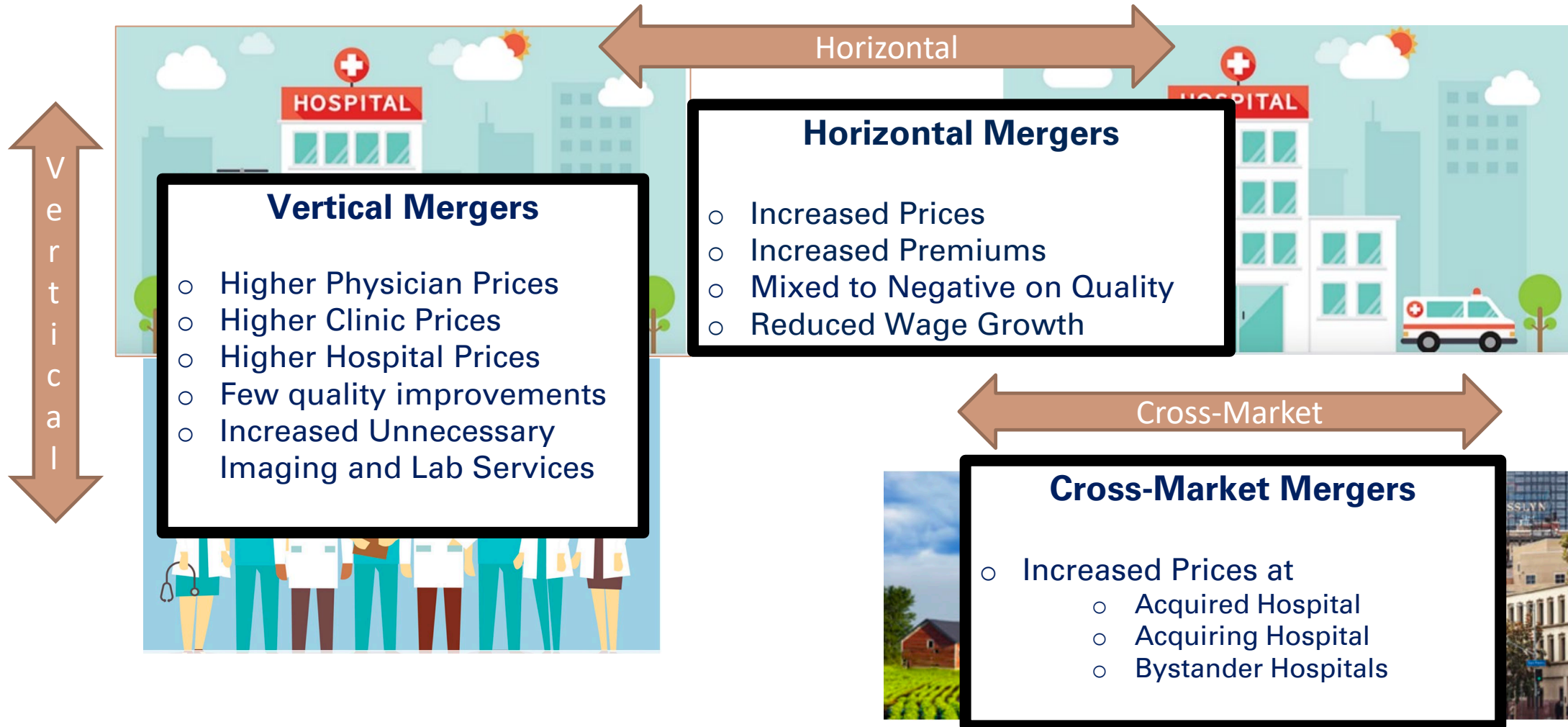
CONSOLIDATION IS INDUSTRY-WIDE

Figure 1: Healthcare Market Concentration Levels 2010-2018



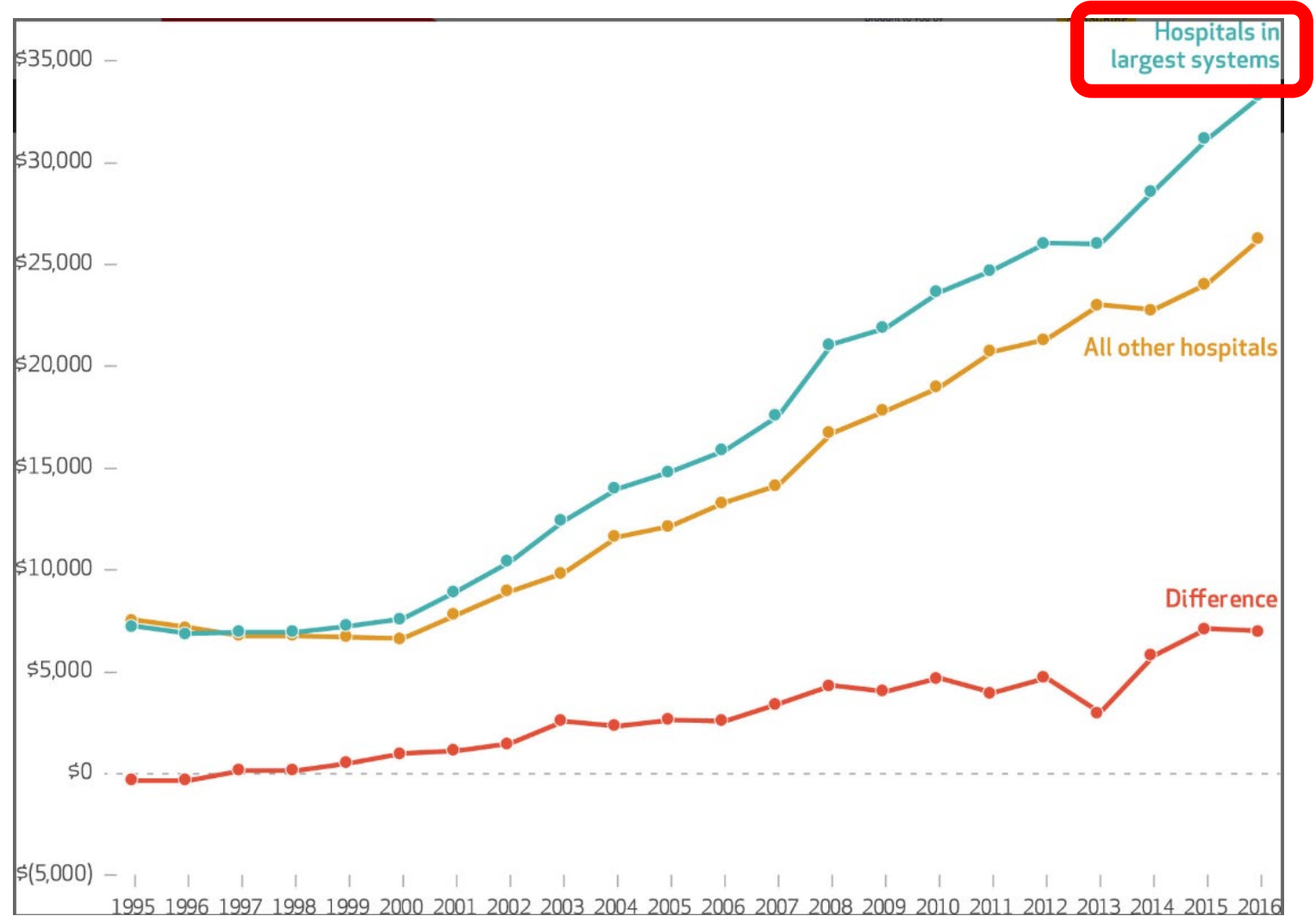
Source: Nicholas C. Petris Center on Health Care Markets and Consumer Welfare (petris.org), University of California, Berkeley, analysis of data from the American Hospital Association Annual Survey, SK&A Office Based Physicians Database from IQVIA, and Managed Market Surveyor File from HealthLeaders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

THE EFFECTS OF MERGER MANIA



HIGHER
CONCENTRATION
LEADS TO HIGHER
PRICES

Hospital Prices in California

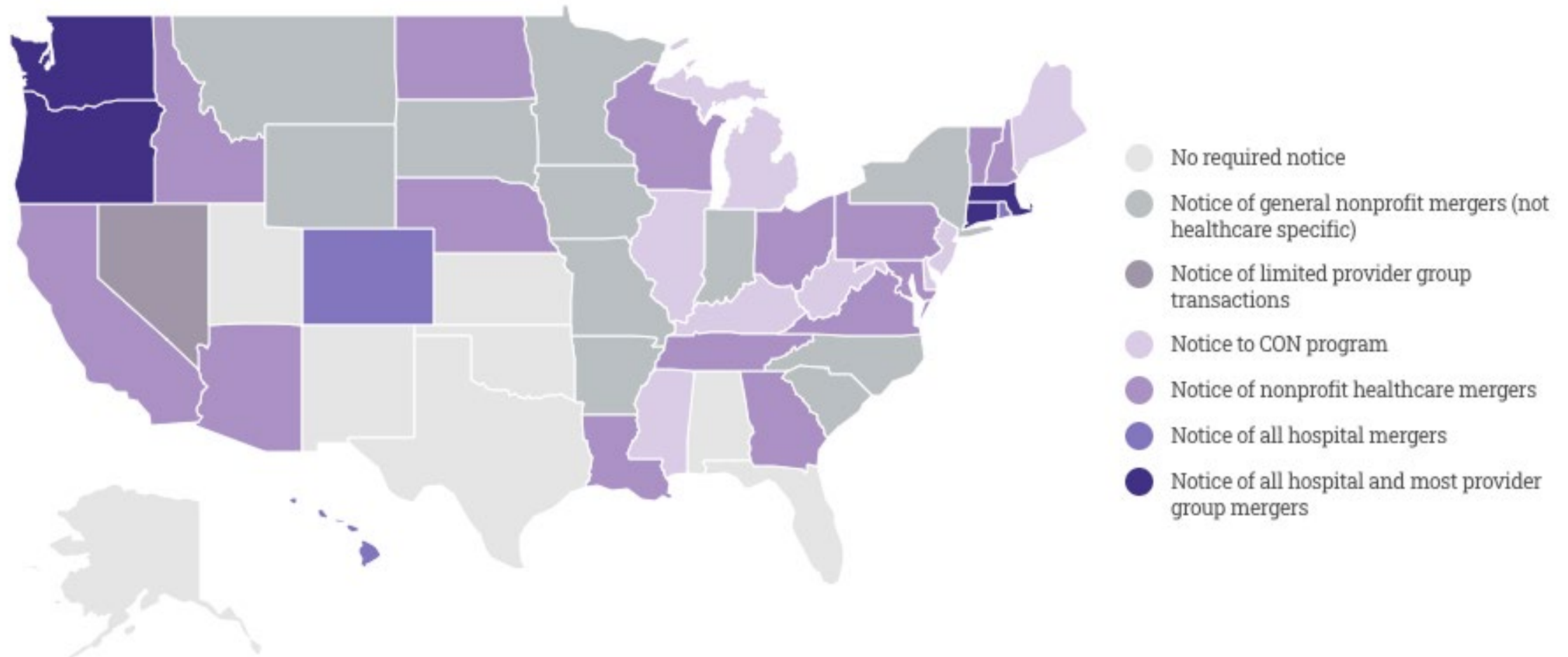


Source: Glenn A. Melnick, Katya Fonkych, and Jack Zwanziger, The California Competitive Model: How Has It Fared, And What's Next?, 37 Health Affairs 1417 (Sept. 2018)

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/>

Statutory Authority: Ideal Provider Merger Review

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





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. GUDIKSEN, 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

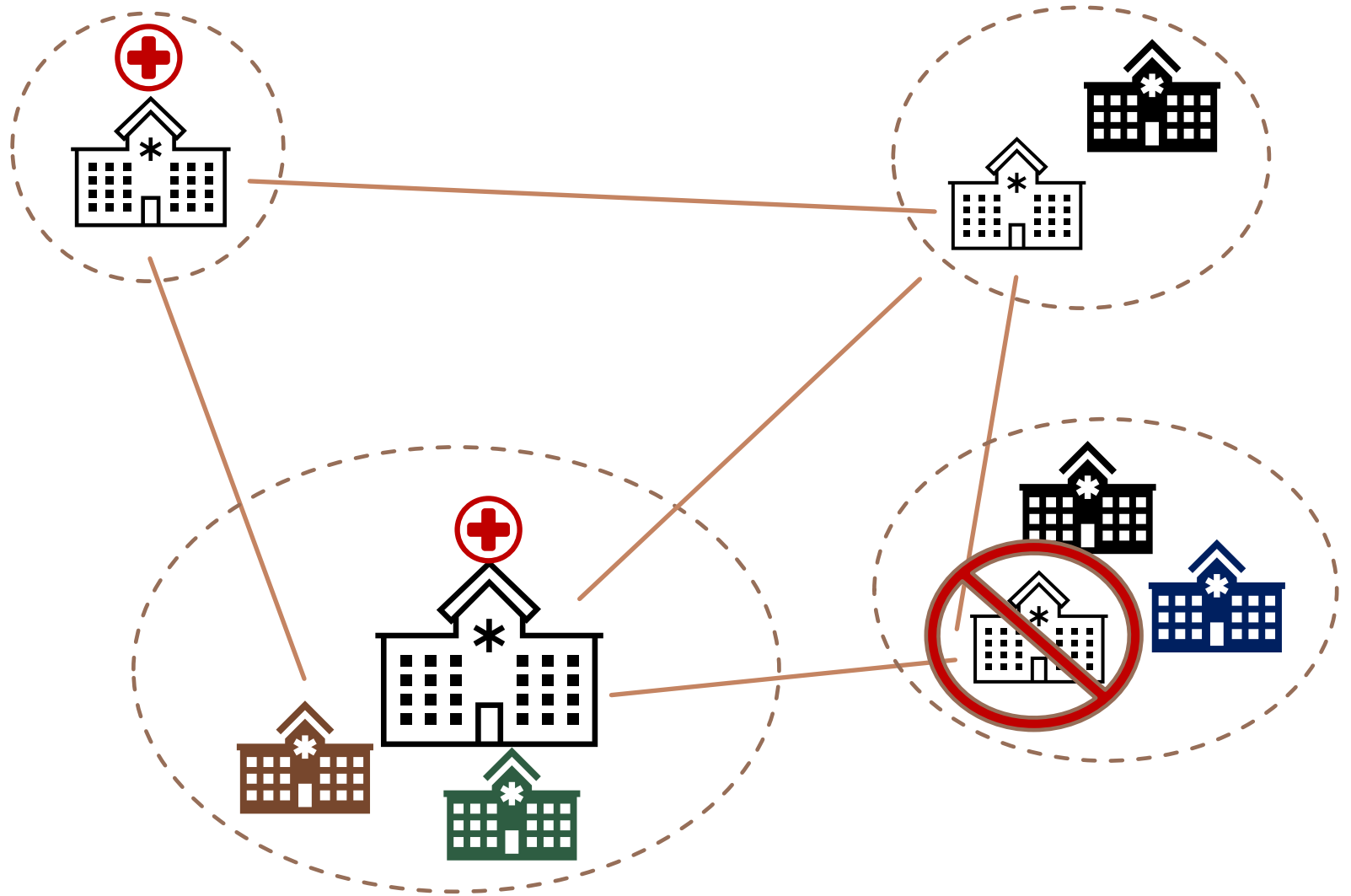
Contracts with insurers allow hospitals to hide prices from consumers, add fees and discourage use of less-expensive rivals

ANTICOMPETITIVE CONTRACT CLAUSES

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

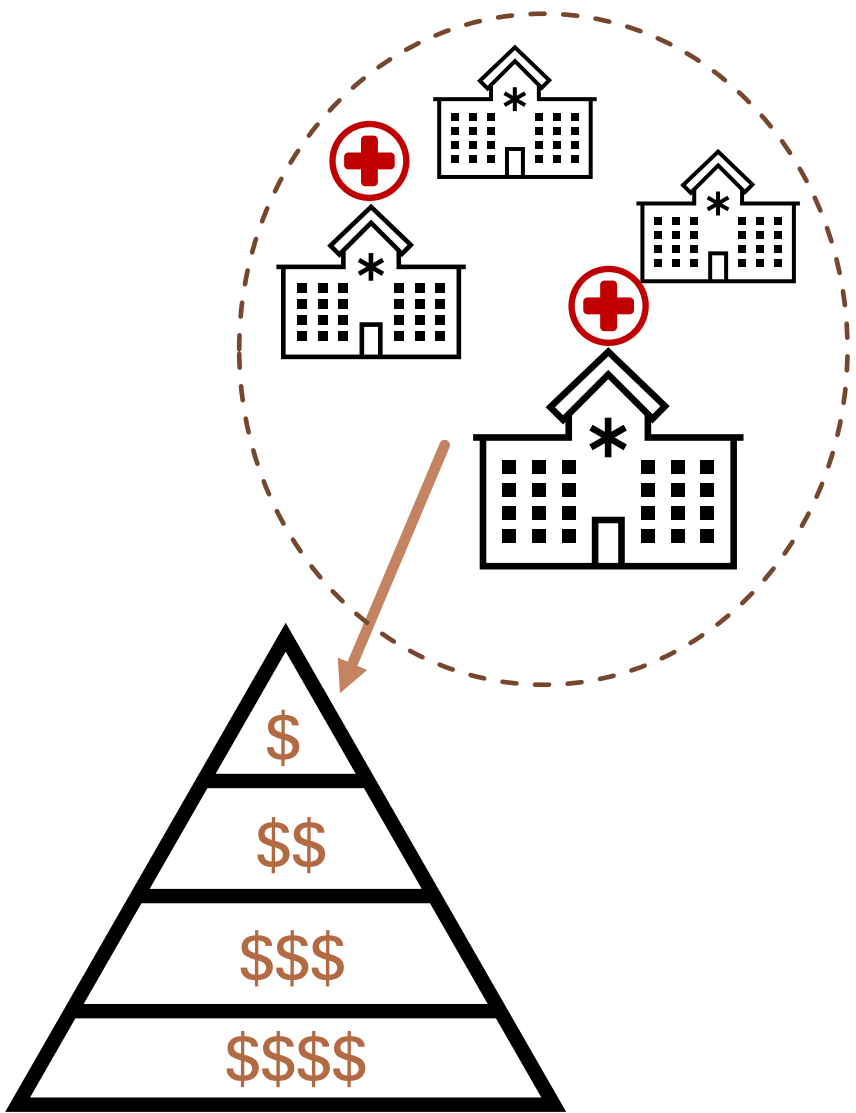
ALL OR NOTHING CONTRACTING (AFFILIATE CONTRACTING)

- ❖ 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

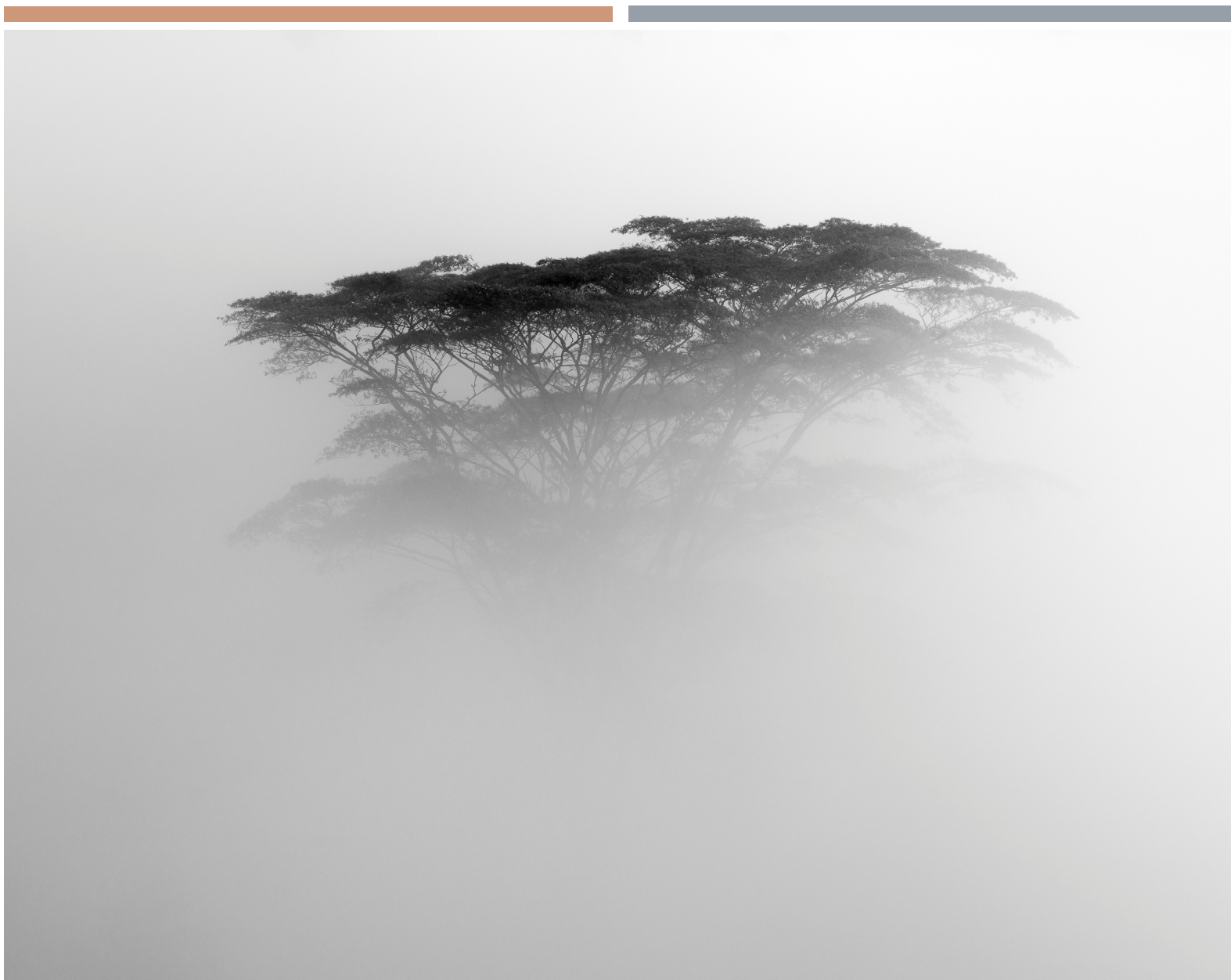
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GAG CLAUSES

- 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



A large, modern multi-story hospital building with a curved facade and extensive glass windows. The Sutter Health logo and name are visible on the upper left portion of the building.

 **Sutter Health**
Sutter Medical Center

**ALLEGED ABUSE OF
MARKET POWER:**

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

SIDIBE V. SUTTER HEALTH

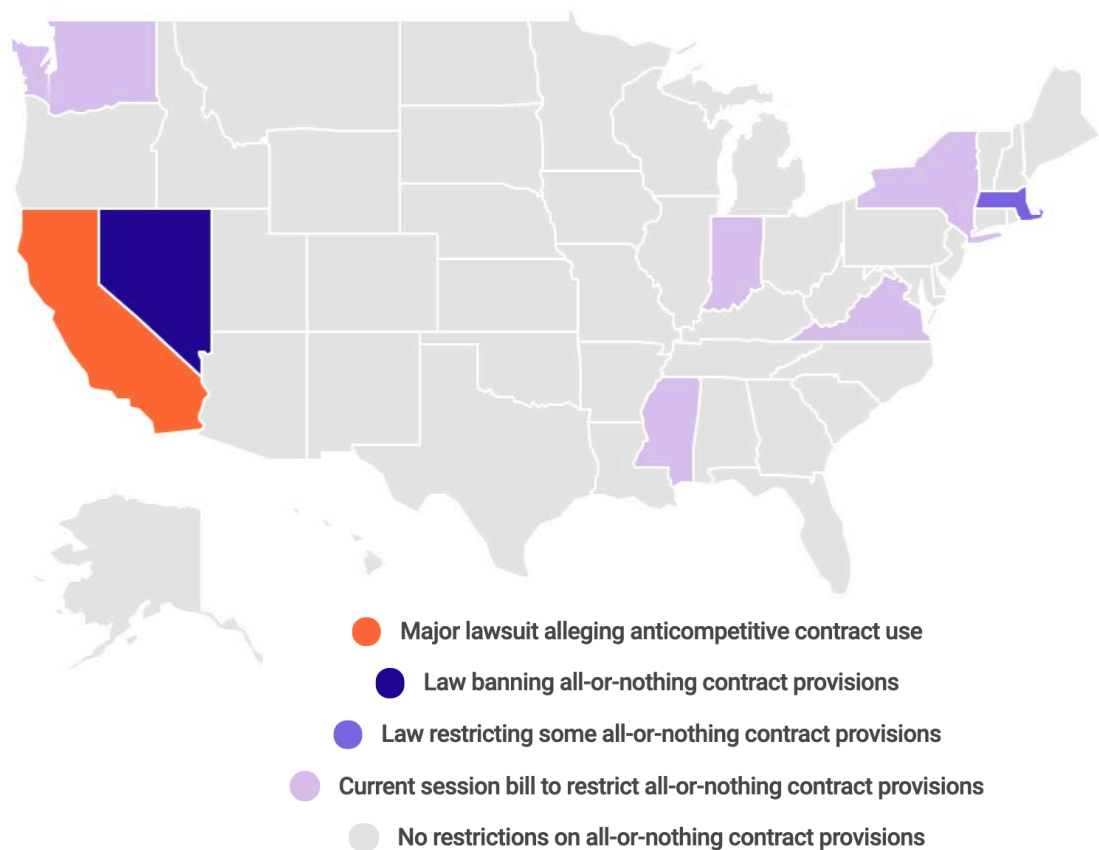
schetti
children's Center

A large center pivot irrigation system is shown in a lush green field. The system consists of multiple long metal arms supported by a series of wheels, with numerous smaller pipes and nozzles extending from them. The background features rolling hills under a clear blue sky. A dark grey banner with white text is overlaid at the bottom of the image.

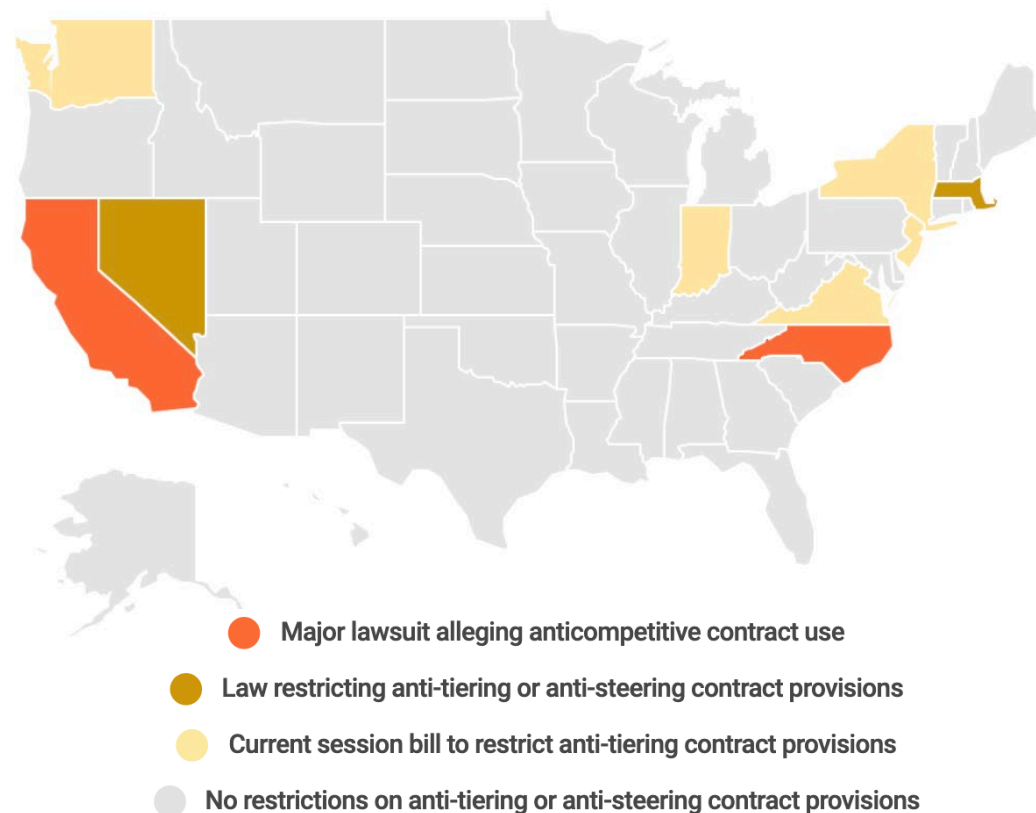
ANTITRUST ENFORCEMENT SEEDS OTHER INTERVENTIONS

STATES WITH LAWS RESTRICTING USE OF SPECIFIC CONTRACT TERMS

All-or-nothing or Affiliate Contracting Restrictions

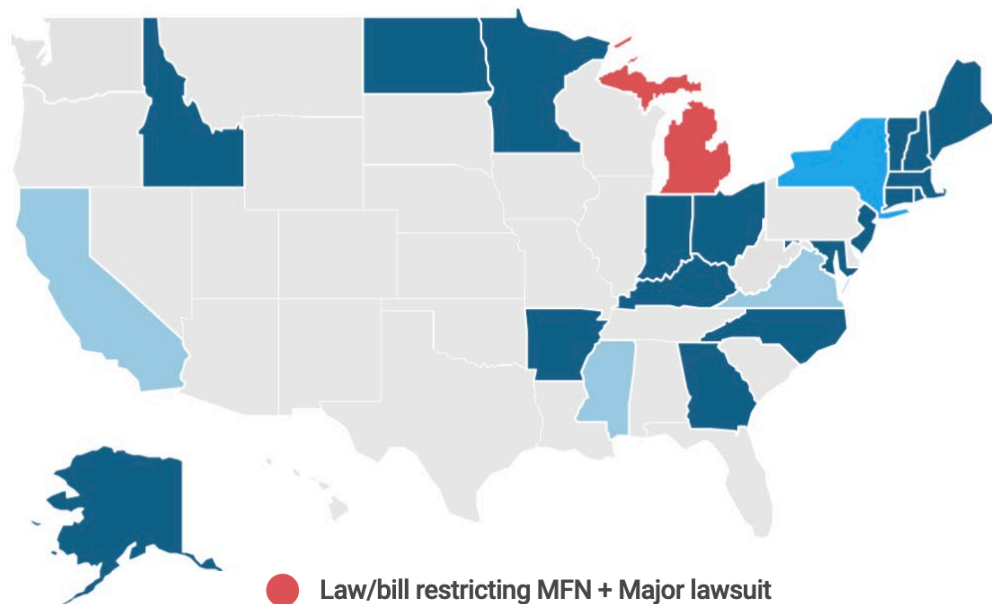


Anti-tiering/anti-steering Restrictions



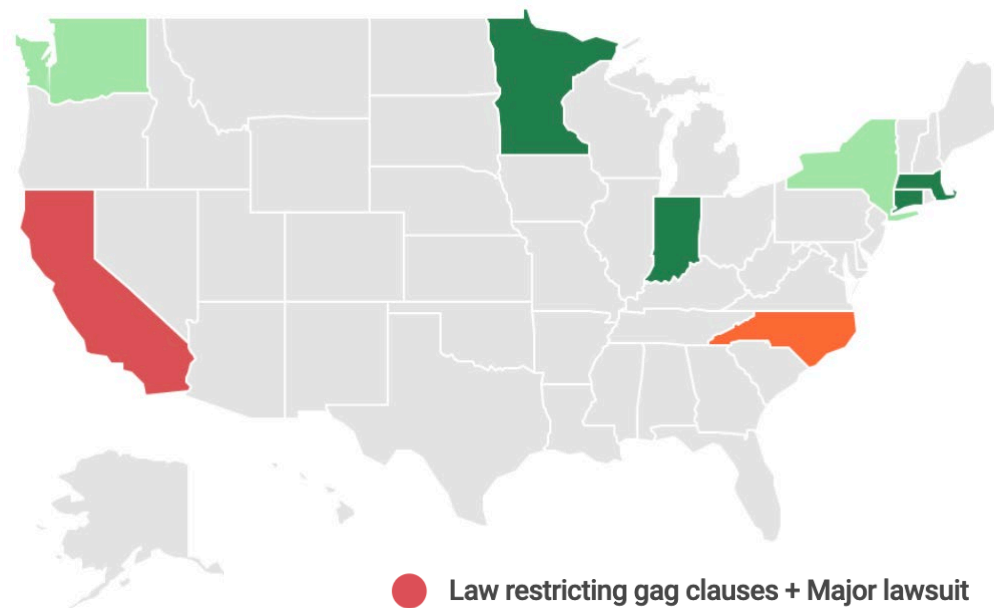
STATES WITH LAWS RESTRICTING USE OF SPECIFIC CONTRACT TERMS

Most-favored Nation Restrictions



- Law/bill restricting MFN + Major lawsuit
- Law restricting MFN contract provisions
- Law discouraging MFNs/Current session bill to restrict MFNs
- Current session bill to restrict MFNs
- No restrictions on MFN contract provisions

Gag Clause or Price Secrecy Restrictions



- Law restricting gag clauses + Major lawsuit
- Major lawsuit alleging anticompetitive contract use
- Law restricting gag clauses (price secrecy provisions)
- Current session bill to restrict gag clauses (price secrecy provisions)
- No restrictions on gag clauses (price secrecy provisions)

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/>

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