Senate Bill 1 – "An Act repealing the Certificate of Need (CON) program for health care facilities"

Alaska's Certificate of Need Program – AS 18.07

Senator David Wilson

Senate Health & Social Services Committee

March 27, 2019

What is a Certificate of Need Program?

Source: George Washington University-Mercatus Center

Certificate of Need Programs

CON laws are state-level statutory laws that require healthcare entities to obtain permission to make significant expenditures or to construct or expand facilities and services, based on the an application fee and the theory that controlling the supply of facilities, equipment, and services is the best method to restrain rising healthcare costs and prevent over-expansion of healthcare facilities.

The Certificate of Need laws were originally created to contain healthcare costs, prevent an over-supply of medical services and infrastructure, and improve access to care for the indigent or to underserved populations.

The basic assumption underlying Certificate of Need is excess capacity stemming from the overbuilding of healthcare facilities which results in healthcare price inflation and overcapacity.

National History of Certificate of Need

1974: National Health Planning Resources Development Act (NHPRDA) required all states seeking federal funding for health programs to establish oversight agencies for the submission of proposals for any major capital spending on health care, i.e. a Certificate of Need program.

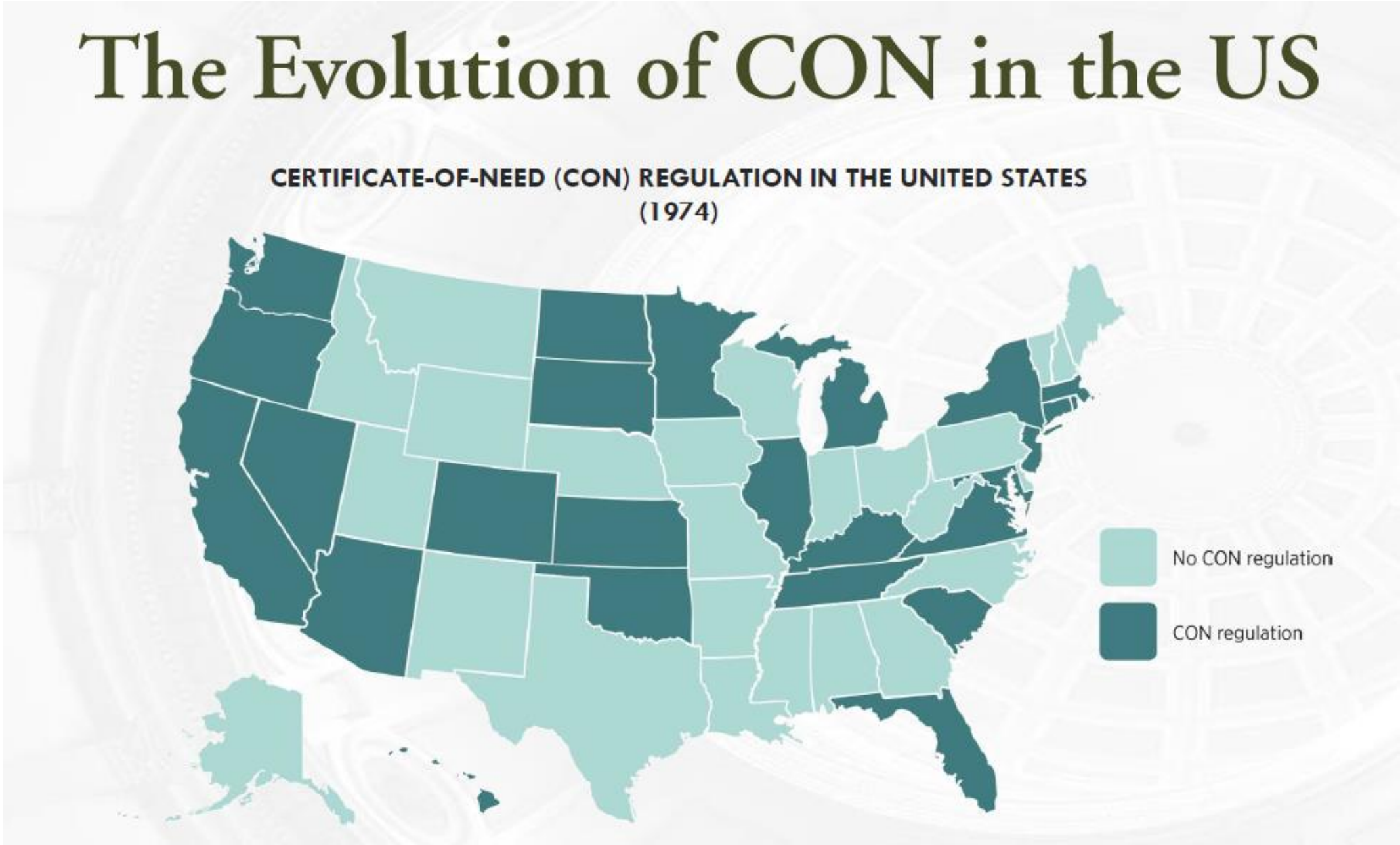
1974-1982: Health care costs continue to rise nationwide despite almost 100% state participation in NHPRDA.

1982: Congress initiates a review of Certificate of Need programs and the Congressional Budget Office study doesn't offer a recommendation but reports that problems with NHPRDA has limited the program's success in achieving cost savings.

1983-1985: Five states abandon Certificate of Need even though NHPRDA is still in effect.

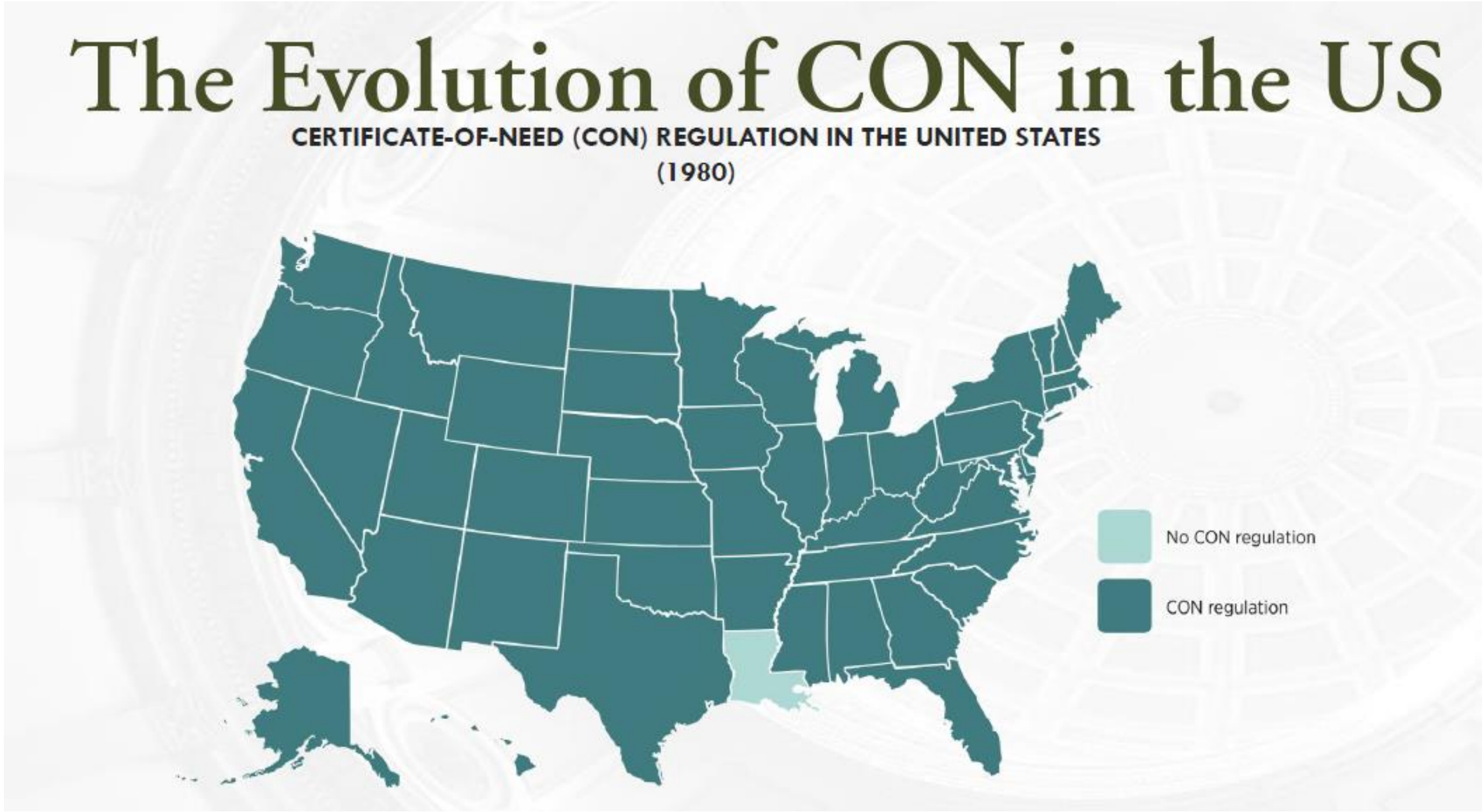
1987-Present: Congress repeals NHPRDA. Following the U.S. repeal, 13 states have now terminated their **Certificate of Need** programs**.**

The Evolution of CON in the US



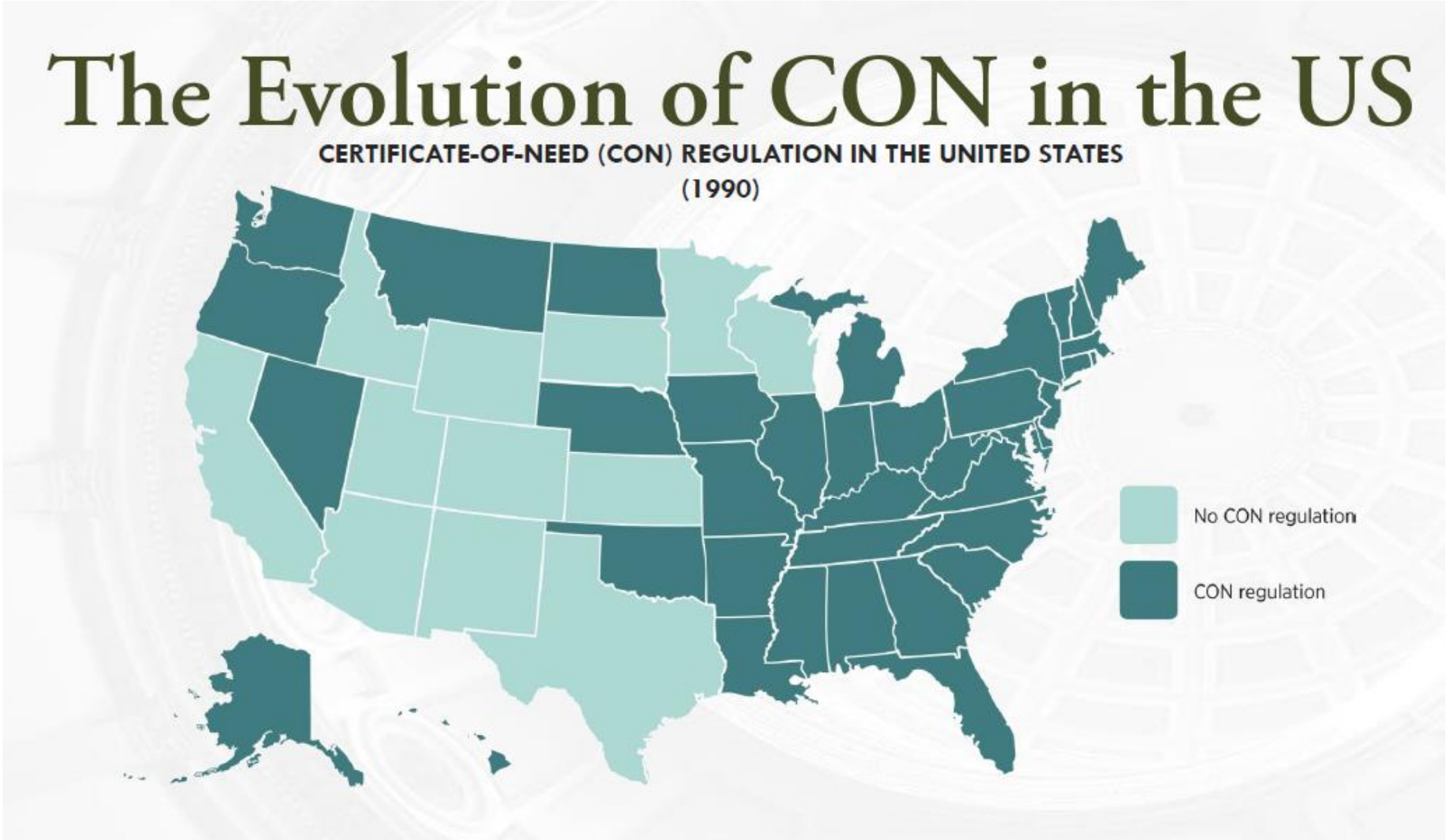
Source: National Conference of State Legislators

The Evolution of CON in the US



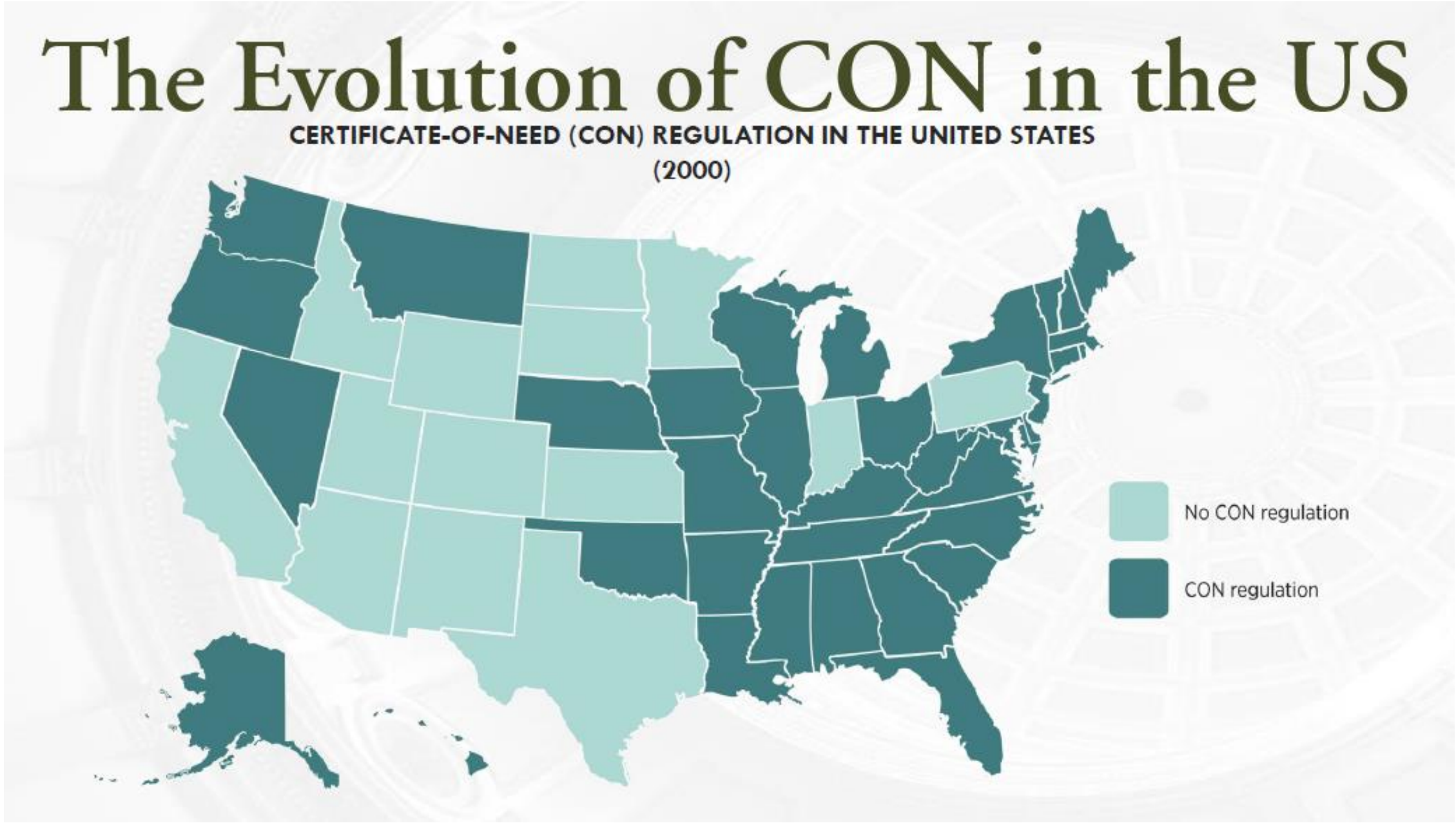
Source: National Conference of State Legislators

The Evolution of CON in the US



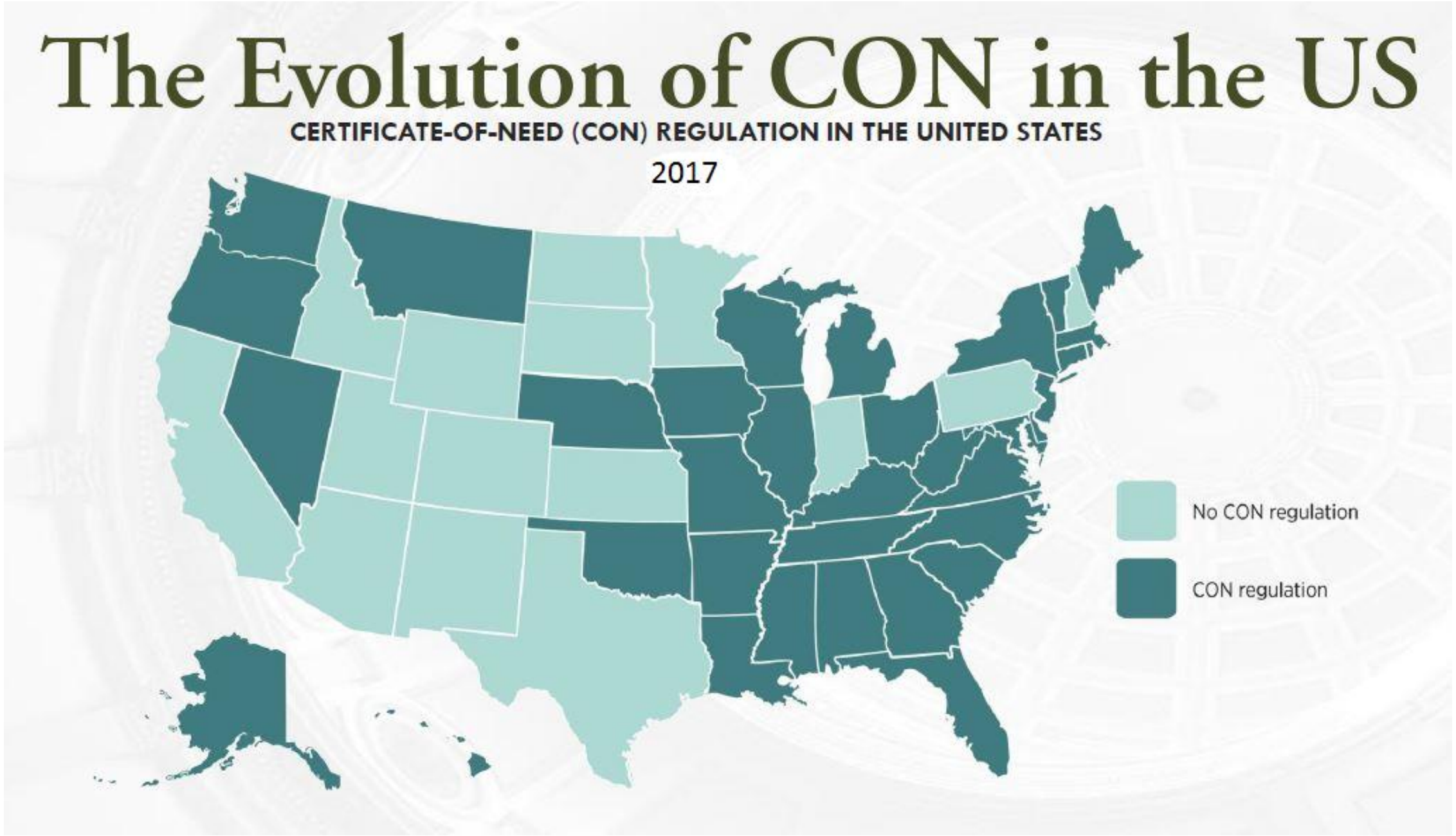
Source: National Conference of State Legislators

The Evolution of CON in the US



Source: National Conference of State Legislators

The Evolution of CON in the US



Source: National Conference of State Legislators

Alaska's Legislative History of Certificate of Need

The following is a past summary of enacted legislation passed by the Alaska Legislature regarding the Certificate of Need program:

1976: HB 665 (Ch. 275, SLA 1976), which repealed and replaced all of AS 18.07 to establish the CON program and regulation of healthcare facilities.

1982: HB 591 (Ch. 59, SLA 1982), covered a temporary but non emergency CON for a health care facility and added a definition of certificate of need dealing with the issuance of certificates.

1982: HB 591 (Ch. 25, SLA 1981), clarified that Pioneer Homes are not subject to CON.

1983: SB 85 (Ch. 95, SLA 1983), added a $1.0 million floor for requiring a CON.

1990: HB 85 (Ch. 85, SLA 1990), provided authorization to Dept. of Health & Social Services to charge a fee for the CON.

1991: SB 86 (Ch. 21, SLA 1991), deleted the federal statutes and changed the title section.

1996: HB 528 (Ch. 84, SLA 96), Placed a moratorium on nursing home beds and established a legislative working group on long-term care.

2004: HB 511 (Ch. 48, SLA 04), Included Residential Psychiatric Treatment Centers.

Source: Legislative Affairs Agency, Research Center

Alaska's Certificate of Need Program

Certificate of Need approval is required in Alaska for any expenditures totaling more than $1.5 million dollars for:

- Construction of a health care facility;
- Alteration of the bed capacity of a health care facility;
- Addition of a category of health services provided by the health care facility; and,
- Conversion of a building or a part of a building to a nursing home.

Non-Refundable Applications & Fees:

- Activity valued at $2.5 million dollars or less, the cost would be $2,500.00 to apply; and,
- Activity valued more than $2.5 million dollars, a fee equal to .1% of the estimated cost is applied, up to a maximum of $75,000.00.

Source: Alaska Statutes 18.07

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Alaska's Certificate of Need Program

Time Standards for review of applications for Certificate of Need:

The department has up to 60 days to review a completed application and to allow concurrent applications/proposals for a similar activity in the same geographic area.

Proceedings for modification, suspension, and revocation:

The department, a member of the public who is substantially affected by activities authorized by the certificate, or another applicant for a Certificate of Need may initiate a hearing conducted by the Office of Administrative Hearings to obtain a modification, suspension, or revocation of an existing Certificate of Need by filing an accusation, THE Commissioner has authority to do this as prescribed under AS 44.62.360.

Definition:

Health care facility means a private, municipal, state, or federal hospital, psychiatric hospital, independent diagnostic testing facility, residential psychiatric treatment center, tuberculosis hospital, skilled nursing home facility, kidney disease treatment center, intermediate care facility, and ambulatory surgery facility.

- *Source: Alaska Statutes 18.07*

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CON Exemptions

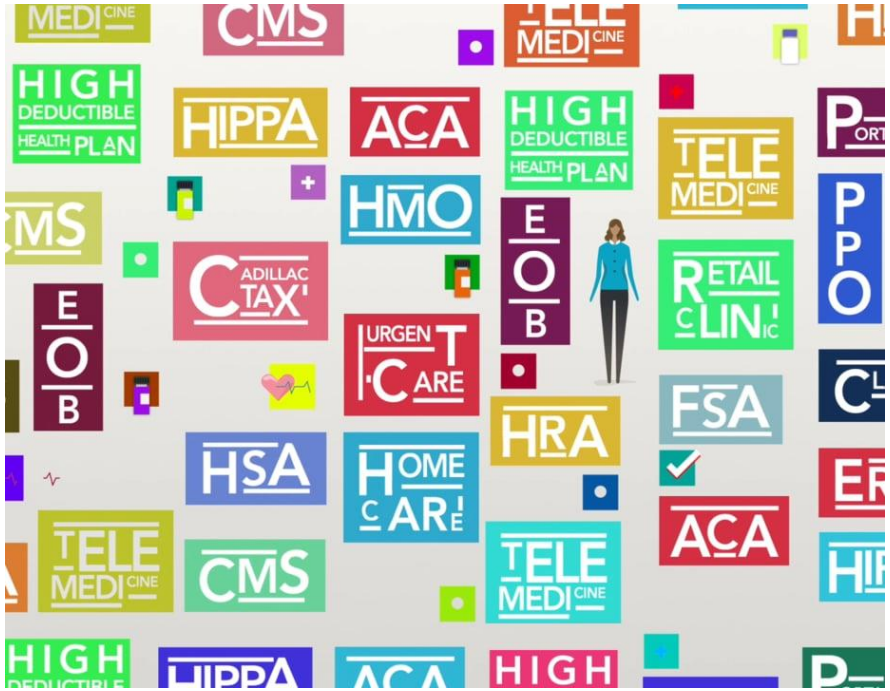
An operational ambulatory surgical facility, may expend any amount of money, to relocate the facility to a new site within the same community without seeking a CON approval. As long as the neither the bed capacity nor the number of categories of health care services remains the same.

Exempt Entities:

- *The Alaska Pioneers' Homes;*
- *The Alaska Veterans' Home;*
- *Offices of private practice physicians or dentists whether in individual or group practice;*
- *US Indian Health Services Facilities; and,*
- *Alaska Tribal Healthcare entities.*

Source: Alaska Statutes 18.07/Regulations 7 AAC 07

Healthcare is complicated!



- Our current healthcare system is a highly fragmented.
- Data is siloed with no sharing, because "proprietary" patient data can be profitable.
- Insurance is bought mostly by employers and the patient is removed from the purchasing process.
- Government laws and regulations require unnecessary administrative efforts for healthcare providers .
- The government dictates what health care facilities, providers, and services are allowed and not allowed into your community.
- The freedom of selecting your healthcare services is dictated and controlled by government.

Repealing Alaska's CON is only a piece of the puzzle

- Over 100 million Americans in twelve states (31% of the U.S. population) live without CON.
- 40 years of studies very clearly show that non-CON states have better access, lower costs, higher quality outcomes, and lower mortality rates than CON states.
- Proponents of CON would have you believe that if CON was repealed, there would chaos in our communities: small hospitals would close, Medicaid/Medicare costs would rise, and hospitals would be unable to provide EMTALA for the indigent care
- CON states and non-CON states have very similar levels of indigent care, whether you have a con or not, this is based on **actual research!**

Source: US Census Bureau; Mercatus Center July 14, 2014 research

Our healthcare providers are cherished and valued members of our communities!

Attempts to repeal Alaska's Certificate of Need program is not meant in anyway, shape, or form to dishonor, disrespect, or minimize how important our healthcare providers are to Alaskan!

They are our friends, family members, and neighbors.

Consequences of Alaska CON Failures

We believe Alaska's CON laws have:

- Stifled competition, prevented innovation, and prevented new technology;
- Failed to increase access for indigent care or the underserved populations;
- Created barriers for new entrants;
- Protected incumbent hospitals and created monopolies;
- And increased healthcare costs, especially in a restrained market like Alaska.

Result: We have the highest healthcare costs in the world!

Why is competition important in our healthcare markets

"Competition is essential to ensure that providers and health plans are subject to the market forces that drive them to attract patients and subscribers by offering low prices and high quality. If market powers are concentrated among providers or plans, they are insulated from those forces."

"Material, lasting improvement to our healthcare system requires harnessing private sector innovation and competition to benefit of all. When ingenuity and capital are focused on what we most value, we see incredible innovation and productivity gains. Enabling competition requires alignment of the incentives of all stakeholders with what we value: sufficient transparency and appropriate regulations that further benefit Alaskans."

"Reform must address the underlying drivers of costs and cost increases, including the current lack of value-based competition in our healthcare delivery system (e.g., hospitals, medical service providers, and pharmaceuticals."

Why Competition Law Matters to Health Care Quality - William Sage, David Hyman, Warren Greenburg - 2003 (page 32); Making Healthcare Markets Work Better: The Role Of Regulation." Stuart Guterman – January 2017 (page 2);

Why is competition important?

"Reduced competition among clinicians leads to higher prices for healthcare services, reduces choice, and negatively impacts overall healthcare quality and the efficient allocation of resources."

"State polices that restrict entry into provider markets can stifle innovation and more cost-effective ways to provide care while limiting choice and competition."

A Bipartisan Blueprint for Improving Our Nation's Health System Performance- Governor's John Hickenlooper, John Kasich, Bill Walker, Tom Wolf, and Brian Sandoval – February 2018 (page 2); Reforming America's Healthcare System Through Choice and Competition – November 2018 (page 3)

Competition is Important

The quotes you see are from research, studies and data regarding how CON laws have stifled competition:

"Competition creates choices for consumers and raises quality standards as providers compete for patient loyalty. A 1993 study found that hospitals in *more competitive markets* had average costs below those of *less competitive markets*."

"Market competition in healthcare delivery provides economic empowerment to patients and payors by providing access, encouraging innovation and the investment of capital in overall cost saving technologies, and creating choices for consumers which, in turn, encourages providers to raise quality standards as they compete for patient loyalty. When patient choice is diminished, decisions about appropriate pricing/costs, access, quality, and beneficial outcomes become the sole purview of the elite groups of oligopoly decision-makers who, in the absence of healthy competition, are free to ignore market demands and patient needs. This circumstance is what drives the acceleration of costs."

Written Testimony to the Senate Labor & Commerce Committee on April 6, 2017 – Robert J. Cimasi (page 7 & 8) + "California Providers Adjust to Increasing Price Controls, J Zwanziger, G. Melnick, A. Bamezai, Health Policy Reform – 1993 (Pages 241-58); Written testimony to the Senate Labor & Commerce Committee on April 6, 2018 – Matthew D. Mitchell, PhD, Mercatus Center-George Mason University (page 17).

CON Laws Prevent Innovation and New Technologies

Example, this applies to Alaska as well due to our CON law restrictions if you're a new entrant and costs exceed $1.5 million !

Dr. Singh, of North Carolina, cannot purchase a new MRI machine because of CON laws in North Carolina, the law that applies here.

On average, an MRI at a North Carolina hospital costs upwards of 2,000. Dr. Singh's charges between $500 to $700 but he has to use a mobile scanner instead of a fixed MRI scanner because of the CON laws.

"The answer lies in the powerful lessons business has learned over the past two decades about the imperatives of competition. In industry after industry, the underlying dynamic is the same; competition compels companies to deliver increasing value to customers. The fundamental driver of this continuous quality improvement and cost reduction is innovation. Without incentives to sustain innovation in health care, short-term cost savings will soon be overwhelmed by the desire to widen access, the growing health needs of an aging population, and the unwillingness of Americans to settle for anything less that the best treatments available. Inevitably, the failure to promote innovation will lead to lower quality or more rationing of care – two equally undesirable results."

Institute of Justice, North Carolina CON (page 1); Making Competition in Health Care Work – Elizabeth Teisbeth, Michael Porter, & Gregory Brown – Harvard Business Review – 1994 (page 1-2)

How CON Laws Prevent Innovation and New Technologies

" The misguided assumption underlying much of the debate about health care reform is that technology is the enemy. By assuming that technology drives up costs, reformers neglect the central importance of innovation or, worse yet, attempt to slow its pace. In fact, innovation driven by rigorous competition is the key to successful reform. Although health care is unique in some ways, in this respect, it is no different than any other industry."

"CON repeal would remove unnecessary and irrational constraints and costly regulatory barriers to innovation; to investment in new technologies; to quality services; and, to cost-effective improvements, which as the technology advances, offer the true and valid opportunity to provide cost-effective quality healthcare to Alaska's citizens."

"Systematically review and rationalize federal and state regulations that may inhibit innovation and competition (e.g., credentialing, clinical trials, and prescription drug import regulations)."

Institute of Justice, North Carolina CON (page 1); Making Competition in Health Care Work – Elizabeth Teisbeth, Michael Porter, & Gregory Brown – Harvard Business Review – 1994 (page 2); Written Testimony to the Senate Labor & Commerce Committee on April 6, 2017 – Robert J. Cimasi (page 8) ; A Bipartisan Blueprint for Improving Our Nation's Health System Performance- Governor's John Hickenlooper, John Kasich, Bill Walker, Tom Wolf, and Brian Sandoval – February 2018 (page 4)

CON Laws Create Barriers for New Entrants

"Government-erected barriers to entry that can lead to a highly-concentrated and inefficient market."

"Under normal market conditions, high prices and/or high profit margins attract new producers and sellers. This increased supply leads to lower prices and higher quality over time. Without the possibility of new entrants and real competition, however, existing producers can use market power to keep prices high and quality low."

"Denial of patient choice in Alaska is because of the barrier to entry posed by CON. New Medical providers, no matter how efficiently and creatively they might contribute to higher quality, more beneficial outcomes, and lower overall healthcare costs, must receive permission and can be challenged by incumbents and this limits competition for Alaskans and their families."

"On average, application fees are $32,000; however, total costs associated with the process to obtain regulatory permission to provide the medical services requested can exceed $5 million for a single application (Conley and Valone 2011) , which exceeds the average price of a magnetic resonance imaging (MRI) machine. The costs include consulting fees as well as review and appeal fees, and the process can take up to three years."

Reforming America's Healthcare System Through Choice and Competition – November 2018 (page 14); Written Testimony to the Senate Labor & Commerce Committee on April 6, 2017 – Robert J. Cimasi (page 9); Barriers to Entry in the Healthcare Markets, Thomas Stratmann, Matthew Baker, Mercatus Center – 2017 (page 4)

What About EMTALA?

Emergency Medical Treatment And Labor Act (EMTALA) is a federal law that requires Medicare-participating hospitals with emergency departments to medically screen every patient who seeks emergency care and to stabilize or transfer those with medical emergencies, regardless of health insurance status or ability to pay – this law has been an unfunded mandate since it was enacted in 1986.

CON laws have failed to increase access for indigent care or the underserved populations

American College of Emergency Physicians – 2015 (page 1, 3, & 4);

Is EMTALA Related Care the Driver of Rising Healthcare Costs?

Emergency care in America is just 2 percent of all U.S. medical costs.

American College of Emergency Physicians – 2015 (page 1, 3, & 4);

By limiting competition, **CON laws allow incumbent healthcare providers to earn greater profits** by charging higher prices for private health insurance and financing indigent care.

"Although advocates of CON laws might seek to promote indigent care, the evidence does not show that CON laws advance that goal."

"Most noticeable in all of the results is a lack of any statistical significant evidence for the cross-subsidization hypothesis. The data provides no statistically significant evidence that increased competition leads to reductions in charity care. The claim that hospitals will use market power to increase services to the poor is largely unsupported by this data."

Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission on the Certificate of Need Laws and Alaska Senate Bill 62 (previous bill number for current SB 1) – April 7, 2017 (pages 13-14); Hospital Competition and Charity Care, Christopher Garmon, Bureau of Economics Federal Trade Commission – October 2006 (page 18)

Contemplate the Following:

"The huge enterprises that U.S. hospitals have become are largely unaccountable for the amounts of revenue they raise or the uses to which they put that money. Indeed they are major contributors to ever-rising healthcare costs."

"Competition is the best way both to limit dominant hospitals' claims on gross domestic product (GDP) and to restore voters and their representatives the power to decide just what extras are worth paying for."

"Early analysis of the Medicare Care Report data show national declines in uncompensated care, especially in expansion states, although the data do not permit reliable estimates of trends in Medicaid payment amounts."

"Almost all states make Medicaid Disproportionate Share Hospital (DHS) payment are made to hospitals serving high proportions of Medicaid or low-income patients."

What is Disproportional Share Hospital payments?

Federal law requires that state Medicaid programs make Disproportionate Share Hospital (DSH) payments to qualifying hospitals that serve a large number of Medicaid and uninsured individuals. Approximately 3,109 hospitals receive this adjustment.

Hospital Competition and Charity Care, Christopher Garmon, Bureau of Economics Federal Trade Commission – October 2006 (page 18); CON Laws: Analysis and Recommendations for the Commission on Rationalizing New Jersey's Health Care Resources, Janelle Sagness – January 2007 (page 9) ; Understanding Medicaid Hospital Payments and the Impact of Recent Policy Changes, Peter Cunningham, Katherine Young, Rachel Garfield, Julia Foutz, Kaiser Family Foundation - 2019 (page 3 & 8); Medicaid.gov Disproportionate Share Hospitals web site.

Medicaid Disproportionate Share Hospital (DSH) payments in 2018 for Alaska:

Who or where was the funding distributed to? What healthcare entities/facilities?

- 4 Hospitals have had ongoing agreements with the department to receive DSH for many years.
  - Alaska Psychiatric Institute (by regulation API receives their facility specific maximum allowable by law)
    - FY2018-$14.7 million
    - FY2017-$14.6 million
    - FY2016-$14.1 million
  - Fairbanks Memorial Hospital- note the decline resulting from falling uncompensated care
    - FY2018-$258.9 thousand
    - FY2017-$660.5 thousand
    - FY2016-$1.3 million
  - Bartlett Regional Hospital – note the decline resulting from falling uncompensated care
    - FY2018-$302.5 thousand
    - FY2017-$274.5 thousand
    - FY2016-$1.8 million
  - Providence Alaska Medical Center - $2,531,019 annually.
    - FY2018-$2.5 million
    - FY2017-$2.5 million
    - FY2016-$2.5 million

State of Alaska , Department of Health & Social Services, email dated January 18, 2019.

Final Considerations on EMTALA

How do other states deal with EMTALA?

Example: New Jersey requires Ambulatory Surgery Centers not owned by a hospital to pay a 3.5% tax of up to $200,000 on the facility's annual gross revenue. The tax helps fund the uncompensated care through the Health Care Subsidy Fund.

There are methodologies to help level the playing field for EMTALA in Alaska for those healthcare providers who are mandated to provide EMTALA. It's not an all of nothing proposition and certainly not a reason to retain CON laws in Alaska.

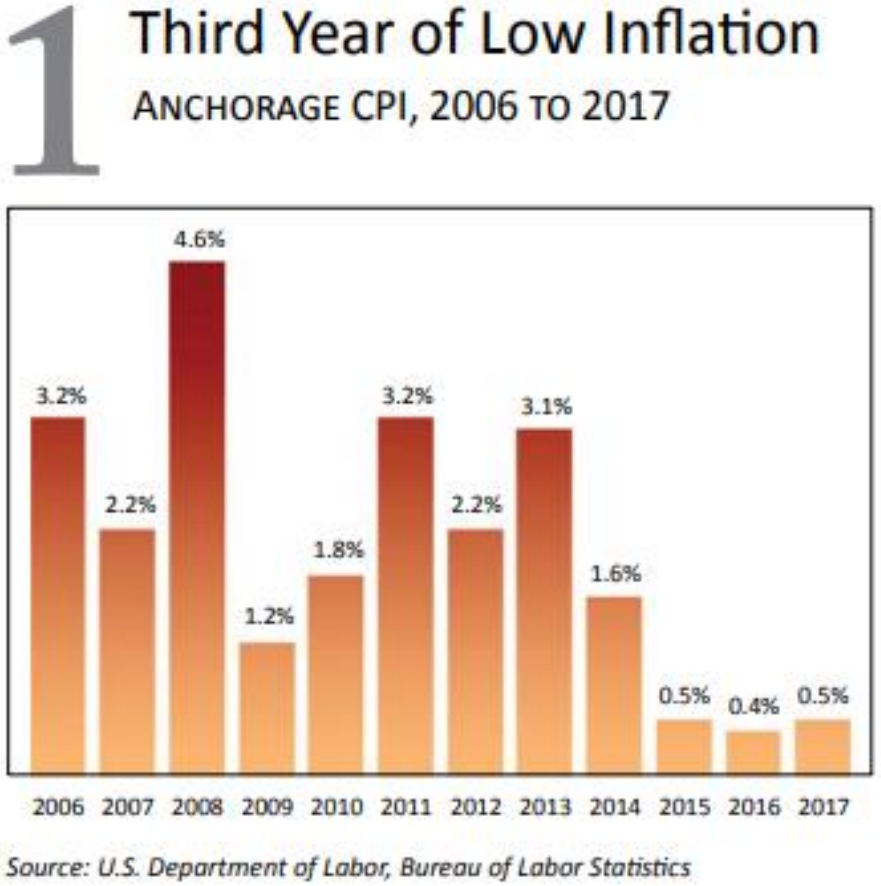
State of Alaska , Department of Health & Social Services, email dated January 18, 2019.

Let's examine the data on Alaska's high healthcare costs!

Inflation vs. Skyrocketing Healthcare Prices

The average overall rate of inflation in Alaska was 1.22% between 2013 – 2017.

Healthcare had a rate of inflation of 10.0% over the same five year period.



Have you heard of the Millian Reports?
This is research data relating to Alaska's healthcare costs in the 2011 Report

KEY CONCLUSIONS

- Hospital operating margins in Alaska were 13.4% on average in 2010, compared with 5.7% for the comparison states (or in other words, average hospital margins in Alaska are 233% of those in the comparison states) Margins for hospitals in rural areas were similar to the comparison states. Margins for hospitals in urban areas were 16.2%, driven largely by high margins in two for-profit hospitals.
- Commercial hospital reimbursement is approximately 137% of the average in the comparison states.
- Average hospital costs are approximately 138% of the average in comparison states.
- Overall health care utilization rates for Medicare patients are similar to the comparison states.

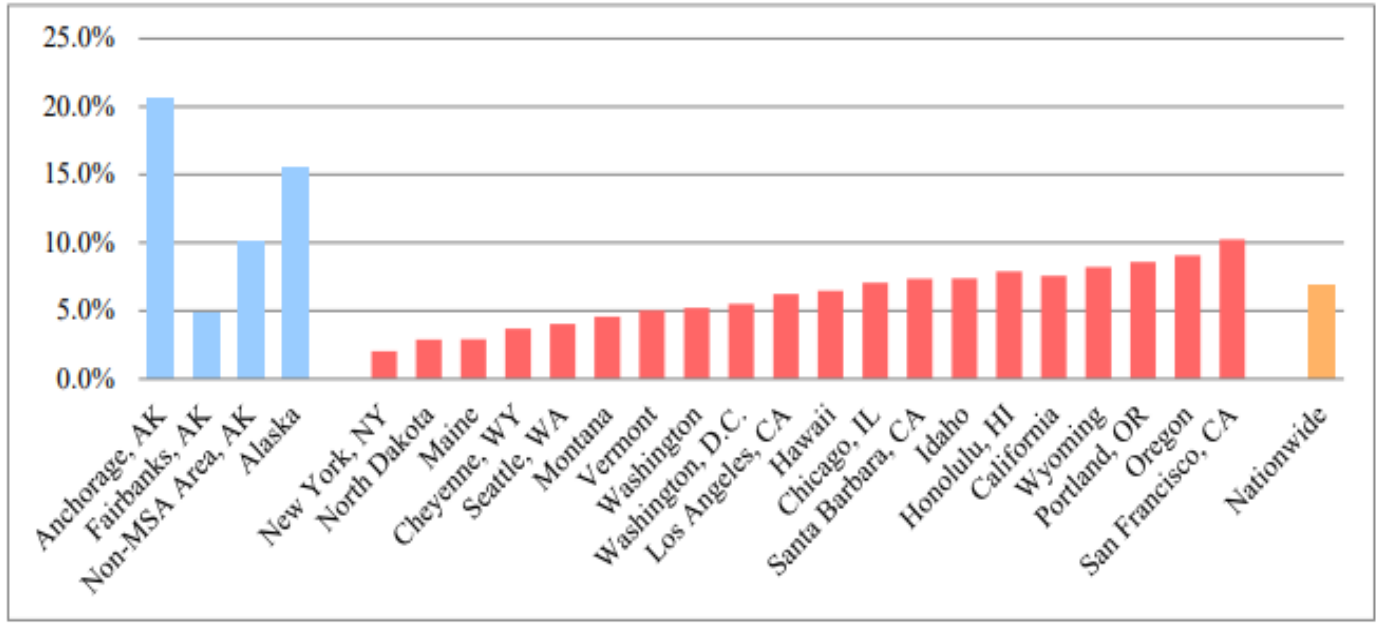
Milliman Client Report, Drivers of Health Care Costs in Alaska and Comparison States, November 2011 – (page 1 & 2)

Data from the Milliman Report from November 2016

Hospital margins

Hospital margins in Alaska are generally higher than those in the rest of the country. Within Alaska, hospital margins in Anchorage are the highest. Figure 10 compares hospital margins for fiscal years 2012 through 2014 by area. Because margins often vary significantly from year to year, we compare a three-year average margin. The margins shown in the chart are total margins, which include nonoperating results such as investment income along with operating results.

Figure 10: Hospital Margins by Area, FY 2012 to FY 2014 Average

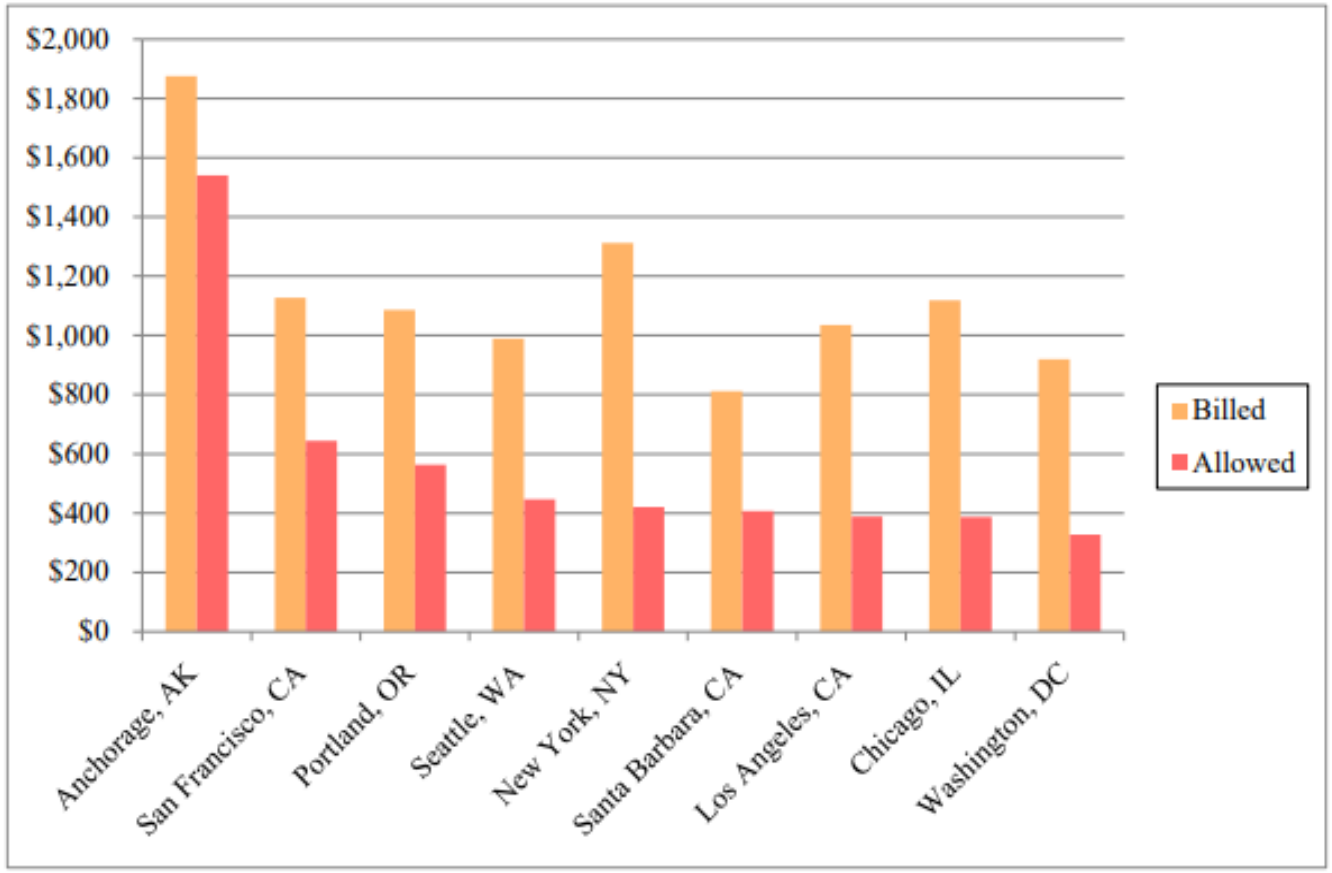


"Figure 10 shows the Alaska average at 15.6% comes in about five points higher than San Francisco, which is the highest of the comparison areas at 10.3%. Anchorage facilities lead the pack with 20.3% margin. Alaska hospitals outside of Anchorage are consistent with the high end of the comparison areas."

Milliman Client Report, Alaska Commercial Healthcare Prices, November 2016 – (page 1 & 10)

An Example - Milliman Report on Colonoscopy from November 2016

Figure 4: Physician Colonoscopy with Biopsy (procedure 45380), Average Unit Cost



Milliman Client Report, Drivers of Health Care Costs in Alaska and Comparison States, November 2016 – (page 5)

Milliman Reports Key Findings - 2016

- Commercial provider payment levels in Alaska are 76% higher than levels nationwide;
  - Physician payment levels are 148% higher in Alaska;
  - Hospital payment levels are 56% higher;

- Commercial provider payment levels have grown faster in Alaska than in comparison areas over the last five years, with the Alaska physician payment level growing by an excess of 15% and the hospital payment levels by an excess of 6%. Combined, this resulted in an additional 10% medical cost growth in Alaska versus the comparison areas over the five year period;

- Hospital margins in Anchorage, at 20.6% are high relative to the nationwide average at 6.9%;

Milliman Client Report, Alaska Healthcare Commercial Prices, November 2016 – (page 1)

Alaska's high healthcare costs are driving our citizens out of state for medical care.

Companies such as The State of Alaska, Premera, General Communication, inc. (GCI), and the Mat-Su Borough have programs that send employees south for medical care because of the high healthcare costs in Alaska.

Look at the cost savings of one such plan available to state employees:

YTD Case Activity – Completed Procedures

State of Alaska

Date of Service	Procedure Description	Location		Case Rates		Savings		Travel Costs
		Member MSA	Provider MSA	Carrier	SurgeryPlus	$	%	
8/21/18	Repair Ventral Hernia (Blocked)	Juneau, AK	Seattle-Tacoma-Bellevue, WA	$17,434	$9,558	$7,876	45.2%	$2,048
9/14/18	Repair Umbilical Hernia (Blocked)	Juneau, AK	Salt Lake City, UT	6,049	2,908	3,140	51.9%	2,706
10/17/18	* Cyst Removal	Juneau, AK	Los Angeles-Long Beach-Anaheim, CA	885	500	385	43.5%	2,404
10/30/18	* Spinal Fusion	Anchorage, AK	Phoenix-Mesa-Scottsdale, AZ	56,141	19,298	36,843	65.6%	3,548
			Total:	$80,508	$32,264	$48,244	59.9%	$10,705

State of Alaska, October 2018 Utilization Report (page 4)

How Do Non-CON states survive?

Twelve States have repealed CON laws, over 100 million Americans - 31% of the U.S. population.

Certificate of Need – State Summary

State	Population	Year CON Repealed
Wyoming	577,737	1989
Idaho	1,754,208	1983
California	39,557,045	1984
Utah	3,161,105	1987
Colorado	5,695,564	1995
North Dakota	760,077	1988
South Dakota	882,235	1983
New Mexico	2,095,428	1985
Kansas	2,911,505	1985
Texas	28,701,845	1996
Pennsylvania	12,807,060	1996
New Hampshire	1,356,458	2018
Total:	100,260,267	
Total US Pop:	327,167,434	
31 % of US Population Lives Without a CON		

Why repeal Alaska's Certificate of Need?

Four decades of research show that CON Laws Have:

- Prevented Access;
- Not increased the levels of indigent care in CON states versus Non-CON states;
- Created barriers to new entrants;
- Enriched incumbent healthcare providers;
- Contributed to high healthcare costs in Alaska;

Alaskans are paying the highest healthcare prices in the world and they continue to increase!

Repealing Alaska's CON program will provide Alaskans with choice and spur competition.

No Better Time to Repeal Alaska's CON Program

As we have shown, four decades of studies and research provide evidence and data that show repealing CON improves healthcare for Americans and will for Alaskans as well.

The fundamental premise of our systems is that consumer welfare is maximized by open competition and consumer choice! Healthcare development should be left to the economics of a well functioning healthcare system for Alaskans.

Alaska's CON law remains a major hurdle for new entrants, existing providers seeking to expand, modernize or reshape their service capabilities. Now is the right time!

<u>Alaskans are paying the highest healthcare prices in the world!</u>

Healthcare is multi-faceted!

Healthcare markets contain many elements that are in need of review, including:

- Escalating costs and care provider shortages;
- Public health and various payer programs;
- Lack of accurate and reliable cost information to consumers;
- Medicaid reforms and implementation challenges;

- "When healthcare markets operate properly, competition will determine the appropriate prices for medical services, the appropriate organizational forms for healthcare financing and delivery, and the appropriate range and availability of cost/quality/service trade-offs."

Thank you for support of Senate Bill 1 "An Act repealing the certificate of need program for health care facilities"