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PIERCING THE HEALTHCARE VEIL: AN ARGUMENT FOR HEALTHCARE PRICING TRANSPARENCY

INTRODUCTION

Jeanne Pinder, former New York Times journalist and current healthcare pricing transparency advocate, called doctors and hospitals throughout the United States and asked a simple question: “What would you accept as a cash payment for an MRI, a blood test or an Echocardiogram?”¹ Jeanne received hang-ups from some and the run-around from others, but the prices quoted from those willing to help was startling.² In the New York City area, paying cash for an Echocardiogram in Brooklyn cost \$200.³ Just a few miles away in Manhattan, the same Echocardiogram cost \$2,150.⁴ A blood test in New Orleans cost \$19 at one provider and \$522 at a different provider a few blocks away.⁵ In San Francisco, an MRI cost \$475 at one location and the same MRI cost \$6,221 at a location 25 miles away.⁶ The question stemming from these responses is “why?” Why is there a 975% difference in cost of an Echocardiogram in Brooklyn and Manhattan? A 2,647% difference in cost for the same blood test in New Orleans? A 1,209% difference in cost for the same MRI in San Francisco?

Contributing in part to the immense margins in price for the same test or procedure is the current opaqueness of pricing within the healthcare industry.⁷ Being a consumer of shoppable services, the term for healthcare procedures that can be planned for in advance, is unlike any other aspect of the consumer experience in America.⁸ For example, the patient receiving a \$522 blood test in New Orleans has no idea about the test’s cost before she receives it, or that the same blood test is only \$19 at another provider within walking distance.⁹

Other issues with the wide price margins of shoppable services among different providers is the rising cost of healthcare and the increasing burden of

¹ TED, *What if all US health care costs were transparent?* / Jeanne Pinder, YOUTUBE (Mar. 11, 2019), <https://www.youtube.com/watch?v=ZjeZ8r7yWOk>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Maria Castellucci et al., *Achieving transparency in healthcare*, MOD. HEALTHCARE, <https://www.modernhealthcare.com/reports/achieving-transparency-in-healthcare/#/>.

⁸ *Id.*

⁹ TED, *What if all US health care costs were transparent?* / Jeanne Pinder, YOUTUBE (Mar. 11, 2019), <https://www.youtube.com/watch?v=ZjeZ8r7yWOk>.

out-of-pocket expenditures on patients.¹⁰ Overall healthcare costs—including all private and public spending—are anticipated to rise by an average of 5.5% per year over the next decade—growing from \$3.5 trillion in 2017 to \$6 trillion by 2027.¹¹ Healthcare spending is projected to grow faster than the economy, increasing from 17.9% of gross domestic product (GDP) in 2017 to 19.4% of GDP in 2027.¹² While healthcare costs continue to rise, increased enrollment in high-deductible health plans (HDHPs) and co-insurance healthcare plans, in which patients pay a percentage of the amount of a test or procedure, result in patients bearing a greater financial burden to access care.¹³

To address these issues, President Donald Trump issued the highly anticipated Executive Order 13877, Improving Price and Quality Transparency in American Healthcare to Put Patients First, on healthcare price and quality transparency on June 24, 2019.¹⁴ The Executive Order calls for increased transparency of healthcare pricing and quality information, citing the need to take on opaque pricing structures that benefit special interest groups.¹⁵ The Trump Administration wants to enable consumers to make fully informed decisions about their healthcare by ensuring they know the price and quality of a good or service in advance.¹⁶ Increased transparency, in the Administration’s view, would help to protect patients from surprise medical bills: by knowing cost information in advance, patients could avoid unexpected and excessive charges from out-of-network providers.¹⁷ Executive Order 13877 significantly emphasizes the disclosure of “actual” prices of shoppable services by providers and insurers, also known as the negotiated price of a shoppable service after

¹⁰ Peter G. Peterson Found., *Healthcare Costs for Americans Projected to Grow at an Alarming High Rate*, PETER G. PETERSON FOUND. (May 1, 2019), <https://www.pgpf.org/blog/2019/05/healthcare-costs-for-americans-projected-to-grow-at-an-alarmingly-high-rate>.

¹¹ *Id.*

¹² *Id.*

¹³ Gary Claxton et al., *Increases in cost-sharing payments continue to outpace wage growth*, PETERSON-KFF HEALTH SYS. TRACKER (June 15, 2018), <https://www.healthsystemtracker.org/brief/increases-in-cost-sharing-payments-have-far-outpaced-wage-growth/>; Robin A. Cohen, Ph.D. et al., *High-deductible Health Plan Enrollment Among Adults Aged 18-64 With Employment-based Insurance Coverage*, 317 NCHS DATA BRIEF 1, 1 (2018).

¹⁴ Exec. Order No. 13,877, 3 C.F.R. § 30849 (2019).

¹⁵ Exec. Order No. 13,877, 3 C.F.R. § 30849 (2019); Katie Keith, *Unpacking The Executive Order On Health Care Price Transparency And Quality*, HEALTHAFFAIRS (June 25, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190625.974595/full/>.

¹⁶ Katie Keith, *Unpacking The Executive Order On Health Care Price Transparency And Quality*, HEALTHAFFAIRS (June 25, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190625.974595/full/>.

¹⁷ *Id.*

taking into account the percentage of the hospital's list price that the insurer is willing to cover.¹⁸

In furtherance of the policies enumerated in Executive Order 13877, the Centers for Medicare & Medicaid Services (CMS) published a Final Rule and a Proposed Rule in the Federal Register that aim to increase the transparency of hospital and insurer prices on November 27, 2019.¹⁹ The Final Rule, effective January 1, 2021, requires hospitals to provide patients with easily accessible information about standard charges, including payer-specific negotiated rates for items and services offered.²⁰ The Proposed Rule would require issuers and health plans to publish provider-specific negotiated rates and give members personalized out-of-pocket cost estimates.²¹ The comment period for the Proposed Rule concludes on January 27, 2020.²²

According to the Final Rule, United States hospitals must publish a machine-readable list of standard charges for each item or service provided in the hospital inpatient setting or outpatient department setting that is “easily accessible.”²³ United States hospitals must also include a description of each item or service provided and any code used by the hospital for the purposes of accounting or

¹⁸ *Id.*

¹⁹ Exec. Order No. 13,877, 3 C.F.R. § 30849 (2019); Transparency in Coverage, 84 Fed. Reg. 229 (proposed Nov. 27, 2019); Rujul Desai et al., *CMS Releases Final Hospital Price Transparency Rule and Proposes Transparency Rule for Health Plans*, LEXOLOGY (Nov. 27, 2019), <https://www.lexology.com/library/detail.aspx?g=4ae25cbe-a21b-4387-81ab-3e81c058c417>.

²⁰ Medicare and Medicaid Programs: CY 2020 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates. Price Transparency Requirements for Hospitals To Make Standard Charges Public, 84 Fed. Reg. 65524, 65525 (Nov. 27, 2019); Rujul Desai et al., *CMS Releases Final Hospital Price Transparency Rule and Proposes Transparency Rule for Health Plans*, LEXOLOGY (Nov. 27, 2019), <https://www.lexology.com/library/detail.aspx?g=4ae25cbe-a21b-4387-81ab-3e81c058c417>.

²¹ Transparency in Coverage, 84 Fed. Reg. 229 (proposed Nov. 27, 2019); Rujul Desai et al., *CMS Releases Final Hospital Price Transparency Rule and Proposes Transparency Rule for Health Plans*, LEXOLOGY (Nov. 27, 2019), <https://www.lexology.com/library/detail.aspx?g=4ae25cbe-a21b-4387-81ab-3e81c058c417>.

²² *Id.*

²³ Medicare and Medicaid Programs: CY 2020 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates. Price Transparency Requirements for Hospitals To Make Standard Charges Public, 84 Fed. Reg. 65524, 65525 (Nov. 27, 2019). Easily accessible means available free of charge, accessible without having to register or establish a user account or password, accessible without having to submit personal identifying information, and digitally searchable. According to the final rule, standard charges include gross charges, payer-specific negotiated charges (with third-party payer and plan identified), de-identified minimum negotiated charges, de-identified maximum negotiated charges, and a discounted cash price, if applicable.

billing for the item or service.²⁴ The Final Rule also demands that hospitals display payer-specific negotiated rates and discounted cash prices for a limited set of 300 shoppable services in an easy-to-read format.²⁵ Hospitals can meet this requirement by offering an easily accessible, consumer-friendly list that is searchable by service description, billing code and payer.²⁶ Alternatively, hospitals can offer an online price estimator tool, prominently displayed on the provider’s website, that allows patients to instead obtain an estimate of the amount they will be obligated to pay.²⁷

Regarding hospital noncompliance, the Final Rule establishes that individuals and entities may file complaints against a hospital, subject to an independent CMS review, in addition to CMS audits of hospitals websites.²⁸ CMS will provide a written warning notice to the hospital specifying the violations if CMS concludes that a hospital is noncompliant with one or more of the price transparency requirements after independent analysis.²⁹ CMS’ written warning notice provides the hospital an opportunity to take voluntary corrective action without incurring any penalties.³⁰ If CMS determines that a hospital remains in noncompliance after a written warning notice was issued, the

²⁴ *Id.* at 65560.

²⁵ *Id.* at 65567. According to the Final Rule, the list of 300 shoppable services is required to include seventy CMS-specified services, plus as many additional hospital-selected shoppable services as necessary for at least 300 services total. If a hospital does not provide 300 shoppable services, it must provide standard charges for whatever services it does provide. Charge information must include charges for corresponding “ancillary services” provided in conjunction with each shoppable primary service. If the hospital does not offer a discounted cash price, it must list its undiscounted gross charge.

²⁶ *Id.* at 65,579 (to be codified at 45 C.F.R. 180.60(d)); R. Ross Burris III et al., *CMS Issues New Final Rule on Pricing Transparency*, Natl. L. Rev. (Nov. 25, 2019), <https://www.natlawreview.com/article/cms-issues-new-final-rule-pricing-transparency>.

²⁷ Medicare and Medicaid Programs: CY 2020 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates. Price Transparency Requirements for Hospitals To Make Standard Charges Public, 84 Fed. Reg. 65524, 65579 (Nov. 27, 2019) (to be codified at 45 C.F.R. 180.60(a)(2)); R. Ross Burris III et al., *CMS Issues New Final Rule on Pricing Transparency*, Natl. L. Rev. (Nov. 25, 2019), <https://www.natlawreview.com/article/cms-issues-new-final-rule-pricing-transparency>.

²⁸ *Id.* at 65582; R. Ross Burris III et al., *CMS Issues New Final Rule on Pricing Transparency*, Natl. L. Rev. (Nov. 25, 2019), <https://www.natlawreview.com/article/cms-issues-new-final-rule-pricing-transparency>.

²⁹ *Id.* at 65582 (to be codified at 45 C.F.R. 180.70); R. Ross Burris III et al., *CMS Issues New Final Rule on Pricing Transparency*, Natl. L. Rev. (Nov. 25, 2019), <https://www.natlawreview.com/article/cms-issues-new-final-rule-pricing-transparency>.

³⁰ Medicare and Medicaid Programs: CY 2020 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates. Price Transparency Requirements for Hospitals To Make Standard Charges Public, 84 Fed. Reg. 65524, 65584 (Nov. 27, 2019) (to be codified at 45 C.F.R. 180); R. Ross Burris III et al., *CMS Issues New Final Rule on Pricing Transparency*, Natl. L. Rev. (Nov. 25, 2019), <https://www.natlawreview.com/article/cms-issues-new-final-rule-pricing-transparency>.

noncompliance constitutes a material violation of the Final Rule.³¹ CMS will then issue a notice of violation and require the hospital to submit a Corrective Action Plan (CAP).³² Failure of a hospital in material violation of the Final Rule to submit a CAP in the form requested or to abide by the terms of an approved CAP permits CMS to impose Civil Monetary Penalties (CMPs) on the noncompliant hospital, which must be paid in full within sixty days of the hospital receiving notice of the CMP's imposition.³³ Continuing violations by noncompliant hospitals may result in additional CMPs until compliance is maintained.³⁴

CMS' Final and Proposed Rules, by furthering the policies in Executive Order 13877, will facilitate fiscal responsibility within the healthcare industry, decrease the margin in price between different providers of shoppable services and promote consumer choice.³⁵ Currently there is no incentive for healthcare providers to be cognizant of the cost of shoppable services, and CMS rules furthering the policies set forth in Executive Order 13877 provides the necessary incentives for the healthcare industry to reign in out of control pricing for shoppable services.³⁶

This Comment analyzes the current problem of opaqueness regarding patient access to pricing of shoppable services within the healthcare industry, the trend of increasing out-of-pocket costs paid by patients for shoppable services, and

³¹ Medicare and Medicaid Programs: CY 2020 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates. Price Transparency Requirements for Hospitals To Make Standard Charges Public, 84 Fed. Reg. 65524, 65586 (Nov. 27, 2019) (to be codified at 45 C.F.R. 180.80). According to the Final Rule, Material Violation means a hospital's failure to make its prices public or to display prices in the manner and form required by the Final Rule.

³² Medicare and Medicaid Programs: CY 2020 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates. Price Transparency Requirements for Hospitals To Make Standard Charges Public, 84 Fed. Reg. 65524, 65604 (Nov. 27, 2019) (to be codified at 45 C.F.R. 180.80).

³³ R. Ross Burris III et al., *CMS Issues New Final Rule on Pricing Transparency*, Natl. L. Rev. (Nov. 25, 2019), <https://www.natlawreview.com/article/cms-issues-new-final-rule-pricing-transparency>.

³⁴ *Id.*

³⁵ Exec. Order No. 13,877, 3 C.F.R. § 30849 (2019); Medicare and Medicaid Programs: CY 2020 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates. Price Transparency Requirements for Hospitals To Make Standard Charges Public, 84 Fed. Reg. 65524 (Nov. 27, 2019); Transparency in Coverage, 84 Fed. Reg. 229 (proposed Nov. 27, 2019).

³⁶ Exec. Order No. 13,877, 3 C.F.R. § 30849 (2019); Medicare and Medicaid Programs: CY 2020 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates. Price Transparency Requirements for Hospitals To Make Standard Charges Public, 84 Fed. Reg. 65524 (Nov. 27, 2019); Transparency in Coverage, 84 Fed. Reg. 229 (proposed Nov. 27, 2019).

how consolidation among health care providers contributes to increased costs to patients. Analysis of the price transparency in the cosmetic procedure industry and successful state healthcare price transparency initiatives is conducted to demonstrate that transparency in pricing can contribute to increased competition, consumer knowledge and lower costs of shoppable services. Finally, this Paper concludes with suggestions for both federal and state-level policymakers on the proper course of action for putting patients' interests first by putting insurance companies and healthcare conglomerates second.

I. THE STATUS QUO OF HEALTHCARE PRICE OPAQUENESS KEEPS PRICES HIGH

Imagine walking into Best Buy with the desire to purchase a television.³⁷ A nice flat screen catches your eye and meets your needs, but Best Buy maintains a policy of not posting prices for their goods in store or on the internet.³⁸ After summoning a Best Buy employee to inform you about the price of the television, she assures you, of course, that you are getting the deal of the century.³⁹ "You hit the jackpot today, the list price of this television is \$15,000, but after a hearty discount you only have to pay \$3,500 to take this television home with you!"⁴⁰ You ask the Best Buy employee why prices are not publicly available, and she gets mad at you, saying, "Nobody pays the list price for televisions anyways, who cares?"⁴¹ You shrug it off and purchase the television, because Netflix is not going to watch itself.

The above is analogous to the current opaqueness within the negotiation process between hospitals and insurers, which is part of the scheme to keep prices high.⁴² Hospitals use a list price, similar to a MSRP or retail price of other goods, as the starting number in negotiating the percentage of the list price that insurers will cover for their policy holders.⁴³ Hospitals compile list prices of all billable services and items into a hospital chargemaster, which captures the costs

³⁷ Elisabeth Rosenthal, *Analysis: Pulling Back Curtain On Hospital Prices Adds New Wrinkle In Cost Control*, KAISER HEALTH NEWS (Jan. 28, 2019), <https://khn.org/news/analysis-pulling-back-curtain-on-hospital-prices-adds-new-wrinkle-in-cost-control/>.

³⁸ *Id.* This is purely hypothetical and is not an accurate reflection of Best Buy's policies or management style.

³⁹ *Id.*

⁴⁰ Elisabeth Rosenthal, *Analysis: Pulling Back Curtain On Hospital Prices Adds New Wrinkle In Cost Control*, KAISER HEALTH NEWS (Jan. 28, 2019), <https://khn.org/news/analysis-pulling-back-curtain-on-hospital-prices-adds-new-wrinkle-in-cost-control/>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

of each procedure, service, supply prescription drug, and diagnostic test provide at the hospital, as well as any fees associated with services, such as equipment fees and room charges.⁴⁴

A. Artificially High List Prices Keep the Cost of Healthcare High

Hospitals set list prices at a much higher rate than the true cost of the given procedure or service to maximize revenues.⁴⁵ A 2016 Health Affairs Study determined that the charge-to-cost ratio (the list price divided by the Medicare-allowable cost) for sampled hospitals with 50 or more beds in 2013 was 4.32.⁴⁶ The sample consisted of hospitals that were not-for-profits, for-profits and government-run, all of which had cost-to-charge ratios of over 3.0.⁴⁷ Some services such as CT scans have charge-to-cost ratios of almost 30, while others like routine inpatient procedures are much lower at only 1.8.⁴⁸ These numbers demonstrate that hospitals' finance departments are setting list prices significantly higher than the procedure's cost to the hospital, essentially because they can.⁴⁹ The lack of public transparency of list prices allows this practice to continue, because market forces cannot come into play when the consumer is unaware of a procedure's cost until the bill arrives in her mailbox.⁵⁰

By way of example, Janet Winston, an English professor at Humboldt State in California, turned to Stanford Health Care for an allergy test.⁵¹ The allergy test included taping 119 tiny plastic containers of various allergens to Winston's back over the course of three days of testing.⁵² Even after a warning by the Stanford-affiliated doctor that this extensive allergy skin-patching test may be "expensive," Winston was not too worried about the cost; Stanford was an in-

⁴⁴ Jacqueline LaPointe, *The Role of the Hospital Chargemaster in Revenue Cycle Management*, REVCYCLE INTELLIGENCE (Feb. 9, 2018), <https://revcycleintelligence.com/features/the-role-of-the-hospital-chargemaster-in-revenue-cycle-management>.

⁴⁵ Ge Bai et al., *US Hospitals Are Still Using Chargemaster Markups To Maximize Revenues*, HEALTH AFFAIRS (Sept. 2016), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2016.0093>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ The George Washington University School of Business, *What is a chargemaster, and what do hospital administrators need to know about it?*, ONLINE HEALTHCARE MBA BLOG (last visited Jan. 18, 2020), <https://healthcaremba.gwu.edu/blog/chargemaster-hospital-administrators-need-know/>.

⁴⁹ Barbara Feder Ostrov, *Here's why a health network charged \$48,000 for one woman's allergy test*, L.A. TIMES (Nov. 1, 2018), <https://www.latimes.com/business/la-fi-allergy-test-bill-20181101-story.html>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

network provider for her insurer and her employer-sponsored insurance plan provided by the State of California had been reliable in the past.⁵³

After the test, the bill arrived in Winston's mailbox.⁵⁴ Stanford's list price for the allergy test was \$48,329.⁵⁵ To Winston's surprise, Stanford's list price per tested allergen was \$339 and Winston's time with her doctor was \$848.⁵⁶ Winston's bill stated that her insurer, Anthem Blue Cross, paid Stanford a negotiated rate of \$11,376.47 for the allergy test and Stanford billed Winston \$3,103.47 as her 20% share of the negotiated rate.⁵⁷ Michael Arrigo, a San Francisco based medical billing expert witness who reviewed Winston's bill stated that the "usual, customary and reasonable" charge for testing a single allergen in the San Francisco area is about \$35 and it seemed in Winston's case that Stanford's list prices were inflated.⁵⁸ After some "bargaining" with Stanford's billing department, Winston ultimately paid \$1,561.86 out of pocket, resulting in a "50% discount."⁵⁹

Hospitals throughout the United States can get away with this because they set list prices for shoppable services at exorbitantly high levels, use these inflated prices to negotiate coverage with insurers, and then pass off the residual cost to the patient.⁶⁰ Only when the patient receives the bill and resulting sticker shock after the procedure's completion can the patient then haggle with the hospital's finance department or insurer to receive a "discount."⁶¹ If hospitals like Stanford started off negotiations with insurers at a more reasonable price, it would likely result in lower costs and lower insurance premiums. Public access to hospitals' list prices and negotiated rates is an important first step to reigning in out of control costs for shoppable services, because hospitals will then finally be held publicly accountable for out of control costs of healthcare. Public access to hospitals' list prices may also contribute to narrowing the currently wide margin between the same shoppable service at different providers.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

B. *Healthcare Price Transparency Can Increase Competition and Lower Costs*

The potential lowering of the cost of healthcare and a potential increase in patient empowerment outweighs the costs of making gross charges and negotiated rates publicly available.⁶² Transparency in shoppable service pricing will likely have the effect of shifting patients from higher to lower-cost service providers, which will force the hand of higher cost providers to lower prices and increase competition.⁶³ This would have the effect of lowering prices of shoppable services across the board, even for patients who do not actively compare prices.⁶⁴ Precedent for the increase in the availability of pricing information of a procedure resulting in a decrease in the procedure's cost exists for non-insured cosmetic surgeries, and there is reason to believe that an increase in the availability of pricing information for shoppable services will have the same desired effect.⁶⁵

Hospitals and the insurance industry argue, however, that price transparency for shoppable services will have the effect of decreasing competition and ultimately raise the cost of shoppable services.⁶⁶ The hospitals argue that if prices for shoppable services are made public, then lower-cost providers will increase prices to match other providers with higher costs for the same services.⁶⁷ For example, the \$475 provider of MRI scans in San Francisco may face the rational incentive of raising prices closer to or matching the \$6,221 cost of the MRI scan at the higher-priced location 25 miles away.⁶⁸ Opponents of healthcare price transparency also argue that since the healthcare market is highly concentrated, and therefore the ability for patients to select amongst competing providers is already limited, the engagement of a small percentage of

⁶² Zach Y. Brown, *What would happen if hospitals openly shared their prices?*, THE CONVERSATION (Jan. 30, 2019, 6:50 AM), <https://theconversation.com/what-would-happen-if-hospitals-openly-shared-their-prices-110352>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Sarah Gantz, *How Lasik and Botox could point the way to health care price transparency*, THE PHILADELPHIA INQUIRER (Feb. 28, 2018), <https://www.inquirer.com/philly/health/health-costs/lasik-20180228.html>.

⁶⁶ Jacqueline LaPointe, *Healthcare Price Transparency Order May Up Prices, Hospitals Warn*, REVCYCLE INTELLIGENCE (June 25, 2019), <https://revcycleintelligence.com/news/healthcare-price-transparency-order-may-up-prices-hospitals-warn>.

⁶⁷ *Id.*

⁶⁸ TED, *What if all US health care costs were transparent?* / Jeanne Pinder, YOUTUBE (Mar. 11, 2019), <https://www.youtube.com/watch?v=ZjeZ8r7yWOk>.

patients that are expected to utilize comparative price tools will have a negligible effect on shoppable service costs.⁶⁹

While opponents of price transparency in healthcare focus on a hypothetical future regarding potential price collusion among healthcare providers if price transparency is required, precedent of the injection of market forces and competition within other U.S. industries indicates that a decrease of the cost of care is likely to occur.⁷⁰ In 1978, President Jimmy Carter signed the Airline Deregulation Act (ADA) into law.⁷¹ This legislation led to the elimination of price controls and route-setting by the now-abolished Civil Aeronautics Board.⁷² Since then, U.S. airline passenger volumes have increased by 210 percent—from about 250 million in 1978 to 850 million in 2017—while inflation-adjusted airfares have fallen by more than 40%.⁷³ Deregulation of the airlines led to aggressive competition, cost-cutting and experimentation within the industry.⁷⁴

The same argument that opponents to price transparency in healthcare currently make, that potential price collusion among healthcare providers may lead to an overall increase in price, could have also been made about the pre-ADA airline industry.⁷⁵ Minor airliners of the day *could* have increased their price to match the exorbitantly high fares of the day, but the injection of market forces within the industry did in fact not lead to such an outcome.⁷⁶ Air travel, once considered to be a luxury for the wealthy, became an affordable mode of transportation for the average American.⁷⁷ Injecting market forces within the U.S. healthcare industry and spurring competition among providers may lead to the same desirable effect.⁷⁸

Arguments abound on both sides of the debate pertaining to healthcare price transparency's effect on the prices of shoppable services, but the status quo of opaqueness and post-procedure billing is not working for patients or their wallets.⁷⁹ While empowering patients and encouraging competition in the

⁶⁹ David Blumenthal et al., *Price Transparency in Health Care Is Coming to the U.S. – But Will It Matter?*, HARVARD BUSINESS REVIEW (July 3, 2019), <https://hbr.org/2019/07/price-transparency-in-health-care-is-coming-to-the-u-s-but-will-it-matter>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* Carriers such as Pan Am, Eastern and TWA all disappeared soon after passage of the ADA.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Mark Galvin, *Why Healthcare Pricing Stays Opaque*, INS. THOUGHT LEADERSHIP (July 5, 2018),

healthcare industry through price transparency will not be a panacea, it is a step in the right direction to make patients' pocketbooks a greater priority than special interests' bank accounts.

II. HEALTH INSURANCE TRENDS RESULT IN PATIENTS PAYING MORE OUT-OF-POCKET COSTS

According to the Centers for Disease Control and Prevention, 56.6% of adults aged 18 to 64 have employment-based health insurance coverage as of 2017, down from 85.1% in 2007.⁸⁰ The percentage of enrollment in a High Deductible Health Plan (HDHP) increased to 43.4% in 2017, up from 14.8% in 2007.⁸¹ Since HDHP's have higher deductibles than traditional plans, and deductibles of traditional employer-sponsored plans are increasing,⁸² patients with employer-sponsored or HDHP insurance coverage are now paying a higher percentage of healthcare costs out of pocket than ever before.⁸³ In other words, today's patients are paying a higher percentage, \$37.7 billion to be exact, of the absurdly high list prices for shoppable services.⁸⁴

A. High Deductible Health Plans Cause Patients to Pay More Out-Of-Pocket Costs

The above statistics display a trend away from traditional health insurance plans with minimal to no deductibles and a shift toward higher-deductible plans.⁸⁵ This shift comes with a tradeoff, however. Since plans with higher deductibles typically accompany lower premiums, health insurance can be accessed by a greater majority of the population as premiums decrease.⁸⁶ A problem arises when care is needed, however; the patient with high deductibles

<http://insurancethoughtleadership.com/why-healthcare-pricing-remains-opaque/>.

⁸⁰ Robin A. Cohen, Ph.D. et al., *High-deductible Health Plan Enrollment Among Adults Aged 18–64 With Employment-based Insurance Coverage*, 317 NCHS DATA BRIEF 1, 1 (2018).

⁸¹ *Id.*

⁸² Matthew Rae et al., *Deductible Relief Day: How Rising deductibles are affecting people with employer coverage*, PETERSON-KFF HEALTH SYS. TRACKER (May 15, 2019), <https://www.healthsystemtracker.org/brief/deductible-relief-day-how-rising-deductibles-are-affecting-people-with-employer-coverage/>.

⁸³ *Id.*

⁸⁴ Amanda Frost et al., *Spending on Shoppable Services in Health Care*, Health Care Cost Inst. (Mar. 1, 2016), <https://healthcostinstitute.org/research/publications/hcci-research/entry/spending-on-shoppable-services-in-health-care>.

⁸⁵ Robin A. Cohen, Ph.D. et al., *High-deductible Health Plan Enrollment Among Adults Aged 18–64 With Employment-based Insurance Coverage*, 317 NCHS DATA BRIEF 1, 1 (2018).

⁸⁶ *Your total costs for health care: Premium, deductible & out-of-pocket costs*, <https://www.healthcare.gov/choose-a-plan/your-total-costs/>.

must pay a higher percentage of the bill than if the patient had a plan with a low deductible.

By way of example, Dr. David Grande, a Philadelphia-area physician, was getting his daughter ready for bed when she told him that her arm hurt from a fall on the school's playground.⁸⁷ Four years prior, Dr. Grande's employer began offering a HDHP, and at the time Dr. Grande's family was healthy.⁸⁸ Dr. Grande's employer contributed \$1,000 toward Dr. Grande's \$3,000 deductible in a pre-tax Health Savings Account (HSA), so the HDHP made financial sense at the time.⁸⁹

The next morning, Dr. Grande's daughter received an outpatient x-ray and a cast, and everything seemed to have gone successfully and smoothly.⁹⁰ Two weeks later, Dr. Grande received an explanation of benefits (EOB) form from his insurer, indicating that the negotiated price of the x-ray was \$481.⁹¹ After receiving the EOB, Dr. Grande consulted with a cost estimator on his insurer's website, which informed Dr. Grande that he paid \$413 more than the average price of \$68 for an x-ray in his market.⁹²

According to Dr. Grande, the extra price paid was a nuisance, not a hardship.⁹³ He realized, however, that many families with high deductibles do not have a health savings account or other financial reserves to absorb unexpected healthcare expenses.⁹⁴ For example, bronze and silver plans in the marketplaces created by the Patient Protection and Affordable Care Act have average deductibles of \$5,181 and \$2,927, respectively.⁹⁵ Low premiums of bronze and silver plans are attractive for individuals and families because they free disposable income that can be used for other monthly expenses, but if an unexpected health issue does arise, then that individual or family may experience financial disaster depending upon the size of the bill they receive weeks after the procedure is administered.⁹⁶

⁸⁷ David Grande, *Sticker Shock: The Experience of a Health Care Consumer*, ANNALS OF FAMILY MEDICINE (May 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4868567/>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

Since health insurance plans with high deductibles are more prevalent than ever before, and patients are paying a greater percentage of healthcare costs out of pocket,⁹⁷ pressure must be placed on both insurers and hospitals to make price information easily accessible. Market forces may correct the immense price margins of shoppable services over the long term,⁹⁸ but responsibility also lies with the patient. Patients must be active in the fight to increase price transparency of shoppable services and to utilize upcoming resources that can make a difference in the patient's bottom line.

B. Patients Are Paying More for Healthcare due to Surprise Out-Of-Network Bills

Another trend surrounding today's health insurance industry that leads to significant headaches, both literally and financially, is receiving a "surprise" out of network hospital bill, even though a patient received treatment from an in-network hospital.⁹⁹ This is unfortunately an increasingly common in today's healthcare system, with 42% of hospital visits resulting in an out-of-network bill.¹⁰⁰ Researchers estimated that patients' potential financial responsibility for hospital visits more than doubled between 2010 and 2016, rising to approximately \$2,000.¹⁰¹

Surprise out of network bills arise when people turn to a hospital they know is part of their insurance plan's network, but are treated by a doctor or provider in the hospital who does not have a contract with the insurer.¹⁰² While "in-network" providers agree to set rates with insurers and are not allowed to bill patients for more than their share of that contracted rate, providers who do not have contracts with insurers are considered out of network and can bill patients directly for the full cost of the procedure.¹⁰³

⁹⁷ Matthew Rae et al., *Deductible Relief Day: How Rising deductibles are affecting people with employer coverage*, PETERSON-KFF HEALTH SYS. TRACKER (May 15, 2019), <https://www.healthsystemtracker.org/brief/deductible-relief-day-how-rising-deductibles-are-affecting-people-with-employer-coverage/>.

⁹⁸ *Id.*

⁹⁹ Sara Gantz, *Surprise out-of-network hospital bills becoming more common, more expensive*, THE PHILADELPHIA INQUIRER (Aug. 12, 2019), <https://www.inquirer.com/health/consumer/surprise-hospital-bill-out-of-network-20190812.html>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

In March 2019, 15-year-old Maili McGraw was scheduled for a wisdom tooth extraction at Nazareth Hospital in the greater Philadelphia area.¹⁰⁴ Maili's mother, Jennifer, took the time to check that the surgeon and hospital were part of their insurance network and that the procedure would be covered by her health insurance plan.¹⁰⁵ It did not occur to Jennifer, however, to ask about the anesthesiologist.¹⁰⁶ It turns out that the in-network hospital contracted with an out-of-network anesthesiologist who "surprised" her with a \$2,574 bill for the anesthesia alone.¹⁰⁷ What Jennifer experienced next is also an unfortunately common trend when dealing with hospitals and insurers: after the Philadelphia Inquirer asked Jennifer's healthcare insurer about the bill, Independence Blue Cross reviewed the case and found that the anesthesia bill was incorrectly denied.¹⁰⁸ Besides this exceptional case where the Philadelphia Inquirer publicized Jennifer and Maili McGraw's case, most patients are on their own to figure out whether the bill they've received is in error or truly a surprise out-of-network charge.¹⁰⁹ Some patients may be referenced to the collections department of the hospital and potentially face a hit to their credit rating if payments cannot be timely made, or the patient may pay the hospital's list price in full.¹¹⁰

A third option for patients upon receiving what appears to be an out-of-network bill, negotiating with the provider for a lower rate or payment plan, sounds an awful lot like the faux "\$15,000 Best Buy television" discount described above.¹¹¹ When Wanda Wickizer had a brain hemorrhage in 2013, a Virginia hospital billed her \$286,000 after a "20 percent uninsured" discount on a hospital bill of \$357,000. In other words, Wanda was stuck paying the hospital's list price for the treatment. This example, among many others that do not gain traction in the media, refutes the notion that hospitals gross charges or list prices are irrelevant to the consumer of shoppable services because patients

¹⁰⁴ Sarah Gantz, *Philadelphia family hit with \$2,500 surprise bill for dental anesthesia*, THE PHILADELPHIA INQUIRER (July 29, 2019), <https://www.inquirer.com/health/consumer/dental-insurance-anesthesia-medical-bill-error-20190729.html>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Elisabeth Rosenthal, *Analysis: Pulling Back Curtain On Hospital Prices Adds New Wrinkle In Cost Control*, KAISER HEALTH NEWS (Jan. 28, 2019), <https://khn.org/news/analysis-pulling-back-curtain-on-hospital-prices-adds-new-wrinkle-in-cost-control/>.

never pay that amount. Today's patients are in fact paying a higher percentage of hospitals' gross charges than ever before.¹¹²

A possible effect of the increased cost burden on patients is increased research into the cost of care.¹¹³ A TransUnion Healthcare study demonstrates that as more of the cost burden of healthcare services shifts to patients, patients are in fact turning to available resources that can assist in evaluating the cost of care.¹¹⁴ The results of the August 2019 TransUnion Healthcare study revealed that 75% of patients surveyed utilized either healthcare provider or insurance websites, among other sources, to research healthcare costs.¹¹⁵ The youngest generations surveyed—Gen Z and Millennials—tended to conduct the most research of healthcare costs.¹¹⁶ Additionally, 62% of those surveyed stated that knowing their out-of-pocket expenses in advance of service impacts the likelihood of pursuing care.¹¹⁷ It appears that an increased financial burden on patients spurs an increase in awareness to the costs of care, and many patients desire to have tools that can assist in making both the best medical and financial decisions possible.¹¹⁸ Executive Order 13877 and CMS rules demanding price transparency and patient access to that data seems to be aligned with patient desires, and greater patient use of the publicly available data appears promising, especially with younger generations.¹¹⁹

III. CONSOLIDATION OF HEALTHCARE PROVIDERS INCREASES PRICES

For the past decade, mergers or other forms of consolidation in the healthcare industry have steadily increased.¹²⁰ Hospital administrators argue that mergers effectively combine resources to improve quality of care, eliminate

¹¹² Matthew Rae et al., *Deductible Relief Day: How Rising deductibles are affecting people with employer coverage*, PETERSON-KFF HEALTH SYS. TRACKER (May 15, 2019), <https://www.healthsystemtracker.org/brief/deductible-relief-day-how-rising-deductibles-are-affecting-people-with-employer-coverage/>.

¹¹³ *News Reports about a Weakening Economy Impacting How Some Patients Seek Medical Treatment*, TRANSUNION (Sept. 17, 2019), <https://newsroom.transunion.com/news-reports-about-a-weakening-economy—impacting-how-some-patients-seek-medical-treatment/>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Exec. Order No. 13,877, 3 C.F.R. § 30849 (2019); *Id.*

¹²⁰ Reed Abelson, *When Hospitals Merge to Save Money, Patients Often Pay More*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/health/hospital-mergers-health-care-spending.html?module=inline>.

redundancies and ultimately lower costs for patients.¹²¹ In many cases, however, these claims are far from the truth; many hospital consolidations and mergers eliminate competition and result in increased costs for patients.¹²²

When the former Jewish Hospital of St. Louis merged with Barnes Hospital in 1996, members of the Board of Directors told the medical staff that the merger would “improve efficiency through economies of scale.”¹²³ Shortly after the merger’s completion, however, Barnes Jewish quickly developed a costly administrative bureaucracy, tore down perfectly good buildings only to replace them with new, often unnecessarily lavish structures, spent enormous sums on marketing, and purchased physician practices above market value on which they lost money.¹²⁴ Post-merger actions of the Barnes Jewish Board of Directors did not convey a desire to consolidate for the purpose of cutting costs and passing down the fruits of efficiency to patients. These actions are more in line with the attempt to eliminate competition in the surrounding geographical area to ultimately increase prices.¹²⁵

A. Mergers and Consolidations in the Healthcare Industry Eliminate Competition and Raise the Cost of Care

Studies show that healthcare markets have become increasingly concentrated, with a small number of firms controlling most of the business within a given market.¹²⁶ When large hospitals or hospital systems eliminate competition within their geographical region, price increases can be dramatic, often exceeding 20%.¹²⁷ With the acquiring hospital increasing its regional market share, any remaining competitors are able to match the higher price demanded by the acquiring hospital, effectively raising the cost of care for all patients within the region.¹²⁸ This translates into higher premiums paid by individuals, employers and workers purchasing private insurance, higher out-of-

¹²¹ *Id.*

¹²² *Id.*

¹²³ Arthur H. Gale, *Bigger But Not Better: Hospital Mergers Increase Costs and Do Not Improve Quality*, THE J. OF THE MO. ST. MED. ASS’N., Jan.–Feb. 2015, at 4.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Emily Gee, *Provider Consolidation Drives Up Health Care Costs*, CTR. FOR AM. PROGRESS (Dec. 5, 2018), <https://www.americanprogress.org/issues/healthcare/reports/2018/12/05/461780/provider-consolidation-drives-health-care-costs/>.

¹²⁷ Martin Gaynor Ph.D. et al., *The Synthesis Project*, ROBERT WOOD JOHNSON FOUND. (June 1, 2012), <https://www.rwjf.org/en/library/research/2012/06/the-impact-of-hospital-consolidation.html>.

¹²⁸ *Hospital Consolidation: Trends, Impacts & Outlook*, NAT’L INST. FOR HEALTH CARE MGMT. (Jan. 2020), <https://www.nihcm.org/categories/hospital-consolidation-trends-impacts-outlook>.

pocket costs for patients without insurance, and higher costs to taxpayers for government subsidized care purchased in the healthcare exchanges.¹²⁹

In addition to increased consolidation among hospitals, hospitals are acquiring smaller physician and specialist practices at a record pace, therefore eliminating consumer choice and competition while increasing the acquiring hospital's bargaining power.¹³⁰ From 2012 to 2015, the number of physician practices employed by hospitals increased by 86%.¹³¹ This trend takes away consumer choice for shoppable services and results in patients paying significantly more at the acquiring hospital than the patient would pay if the shoppable service was administered at an independent physician's office.¹³² For example, consider that a patient with Medicare coverage visits her independent physician to receive an ultrasound.¹³³ Medicare pays the physician's office \$200 and the patient pays her co-pay, which is 20% of the bill.¹³⁴ Before the patient returns the next month to receive an ultrasound, the independent physician's office is purchased by the local hospital.¹³⁵ The patient returned to receive the same ultrasound, by the same doctor, but the cost to Medicare for the procedure is now \$400.¹³⁶ Not only did the cost of the same procedure double, but also the monetary burden on the taxpayer and on the patient increased as well.¹³⁷

B. Reconsideration of Anti-Trust Laws is Required to Encourage Competition Within the Healthcare Industry

The trend of increased hospital consolidation piqued the interest of the Federal Trade Commission (FTC) regarding the possible antitrust implications of some transactions, but the FTC faces significant obstacles in enforcement of antitrust law against nonprofit hospitals.¹³⁸ Federal Trade Commissioner

¹²⁹ *Id.*

¹³⁰ Shannon Muchmore, *Hospitals acquired 5K physician practices in 1-year period*, HEALTHCARE DIVE (Mar. 14, 2018), <https://www.healthcarediver.com/news/hospitals-acquired-5k-physician-practices-in-1-year-period/519167/>.

¹³¹ Jenny Gold et al., *Patients pay the price when hospital giants hire your private practitioner*, CNN (Sept. 16, 2017), <https://money.cnn.com/2017/09/16/news/economy/doctor-consolidation/index.html>.

¹³² Dr. Erik Nilssen, *Hospital Pricing vs. Private Practice Pricing*, NILSSEN ORTHOPEDICS ANKLE + FOOT CTR. (Sept. 27, 2016), <https://nilssenorthopedics.com/hospital-pricing-vs-private-practice-pricing/>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Steven Porter, *More Aggressive Review Of Hospital Mergers Needed, Says FTC Commissioner*, HEALTHLEADERS (May 15, 2019), <https://www.healthleadersmedia.com/strategy/more-aggressive-review->

Rebecca Kelly Slaughter is advocating for a more assertive approach to protect competitive forces among healthcare providers, but the inability of the FTC to enforce antitrust law against anticompetitive practices by nonprofit hospitals hampers any effort to cease anticompetitive activity.¹³⁹ Approximately 45% of hospitals in the United States enjoy not for profit status, so the current status of antitrust law keeps the FTC on the sidelines, even if it is aware of post-merger anticompetitive practices by a nonprofit hospital.¹⁴⁰

Hospitals' increased acquisition of smaller, independently owned physicians' offices also poses problems for the FTC and other antitrust regulators.¹⁴¹ Since the deal sizes for this type of acquisition is generally small, and investigations for antitrust violations typically occur one transaction at a time, the FTC is unlikely to even know about increases in provider concentration until the hospital has a controlling share of the market and is engaged in anticompetitive practices.¹⁴² Unless antitrust law is reconfigured to allow the FTC to take more assertive approaches in combatting anticompetitive activity by nonprofit hospitals in the future, the trend of increased consolidation and increased costs to patients and taxpayers are likely to continue.¹⁴³

For healthcare price transparency to be effective in achieving the goal of lower costs for shoppable services, competition within the healthcare marketplace is an essential prerequisite.¹⁴⁴ Patient access to pricing information is futile if there is only one system of providers within a patient's geographical area.¹⁴⁵ In an environment with increasing trends of healthcare provider merger, consolidation, and accompanying increases in prices, bold measures must be taken to put patients' interests and pocketbooks, and not the healthcare conglomerates interests, first.¹⁴⁶

hospital-mergers-needed-says-ftc-commissioner.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Cory Capps et al., *When Healthcare Providers Consolidate, Medical Bills Rise*, KELLOGGINSIGHT (Feb. 1, 2018), <https://insight.kellogg.northwestern.edu/article/when-healthcare-providers-consolidate-medical-bills-rise>.

¹⁴² *Id.*

¹⁴³ Steven Porter, *More Aggressive Review Of Hospital Mergers Needed, Says FTC Commissioner*, HEALTHLEADERS (May 15, 2019), <https://www.healthleadersmedia.com/strategy/more-aggressive-review-hospital-mergers-needed-says-ftc-commissioner>.

¹⁴⁴ Zach Y. Brown, *What would happen if hospitals openly shared their prices?*, THE CONVERSATION (Jan. 30, 2019, 6:50 AM), <https://theconversation.com/what-would-happen-if-hospitals-openly-shared-their-prices-110352>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

IV. UNINSURED COSMETIC PROCEDURES YIELD PROMISING RESULTS FOR PRICE TRANSPARENCY

A. *Prices are Transparent Within the Cosmetic Surgery Industry*

Most insurance plans do not cover procedures taken on for purely cosmetic or discretionary purposes, such as plastic surgery, or procedures such as Botox, Lasik and hair transplant surgeries.¹⁴⁷ Since providers of these procedures do not engage in back room deals with insurers, patients must pay the entire cost of the procedure out of pocket.¹⁴⁸ Therefore, providers of cosmetic procedures must make pricing information publicly available.¹⁴⁹ Informing patients of the cost of cosmetic procedures before they receive them appears to narrow the margin between the lowest and highest cost of a given procedure within a given geographical region, effectively decreasing the procedure's cost and increasing competition.¹⁵⁰

Dr. James Lewis, a Philadelphia-area eye surgeon, engages in the truly unconventional within the healthcare industry; he charges what makes sense in the market.¹⁵¹ Since the Lasik procedures that Dr Lewis administers are not covered by insurance, Dr. Lewis and many other cosmetic doctors make their prices publicly available for patients to consult before the procedure's administration.¹⁵² A survey of Lasik providers in the Philadelphia area found prices, including one year of follow-up care, ranged from Dr. Lewis' cost of \$3,000 up to \$6,000.¹⁵³ While not immaterial, the 100% price margin between Philadelphia area Lasik procedures pales in comparison to the 2,647% price margin for the same blood test in New Orleans, for example.¹⁵⁴

While a triple digit price margin still remains for cosmetic or discretionary procedures, patients consider many factors that may lead to a disparity in price between one cosmetic provider and another, including personal

¹⁴⁷ Mila Araujo, *Plastic Surgery Costs and What Insurance May Cover*, THE BALANCE (Oct. 31, 2019), <https://www.thebalance.com/plastic-surgery-costs-and-what-insurance-may-cover-2645384>; Sarah Gantz, *How Lasik and Botox could point the way to health care price transparency*, THE PHILADELPHIA INQUIRER (Feb. 28, 2018), <https://www.inquirer.com/philly/health/health-costs/lasik-20180228.html>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ TED, *What if all US health care costs were transparent?* / Jeanne Pinder, YOUTUBE (Mar. 11, 2019), <https://www.youtube.com/watch?v=ZjeZ8r7yWok>.

recommendations, reputation of the provider, or simply the gut feeling the patient has upon meeting with the provider and his or her staff.¹⁵⁵ These non-monetary factors certainly play a role, not only regarding cosmetic procedures, but also in patients' selection processes for shoppable services. Patients may select a prestigious large hospital with an impeccable reputation of quality of care, for instance. Patients may not realize, however, that the hospital has a higher facility fee than smaller clinics or that demand for the large hospital's services may command a higher price than lesser-known providers until the bill arrives in the mail, weeks after the procedure's administration.¹⁵⁶ With market pressures applied to hospitals through public price transparency of shoppable services, maybe a hospital will think twice before charging a \$6,000 "operating room fee" for a routine colonoscopy if its competitor down the street is listing its price at \$1,000.¹⁵⁷

B. Transparency Leads to a Narrowing of Price Margins Without Sacrificing Quality

Many more examples exist of how the \$16 billion a year market for elective cosmetic surgeries in the United States serves as an example of market forces contributing to a lowering of costs and tightening of price margins, all without sacrificing quality.¹⁵⁸ For example, the two most popular surgical cosmetic procedures in 2017 were breast augmentation and liposuction.¹⁵⁹ Even though the 2017 prices for these highly popular procedures increased in current dollar prices by 25.5% and 28% respectively since 1998, these increases were roughly half of the 50.3% increase in consumer prices between 1998 and 2017.¹⁶⁰ Therefore, the inflation-adjusted prices for breast augmentation and liposuction procedures have fallen by 17% and 15%, respectively, since 1998.¹⁶¹ The top three nonsurgical cosmetic procedures in 2017, Botox injections, chemical peel

¹⁵⁵ Sarah Gantz, *How Lasik and Botox could point the way to health care price transparency*, THE PHILADELPHIA INQUIRER (Feb. 28, 2018), <https://www.inquirer.com/philly/health/health-costs/lasik-20180228.html>.

¹⁵⁶ *Id.*

¹⁵⁷ Elisabeth Rosenthal, *Analysis: Pulling Back Curtain On Hospital Prices Adds New Wrinkle In Cost Control*, KAISER HEALTH NEWS (Jan. 28, 2019), <https://khn.org/news/analysis-pulling-back-curtain-on-hospital-prices-adds-new-wrinkle-in-cost-control/>.

¹⁵⁸ Mark J. Perry, *What economic lessons about health care costs can we learn from the competitive market for cosmetic procedures?*, AM. ENTERPRISE INST. (Mar. 30, 2018), <https://www.aei.org/carpe-diem/what-economic-lessons-about-health-care-costs-can-we-learn-from-the-competitive-market-for-cosmetic-procedures/>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

and laser hair removal are also in accordance with the trend that public availability of prices allows market forces to lower costs.¹⁶² Nominal prices for Botox injections have decreased by 1% from 1998 to 2017 and by more than 33% for chemical peel, while demand for both procedures has significantly increased, by 883% and 63%, respectively.¹⁶³ It appears that the cosmetic surgery marketplace is taking the correct approach to pricing; transparency, not opaqueness.¹⁶⁴

C. Price Transparency Can Benefit Practitioners as well as Patients

In addition to individual cosmetic surgeons and practitioners that make prices of procedures publicly available via the internet, the American Board of Cosmetic Surgery (ABCS) also has a price range calculator of its own on the ABCS website.¹⁶⁵ Potential patients have the ability to view price ranges for a given procedure within a geographical area by entering his or her ZIP code.¹⁶⁶ The procedure's price range nationally can also be viewed, in addition to descriptions about the procedure itself.¹⁶⁷ This information is very useful to patients, because it not only allows them to understand the details of a given procedure and its potential risks, but it also makes them more knowledgeable consumers of cosmetic services.¹⁶⁸ For example, if an individual decides to consult with a local cosmetic surgeon for a facelift, and that individual consulted the ABCS price range calculator beforehand, then that individual at the very least has a point of comparison with other practitioners in the area with regard to price.¹⁶⁹ If the given price of the facelift at the consultation is higher than the individual planned for or can afford, then the individual is empowered by being informed of other practitioners in the area and can plan accordingly.¹⁷⁰ The power dynamic of this patient-provider relationship is in the hands of the patient; the patient has information beforehand that is useful in obtaining services or a procedure at a price he or she can afford. In the current marketplace of shoppable services covered by insurance, however, hospitals and insurance companies hold the position of power in the relationship. Hospitals and insurance companies

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Cosmetic Surgery Pricing, Am. Board of Cosmetic Surgery, <https://www.americanboardcosmeticsurgery.org/pricing-calculator/>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

currently play hide the ball with patients regarding the price of shoppable services, which leads to confusion, anger, and financial distress for many patients.¹⁷¹

Transparency of pricing within the cosmetic surgery industry not only benefits patients; many surgeons and practitioners also claim benefit from more informed patients regarding the cost of a given procedure.¹⁷² By way of example, Dr. Jonathan Kaplan, MD, MPH, a plastic surgeon in the San Francisco area, reaped the benefits of combining pricing transparency for his services in conjunction with creating leads and increasing his patient pool for his recently established practice.¹⁷³ Initially Dr. Kaplan had no patient contacts when he moved to San Francisco, so obtaining contact information from individuals qualified and legitimately interested in receiving plastic surgery services was priority number one.¹⁷⁴ To achieve this goal Dr. Kaplan's website directed prospective patients to submit a procedure "wishlist" and contact information via email, to which a response was given to the patient with the relevant costs of the requested procedure.¹⁷⁵ Dr. Kaplan established an automated price list in the cloud that would compile all relevant costs for a requested procedure, which sent a reply email containing the cost information to the prospective patient.¹⁷⁶

In Dr. Kaplan's experience, a major roadblock for acquiring new patients was the cost of procedures.¹⁷⁷ Some patients would engage in an in-person consultation about a procedure, its potential risks and results, but the patient would be sticker shocked by the procedure's cost and would ultimately decide against moving forward with Dr. Kaplan.¹⁷⁸ Dr. Kaplan's system of generating a procedure's cost via the cloud and automatically sending that information to prospective patients eliminated this inefficiency by educating the patient beforehand about price.¹⁷⁹ Dr. Kaplan also became more efficient through implementing transparency of pricing within his practice. Patients that

¹⁷¹ Joshua Cohen, *Surprise Billing: Another Healthcare Market Failure*, FORBES (June 10, 2019, 8:46 AM), <https://www.forbes.com/sites/joshuacohen/2019/06/10/surprise-billing-another-healthcare-market-failure/#3184a8f399e3>.

¹⁷² *3 Reasons for Plastic Surgeons to LOVE Price Transparency*, REALPATIENTRATINGS, <http://www.therealratingsgroup.com/3-reasons-to-love-price-transparency/> (last visited Jan. 18, 2020).

¹⁷³ Jonathan Kaplan, MD, MPH, *Consumers Believe in Price Transparency. So Should You!*, MOD. AESTHETICS (Sept.-Oct. 2016), <https://modernaesthetics.com/articles/2016-sept-oct/consumers-believe-in-price-transparency-so-should-you>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

scheduled consultations were previously informed of the procedure's cost and, in Dr. Kaplan's experience, were more likely to move forward with plastic surgery than patients who were informed of a procedure's cost upon the commencement of the in-person consultation.¹⁸⁰

Price transparency skeptics argue, however, that the existence of insurance companies, essentially acting as a middleman in the shoppable services market, would lead price transparency initiatives to be ineffective in lowering costs of procedures and informing potential patients of a procedure's cost.¹⁸¹ CMS' proposed rule on hospital price transparency would require hospitals to disclose negotiated rates between hospitals and third-party insurers, which skeptics claim would be used by competitor hospitals and other providers as a roadmap to bidding up prices rather than lowering costs for patients.¹⁸² The status quo of hospitals and insurance companies privately negotiating rates and other hidden charges, however, stifles competition within the healthcare industry and may contribute to an increase in prices and out-of-pocket costs to patients.¹⁸³ Currently there are no incentives for hospitals to negotiate lower rates with insurers and there is no mechanism by which insurers can compare what other hospitals are charging them for the same procedure.¹⁸⁴ Without competition injected into these negotiations, prices will either stay at their current rates or even increase.¹⁸⁵ By no longer allowing hospital-insurer negotiations to continue behind closed doors, patients may finally be able to take control of their healthcare by choosing a quality healthcare provider at a reasonable price, while obtaining insurance that vigorously negotiates with hospitals on behalf of the patient, rather than passing along a greater share of the procedure's cost to the patient.¹⁸⁶

¹⁸⁰ *Id.*

¹⁸¹ Julie Appleby, *White House Unveils Finalized Health Care Price Transparency Rule*, KAISER HEALTH NEWS (Nov. 15, 2019), <https://khn.org/news/white-house-unveils-finalized-health-care-price-transparency-rule/>.

¹⁸² *Id.*

¹⁸³ John McCracken, Ph.D., *A Groundbreaking Proposal to Compel Healthcare Price Transparency*, ALLIANCE FOR PHYSICIAN LEADERSHIP, <https://www.utdallas.edu/apl/361/a-groundbreaking-proposal-to-compel-healthcare-price-transparency/> (last visited Jan. 18, 2020).

¹⁸⁴ *Id.*

¹⁸⁵ Federal Trade Commission, *Competition Counts: How Consumers Win When Businesses Compete*, FTC, <https://www.ftc.gov/sites/default/files/attachments/competition-counts/zgen01.pdf> (last visited Jan. 18, 2020).

¹⁸⁶ Grace-Marie Turner, *Three Cheers for Transparency*, FORBES (Nov. 15, 2019), <https://www.forbes.com/sites/gracemarieturner/2019/11/15/three-cheers-for-transparency/#1433edb61349>.

By using the success of transparency in pricing of cosmetic procedures as precedent, Executive Order 13877 and CMS' Final Rule requiring transparency in pricing for shoppable services will have a similar, positive effect.¹⁸⁷ The health insurance trend of patients having higher deductibles with employer-sponsored insurance and HDHPs leads to patients paying more out of pocket costs for shoppable services, but patients do not have the current ability to shop around before the procedure is administered to select a provider within their budgets.¹⁸⁸ Even if the cosmetic surgery marketplace is transparent with pricing out of necessity, it serves as a successful example of how publicly available prices of services, mixed with patient empowerment and engagement, can contribute to the narrowing of excessive margins within the greater healthcare marketplace.¹⁸⁹

V. STATE-LEVEL PRICE TRANSPARENCY INITIATIVES ARE SUCCEEDING

While the national debate surrounding healthcare will certainly continue into 2020 and beyond, many states have joined in on the conversation by passing healthcare transparency legislation of their own.¹⁹⁰ More than thirty states require hospitals to disclose charges for common procedures online, it appears that the people and their state-level representatives are successfully paving the way toward greater healthcare price transparency and serving as a successful example for federal involvement in the area.¹⁹¹ In addition to the establishment of greater consumer choice and knowledge in the realm of a given procedure's cost, the data demonstrates that state-level healthcare transparency legislation and initiatives are reducing costs of shoppable services and increasing competition among service providers within the states that passed such legislation.¹⁹²

¹⁸⁷ Exec. Order No. 13,877, 3 C.F.R. § 30849 (2019); Medicare and Medicaid Programs: CY 2020 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates. Price Transparency Requirements for Hospitals To Make Standard Charges Public, 84 Fed. Reg. 65524 (Nov. 27, 2019); Mark J. Perry, *What economic lessons about health care costs can we learn from the competitive market for cosmetic procedures?*, AM. ENTERPRISE INST. (Mar. 30, 2018), <https://www.aei.org/carpe-diem/what-economic-lessons-about-health-care-costs-can-we-learn-from-the-competitive-market-for-cosmetic-procedures/>.

¹⁸⁸ Robin A. Cohen, Ph.D. et al., *High-deductible Health Plan Enrollment Among Adults Aged 18-64 With Employment-based Insurance Coverage*, 317 NCHS DATA BRIEF 1, 1 (2018).

¹⁸⁹ *Id.*

¹⁹⁰ Roslyn Murray et al., *The State Of State Legislation Addressing Health Care Costs And Quality*, HEALTHAFFAIRS (Aug. 22, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190820.483741/full/>.

¹⁹¹ Ethan M.J. Lieber, *Does It Pay to Know Prices in Health Care?*, 9 Am., Econ. J. 154, 157 (2017).

¹⁹² Jacqueline LaPointe, *Healthcare Price Transparency in NH Reduced Out-of-Pocket Costs*, REVCYCLE INTELLIGENCE (Feb. 11, 2019), <https://revcycleintelligence.com/news/healthcare-price-transparency-in-nh-reduced-out-of-pocket-costs>.

Sixteen of the thirty states with enacted healthcare price transparency legislation tackled the opaque pricing of shoppable services by creating all-payer claims databases (APCDs), which collect and aggregate healthcare price and quality information.¹⁹³ Eight of the sixteen states with APCDs make healthcare price and quality information publicly available through state-based websites.¹⁹⁴ As the name suggests, APCDs aggregate pricing information and related data from patients with private insurance and those utilizing state or federal resources, such as Medicare or Medi-Cal in the state of California.¹⁹⁵ The resulting APCD database provides a unique view across a state's healthcare marketplace.¹⁹⁶ From the perspective of a patient, APCDs can be used as benchmarks regarding the costs paid by him or her relative to others within the same geographical region.¹⁹⁷ If the patient's cost for a given procedure would be higher relative to similar claims filed for the procedure, the patient can utilize that information to determine whether a change of insurance or healthcare provider may result in cost savings.¹⁹⁸ APCDs are also effective tools for policymakers because they provide data on the strengths or weaknesses of a state's healthcare market and inform policymakers of needed interventions that would improve the market for patients.¹⁹⁹

A. New Hampshire and Washington's Price Transparency Initiative Proves Successful

New Hampshire was one of the first states to implement an APCD.²⁰⁰ At the time New Hampshire's APCD was created, many patients in New Hampshire lacked a sufficient number of healthcare providers, which resulted in patients traveling long distances to access healthcare services.²⁰¹ One data point that New Hampshire's APCD collected was the distance that patients traveled for care within the state, and New Hampshire's insurance regulators used this information to establish rules on network adequacy.²⁰² Not only did this APCD

¹⁹³ Roslyn Murray et al., *The State Of State Legislation Addressing Health Care Costs And Quality*, HEALTHAFFAIRS (Aug. 22, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190820.483741/full/>.

¹⁹⁴ *Id.*

¹⁹⁵ Kristof Stremikis, *How An All-Payer Claims Database Can Improve Care in California*, CAL. HEALTH CARE FOUND. (Oct. 24, 2018), <https://www.chcf.org/blog/all-payer-claims-database-california/>.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

data provide a check on health plans that make claims that providers are located within a certain geographical area, but it also may serve as a cost-reducing mechanism for the out-of-pocket expenses for the procedure itself.²⁰³ Access to healthcare in many rural areas of the country, including areas of New Hampshire, is limited and therefore out of pocket travel expenses must be incurred to access services.²⁰⁴ With an increasing number of patients insured by HDHPs, travel expenses to receive services is another line item affecting the patient's bottom line and increases the patient's burden to receive care.²⁰⁵ By pinpointing a previously unquantified issue, policymakers at the state level identify and correct problems with the existing healthcare markets within their borders to improve patient access, consumer knowledge, and efficiency of the marketplace.²⁰⁶

New Hampshire also has demonstrated success in lowering out-of-pocket costs for shoppable services and shifting care to lower-cost healthcare providers since implementing its healthcare price transparency website in 2007.²⁰⁷ In a 2019 study, Assistant Professor of Economics Zach Y. Brown, Ph.D., of the University of Michigan, analyzed the effects of New Hampshire's healthcare price transparency website on patients' out-of-pocket costs over the five-year period subsequent to the website's creation.²⁰⁸ Assistant Professor Brown's study revealed that individuals saved approximately \$7.9 million and payers saved \$36 million on x-rays, CT scans and MRI scans over the five-year period.²⁰⁹ By year five, patients' out-of-pocket costs were eleven percent lower and patients with deductibles saw almost a twenty-two percent savings after five years.²¹⁰

In 2018, the State of Washington launched its WAHealthCareCompare website, which informs patients of the average price of many shoppable services,

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Matthew Rae et al., *Deductible Relief Day: How Rising deductibles are affecting people with employer coverage*, PETERSON-KFF HEALTH SYS. TRACKER (May 15, 2019), <https://www.healthsystemtracker.org/brief/deductible-relief-day-how-rising-deductibles-are-affecting-people-with-employer-coverage/>.

²⁰⁶ Kristof Stremikis, *How An All-Payer Claims Database Can Improve Care in California*, CAL. HEALTH CARE FOUND. (Oct. 24, 2018), <https://www.chcf.org/blog/all-payer-claims-database-california/>.

²⁰⁷ Jacqueline LaPointe, *Healthcare Price Transparency in NH Reduced Out-of-Pocket Costs*, REVCYCLE INTELLIGENCE (Feb. 11, 2019), <https://revcycleintelligence.com/news/healthcare-price-transparency-in-nh-reduced-out-of-pocket-costs>

²⁰⁸ Zach Y. Brown, *Equilibrium Effects of Health Care Price Information*, 101 Rev. of Econ. and Stat. 699 (2019).

²⁰⁹ *Id.* at 710.

²¹⁰ *Id.* at 706.

such as x-rays, colonoscopies, and eye exams to name a few.²¹¹ By requesting the type of procedure and entering a ZIP code, a patient can gain immediate information about the procedure itself, the average price of the procedure in the State of Washington, and typical low and high prices for the procedure in different ZIP codes throughout the State.²¹² The website also provides a listing of healthcare service providers within the given ZIP code, the cost of the requested procedure at the given provider, as well as information about how the quality of care at a given provider compares to other providers statewide.²¹³ The website also contains a cost calculator, allowing a patient to enter the estimated cost of a procedure given by the website, input insurance information such as the patient's deductible, co-insurance percentage or co-pay amount to receive a bottom-line estimate of the patient's out-of-expenses for the procedure.²¹⁴

B. Kentucky's Transparency Tool Saves Public Employees Millions

The experiments of making the cost of shoppable services publicly accessible has indicated a resulting trend of lower costs of care. Across the country, state governments spend in excess of \$30 billion to insure roughly 2.7 million public employee households.²¹⁵ Among state and local governments, roughly 89% of workers are offered health benefits, and 79% of these workers enroll in a health benefit program.²¹⁶ Between 2008 and 2011, Kentucky increased the amount that state employees could contribute to their health insurance by 55%.²¹⁷ By 2012, however, the average total premium for an employee and dependents was still over \$1,200 per month.²¹⁸ To control costs, Kentucky then increased deductibles in two of their more popular plans—achieving some cost control but also increasing employee out-of-pocket costs, which turned out to be an unpopular move by the State.²¹⁹

²¹¹ Wash., <https://www.wahealthcarecompare.com/> (last visited Jan. 18, 2020); Jacqueline LaPointe, *WA Makes Healthcare Price Transparency Consumer-Friendly*, REVCYCLE INTELLIGENCE (Aug. 2, 2018), <https://revcycleintelligence.com/news/wa-makes-healthcare-price-transparency-consumer-friendly>.

²¹² Wash., <https://www.wahealthcarecompare.com/procedure/knee-x-ray?zipcode=98001> (last visited Jan. 18, 2020).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Jared Rhoads, *Right to Shop for Public Employees: How Health Care Incentives Are Saving Money in Kentucky*, THE DARTMOUTH INST. FOR HEALTH POL'Y AND CLINICAL PRAC. 1 (Mar. 8, 2019), <https://thefga.org/wp-content/uploads/2019/03/RTS-Kentucky-HealthCareIncentivesSavingMoney-DRAFT8.pdf>.

²¹⁶ *Id.* at 3.

²¹⁷ *Id.* at 4.

²¹⁸ *Id.*

²¹⁹ *Id.*

Kentucky searched for new approaches to keep health care costs under control while lessening the financial burden on state employees.²²⁰ Without consumer friendly access to healthcare price information and a lack of incentive to do so, Kentucky developed mechanisms by which public employees could shop for the best-valued shoppable services.²²¹ In 2013, Kentucky implemented the Vitals SmartShopper program, a technologically-enabled third-party service designed to share price information for various healthcare procedures, including shoppable services.²²² In addition to making prices for shoppable services publicly available to the entire populous of Kentucky, Vital SmartShopper offers incentives to Kentucky's public employees and retirees to utilize the information and make lower-cost healthcare decisions.²²³ For example, if a Kentucky public employee visits her doctor who subsequently recommends a certain shoppable service, she could then consult the Vital SmartShopper website to discover what providers offer the best price for the required procedure.²²⁴ If the provider chosen is one that Vital SmartShopper has established as qualified under the program, the public employee will receive a reward check in the mail within forty-five to sixty days of her claim being paid.²²⁵

The shopper program has been popular among public employees.²²⁶ Through mid-2018, about 42% of eligible households used the program to look up information about prices and rewards, and 57% of those employees actively chose a more cost-effective provider.²²⁷ While skeptics argue that shopping incentives will lead to lower-quality care, that does not seem to be the case with the Kentucky experiment.²²⁸ Public employees in Kentucky are now better informed; they can make decisions on where to receive shoppable healthcare services based on location, quality *and* cost.²²⁹ The lowest priced option is not always chosen and many Kentucky public employees choose a costlier procedure, foregoing the maximum or even a slight cash incentive.²³⁰ Kentucky's experience has shown that empowering patients with a price

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 6.

²²³ *Id.* at 8.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 10.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 12.

transparency tool results in both taxpayer savings and direct savings, in addition to providing incentives to members without sacrificing quality.²³¹

Results indicate that healthcare providers within Kentucky are not as opposed to the Vital SmartShopper program as one might think.²³² In response to Kentucky's price transparency initiative, some hospitals and imaging centers have become aware that their prices are high and have lowered their prices to rank higher on the lists provided to patients.²³³ For example, one high-cost regional hospital inquired how much they would need to lower their imagine rates to be listed competitively in the shopper program.²³⁴ Working with the provider and the health plan, the hospital lowered their imaging rates for MRIs and CT scans by roughly 30% to rank higher in the shopper program.²³⁵ Similarly, some providers that are already low-cost have reached out to Vitals to provide more information about additional services that they also offer at their locations at competitive prices, which can help expand the set of services eligible for incentives.²³⁶

Savings by Kentucky public employees have been significant over the life of the Vital SmartShopper program.²³⁷ According to data from the state through mid-2018, Vitals SmartShopper has saved state taxpayers a total of \$13.2 million in health care costs.²³⁸ Over 19,000 incentives have been paid to members for a total of \$1,919,460 back into the pockets of public employees.²³⁹ The average savings to the state per claim that was shopped is \$546.²⁴⁰ Kentucky's Vital SmartShopper program, along with the other state initiatives geared toward price transparency of shoppable services, serves as an example of the effectiveness of informing patients of hospitals' list prices, negotiated rates with insurers, and out-of-pocket costs.²⁴¹ By empowering patients with information, patients across the country will finally be able to make healthcare decisions based not only on the quality and easy accessibility of care, but also by cost.²⁴² While a

²³¹ *Id.*

²³² *Id.* at 13.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 8.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

national model designed off of the various state price transparency initiatives would require more fortitude and data to establish, state initiatives demonstrate that price transparency surrounding shoppable services can lead to lower out of pocket costs for patients in the long-term, increase consumer choice, and can contribute to increased competition within the healthcare industry.²⁴³

CONCLUSION

Justice Louis Brandeis once said, “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”²⁴⁴ While this statement was made over a century ago, it represents sound advice in solving today’s problem of the exorbitantly high cost of healthcare in the United States.²⁴⁵ The injection of transparency into the currently opaque status quo of privately-negotiated pricing between hospitals and insurers, obscure list prices generated by hospitals, and the inability of patients to gain meaningful information to make the best health *and* financial decisions for themselves and their families requires immediate action and attention.²⁴⁶ Exposure of hospitals’ list prices and negotiated rates to public scrutiny is a necessary predicate to reverse the trend of increasing costs of healthcare in the United States.²⁴⁷ The current system allows one of the largest industries in the nation to be insulated from market forces, and as a result, patients pay a very high price.²⁴⁸

As deductibles rise and the percentage of Americans with HDHPs increases, patients will be paying a higher percentage of the cost of shoppable services out-of-pocket.²⁴⁹ While HDHPs benefit relatively healthy patients through the incentive of lower monthly premiums, significant financial hardship may arise if an unexpected injury occurs and a plethora of scans and procedures are needed to remedy the problem.²⁵⁰ Price transparency is an essential vehicle to create greater patient involvement with their healthcare in addition to lessening the

²⁴³ *Id.*

²⁴⁴ JOSHUA TAUBERER, *SUNLIGHT AS A DISINFECTANT IN OPEN GOVERNMENT DATA: THE BOOK* (2nd ed. 2014).

²⁴⁵ JOSHUA TAUBERER, *SUNLIGHT AS A DISINFECTANT IN OPEN GOVERNMENT DATA: THE BOOK* (2nd ed. 2014); Jim Probasco, *Why Do Healthcare Costs Keep Rising?*, INVESTOPEdia (Oct. 16, 2019),

²⁴⁶ Elisabeth Rosenthal, *Analysis: Pulling Back Curtain On Hospital Prices Adds New Wrinkle In Cost Control*, KAISER HEALTH NEWS (Jan. 28, 2019), <https://khn.org/news/analysis-pulling-back-curtain-on-hospital-prices-adds-new-wrinkle-in-cost-control/>.

²⁴⁷ Kimberly Amadeo, *The Rising Cost of Health Care by Year and Its Causes*, The Balance, <https://www.thebalance.com/causes-of-rising-healthcare-costs-4064878> (last updated Jan. 14, 2020).

²⁴⁸ *Id.*

²⁴⁹ Robin A. Cohen, Ph.D. et al., *High-deductible Health Plan Enrollment Among Adults Aged 18-64 With Employment-based Insurance Coverage*, 317 NCHS DATA BRIEF 1, 1 (2018).

²⁵⁰ *Id.*

financial burden on patients who are now paying more healthcare costs out-of-pocket than ever before.²⁵¹

Vertical consolidations between hospitals and independent physician groups and horizontal consolidations among hospitals limits consumer choice and raises costs for patients.²⁵² The United States' healthcare industry is highly concentrated, and with healthcare costs higher than they have ever been it is difficult to see how cost savings are being funneled down to patients.²⁵³ Price transparency in healthcare is the necessary first step toward lowering the cost of shoppable services for patients, but federal enforcement of antitrust law is also needed to provide choices for patients and to inject competitive forces within the industry.²⁵⁴

Price transparency efforts by state governments and the uninsured cosmetic surgery industry have shown signs of success, and they serve as precedent in the likelihood of CMS' Final Rule lowering prices of shoppable services, encouraging patient involvement and increasing competition within the national healthcare industry.²⁵⁵ The cosmetic surgery industry's success of narrowing cost margins for procedures, informing patients of the financial burden of procedures beforehand, and maintaining competitive forces among providers within a given geographical region will likely have the same effect within the shoppable services market.²⁵⁶ The injection of competitive forces is likely to narrow the margin for a given procedure towards the average, because many patients will choose a less costly option without sacrificing the quality of the procedure.²⁵⁷ And as Kentucky, Washington and many other states have shown, empowering patients with choices in an environment of increasing out-of-pocket

²⁵¹ *Id.*

²⁵² Emily Gee, *Provider Consolidation Drives Up Health Care Costs*, Ctr. for Am. Progress (Dec. 5, 2018 at 8:00 AM), <https://www.americanprogress.org/issues/healthcare/reports/2018/12/05/461780/provider-consolidation-drives-health-care-costs/>.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Jared Rhoads, *Right to Shop for Public Employees: How Health Care Incentives Are Saving Money in Kentucky*, THE DARTMOUTH INST. FOR HEALTH POL'Y AND CLINICAL PRAC. 1 (Mar. 8, 2019), <https://thefga.org/wp-content/uploads/2019/03/RTS-Kentucky-HealthCareIncentivesSavingMoney-DRAFT8.pdf>;

²⁵⁶ Sarah Gantz, *How Lasik and Botox could point the way to health care price transparency*, THE PHILADELPHIA INQUIRER (Feb. 28, 2018), <https://www.inquirer.com/philly/health/health-costs/lasik-20180228.html>.

²⁵⁷ Mark J. Perry, *What economic lessons about health care costs can we learn from the competitive market for cosmetic procedures?*, AM. ENTERPRISE INST. (Mar. 30, 2018), <https://www.aei.org/carpe-diem/what-economic-lessons-about-health-care-costs-can-we-learn-from-the-competitive-market-for-cosmetic-procedures/>.

costs is a resource that can lower costs of shoppable services, even for those who do not actively use pricing information or receive the lowest cost procedure.²⁵⁸

As healthcare costs in the United States continue to rise,²⁵⁹ more states should follow the lead of Kentucky and other proactive states in the area of price transparency of shoppable services.²⁶⁰ Kentucky's Vital SmartShopper program is as an exemplar for a proactive solution to the problem of rising healthcare costs combined with patients bearing more of a direct financial burden resulting from higher deductibles.²⁶¹ By making constituents aware of available cost comparison tools, establishing efficient registration mechanisms and periodically reminding individuals about available cost savings, many more states can help offset out-of-pocket costs while empowering patients with choices.²⁶²

A majority of Americans are currently attempting to access cost information pertaining to healthcare and this number will likely continue to grow as a higher percentage of healthcare costs are placed on the patient.²⁶³ While CMS' Final Rule will provide the tools by which patients can become even more actively involved in their healthcare, the onus is on the patient to utilize this invaluable resource.²⁶⁴ The longstanding healthcare debate will certainly continue into the 2020 election and beyond, but for the first time patients are being put first instead of special interests that benefit from a status quo of keeping healthcare prices

²⁵⁸ Zach Y. Brown, *What would happen if hospitals openly shared their prices?*, THE CONVERSATION (Jan. 30, 2019, 6:50 AM), <https://theconversation.com/what-would-happen-if-hospitals-openly-shared-their-prices-110352>.

²⁵⁹ Peter G. Peterson Found., *Healthcare Costs for Americans Projected to Grow at an Alarming High Rate*, PETER G. PETERSON FOUND. (May 1, 2019), <https://www.pgpf.org/blog/2019/05/healthcare-costs-for-americans-projected-to-grow-at-an-alarmingly-high-rate>.

²⁶⁰ Jared Rhoads, *Right to Shop for Public Employees: How Health Care Incentives Are Saving Money in Kentucky*, THE DARTMOUTH INST. FOR HEALTH POL'Y AND CLINICAL PRAC. 1 (Mar. 8, 2019), <https://thefga.org/wp-content/uploads/2019/03/RTS-Kentucky-HealthCareIncentivesSavingMoney-DRAFT8.pdf>.

²⁶¹ Jared Rhoads, *Right to Shop for Public Employees: How Health Care Incentives Are Saving Money in Kentucky*, THE DARTMOUTH INST. FOR HEALTH POL'Y AND CLINICAL PRAC. 1 (Mar. 8, 2019), <https://thefga.org/wp-content/uploads/2019/03/RTS-Kentucky-HealthCareIncentivesSavingMoney-DRAFT8.pdf>; Robin A. Cohen, Ph.D. et al., *High-deductible Health Plan Enrollment Among Adults Aged 18-64 With Employment-based Coverage*, 317 NCHS DATA BRIEF 1, 1 (2018).

²⁶² Jared Rhoads, *Right to Shop for Public Employees: How Health Care Incentives Are Saving Money in Kentucky*, THE DARTMOUTH INST. FOR HEALTH POL'Y AND CLINICAL PRAC. 1 (Mar. 8, 2019), <https://thefga.org/wp-content/uploads/2019/03/RTS-Kentucky-HealthCareIncentivesSavingMoney-DRAFT8.pdf>.

²⁶³ Sara Heath, *75% of Patients Look at Price Transparency Ahead of Care Access*, XTELLIGENT HEALTHCARE MEDIA (Sept. 17, 2019), <https://patientengagementhit.com/news/75-of-patients-look-at-price-transparency-ahead-of-care-access>

²⁶⁴ *Id.*

behind a veil of secrecy.²⁶⁵

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²⁶⁵ Timothy Kelley, *Prices: High, Confusing, and Opaque. Would Transparency Even Help?*, *Managed Care* (Apr. 30, 2019), <https://www.managedcaremag.com/archives/2019/5/prices-high-confusing-and-opaque-would-transparency-even-help>.

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