

Testimony before the House Judiciary
Subcommittee on Antitrust, Commercial, and Administrative Law

Hearing On:
“Treating the Problem: Addressing Anticompetitive Conduct and Consolidation in Healthcare
Markets”

Senator Mike Lee

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Chairman Cicilline, Ranking Member Buck, and esteemed members of the Subcommittee: thank you for inviting me to speak today.

As the leading Republican on the Senate’s sister subcommittee to this body for the last decade, I have developed a great appreciation for our country’s antitrust laws and the importance of competition policy to our national economy.

Rising healthcare costs and limited healthcare options are leading concerns of Americans of all stripes, making competition in the healthcare markets particularly important. I share the commitment of my colleagues who have joined you today in ensuring and protecting competition across the healthcare space.

In 2016, I was honored to introduce—along with Senators Grassley, Leahy, and Klobuchar—the CREATES Act, which was finally passed by Congress and signed into law by President Trump in 2019. As you know, the CREATES Act was designed to protect competition and lower drug costs by ensuring that generic competitors have access to samples of certain brand name drugs for the purpose of establishing bioequivalence for the FDA. The Congressional Budget Office estimated that the law will save taxpayers \$3.8 billion dollars over 10 years, and industry participants tell me it is already improving generic competition.

As this Subcommittee considers additional legislation aimed at improving competition across various healthcare markets, I urge you to follow the model that made the CREATES Act successful: light touch reform to help align private incentives to benefit competition, rather than government intervention that displaces competition with regulation.

We should all examine our history to find the root causes of consolidation in America’s healthcare industry, and tackle the issue with incremental, targeted fixes rather than a massive, one-size-fits-all approach. That will require taking a wide view of all of the factors that impact competition in healthcare markets, including existing federal and state laws and regulations.

If there is anything worse than a monopolist using its power to squelch competition and squeeze consumers, it is when that monopolist is a creature of government policy and power. We—as representatives of the people entrusted to enact laws that pursue justice and equality—must always be vigilant against allowing the democratic process to be corrupted, even inadvertently, to pick winners and losers.

If we wish to make reforms in this area, we sadly have no shortage of opportunities. At the state level, entry into hospital markets is frequently restrained by state certificate of need laws. These laws require potential market entrants and existing competitors to obtain approval from the state to build new hospitals or expand current facilities. In some states, incumbent hospitals even have veto power over granting certificates to new entrants. This is crony capitalism, pure and simple, and patients have suffered for it. It's no wonder that the pandemic saw at least 24 states suspend or loosen their certificate-of-need laws. Imagine the benefits to healthcare and competition if states repealed those laws.

Another common restriction at the state level are limitations on nurse practitioners, some of which make little to no sense and provide little to no benefit or additional safety to the patient. The conflict of interest is obvious: for many basic needs, nurse practitioners offer comparable skill and service at a lower price, increasing access to healthcare for the most economically vulnerable. Removing these sorts of restrictions would generate price and quality competition between nurse practitioners and physicians, and improve costs and outcomes for patients across the country.

Government intervention in healthcare has also had disastrous effects at the federal level. Medicare has used federal clout to strong-arm healthcare providers into agreeing to low reimbursement rates. Ordinarily, we should cheer lower prices, but in this case the "savings" are really just subsidies paid for by insured and self-pay patients. This isn't healthcare reform; it's a Ponzi scheme. "Medicare for all" would mean there was no one left to pay the subsidy, and everyone would suffer. These artificial pricing pressures also mean that healthcare markets are not able to fully respond to competitive pressure and have fewer resources to invest in expansion and innovation.

Obamacare has had a similar effect. We're all familiar with the infamous promise that, "if you like your plan, you can keep it." It turned out that the largest expansion of government regulation of healthcare and health insurance had the opposite effect. The aftermath of Obamacare saw sudden and significant increases in consolidation among providers and reduced output from insurers. This is just one more example of why a belief in the benefits of competition needs to be paired with skepticism of government intervention.

My criticism of these specific approaches, however, should not be taken as criticism of the underlying goals. Just as Democrats and Republicans are united in our desire to protect consumers, we are also united in our desire to ensure that everyone has access to affordable quality healthcare. The devil is in the details, as they say. The best way to improve healthcare in the future is to return to what has worked in the past: procompetitive measures that prioritize patient freedom and choice and prevent the government from tipping the scales.

It is tempting to retrench into tribalism and push for all encompassing reforms that might only require floor time once. But, our constituents deserve better. They deserve a free market approach, where providers—whether they be doctors, insurers, pharmaceutical companies, hospitals, etc.—respond to their needs and demands. Antitrust enforcement and competition policy have historically been areas of bipartisan agreement. For all the differences between our

two parties, we are united in our desire to protect consumers and ensure Americans have access to affordable, high-quality care. We know that vigorous competition is essential to both.

Thank you for your close attention to keeping America's healthcare markets competitive, and thank you again for inviting me to join you today. I look forward to working with each of you.