

# ERISA: The Federalism Trap for State Health Reform

Presentation to NCOIL | Dec. 6, 2018

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# The Project:

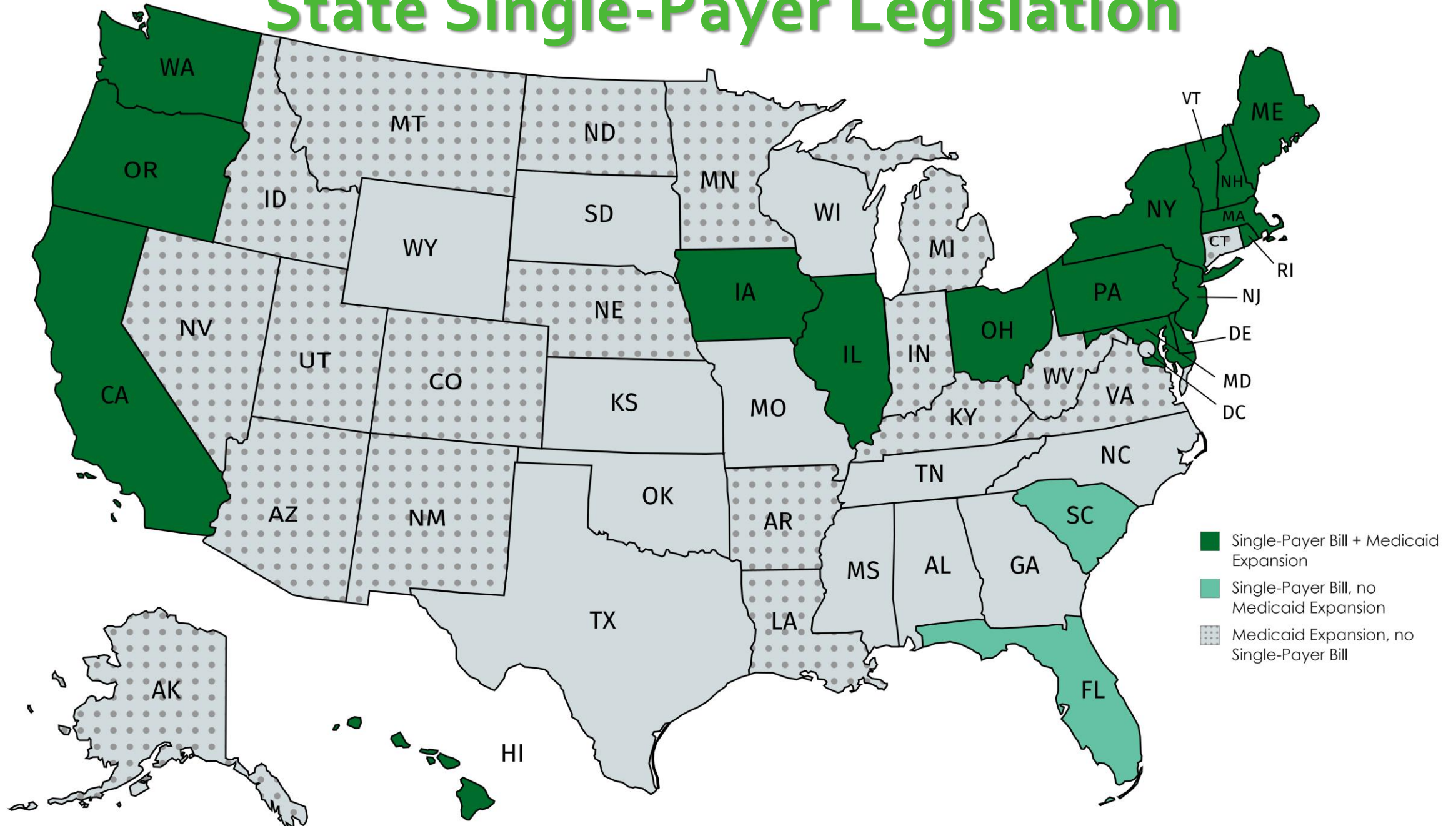
- State health reform momentum
- ERISA preemption trap
- Subverting health care federalism
- Pave the way for state reform:
  - ✓ Amend ERISA
  - ✓ Refresh ERISA preemption jurisprudence
  - ✓ Legislate around ERISA

# State Health Reform: *After the ACA*



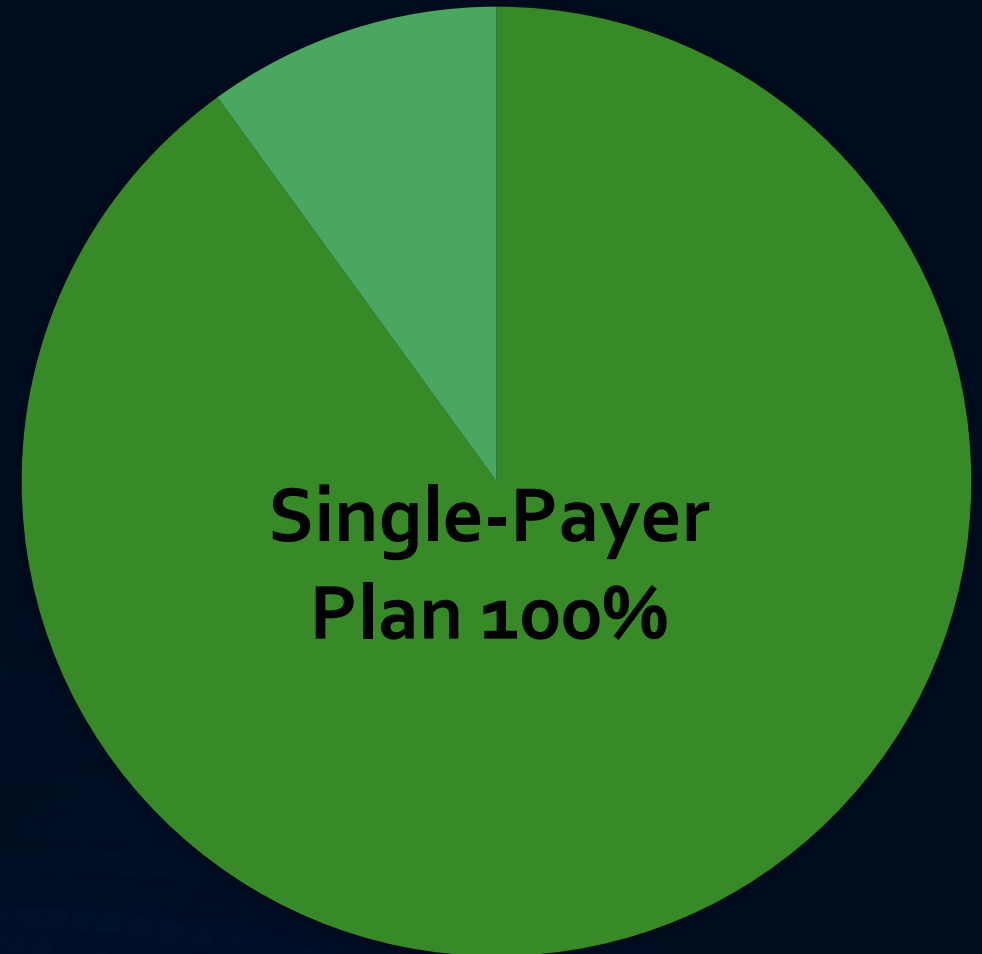
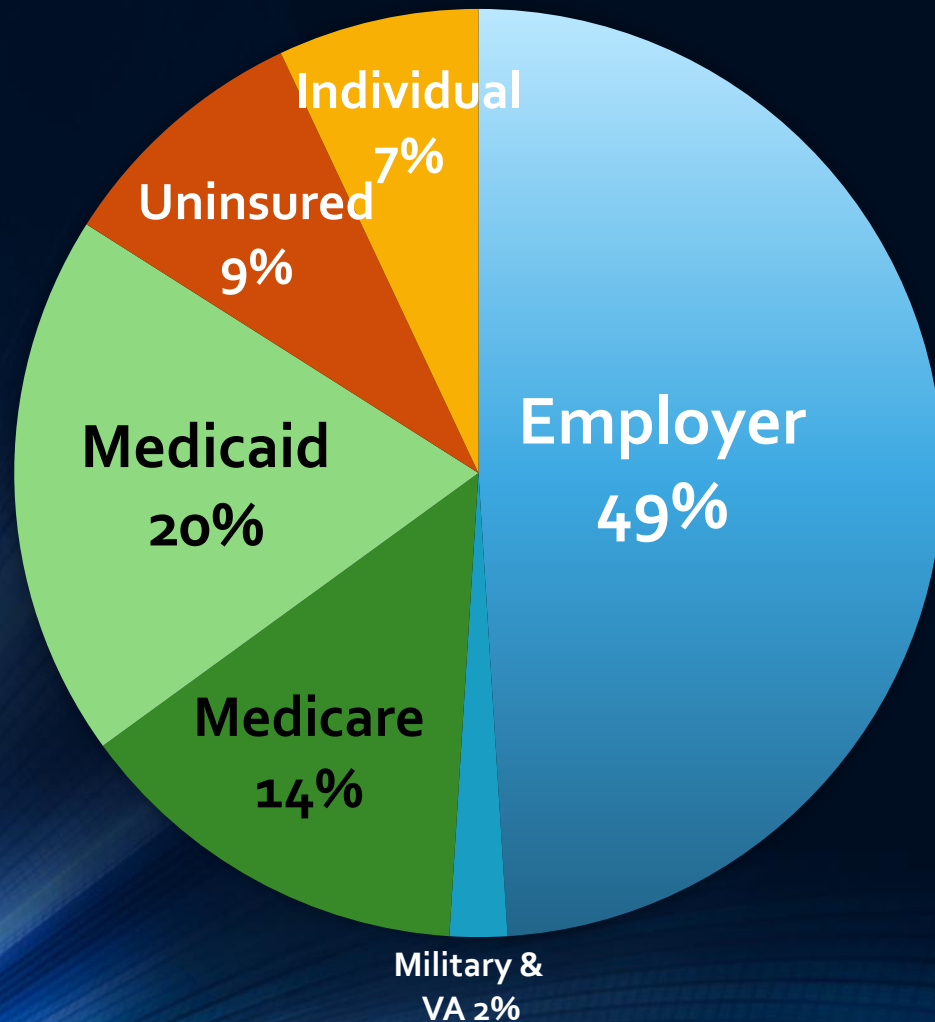
12 State-based marketplaces    5 State-based marketplaces using the federal platform    3 Federally Facilitated Marketplaces: state-based SHOP    31 Federally Facilitated marketplaces

# State Single-Payer Legislation



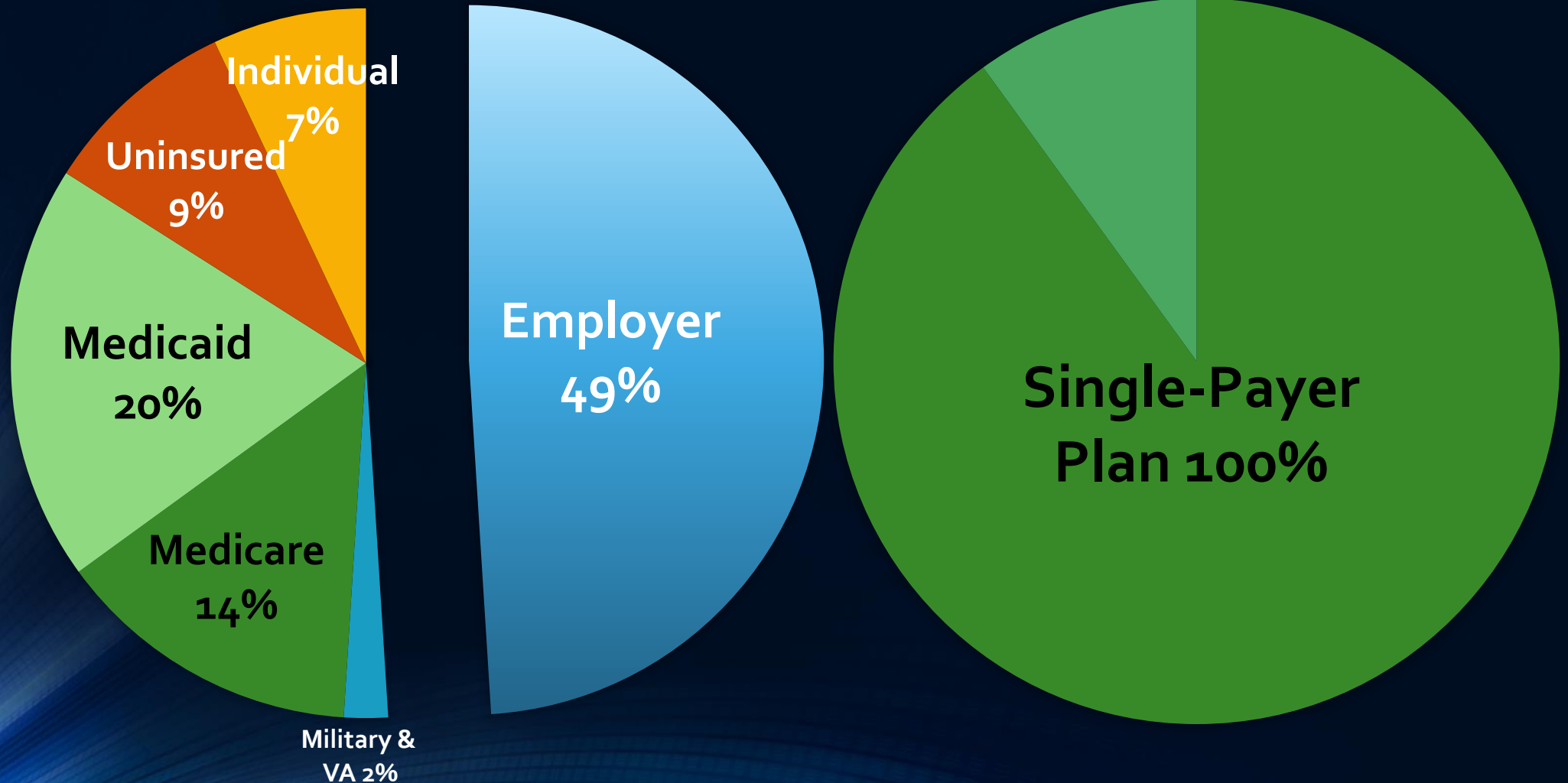
# State Single-Payer Legislation

## FUNDING & PARTICIPATION



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# State Single-Payer Legislation

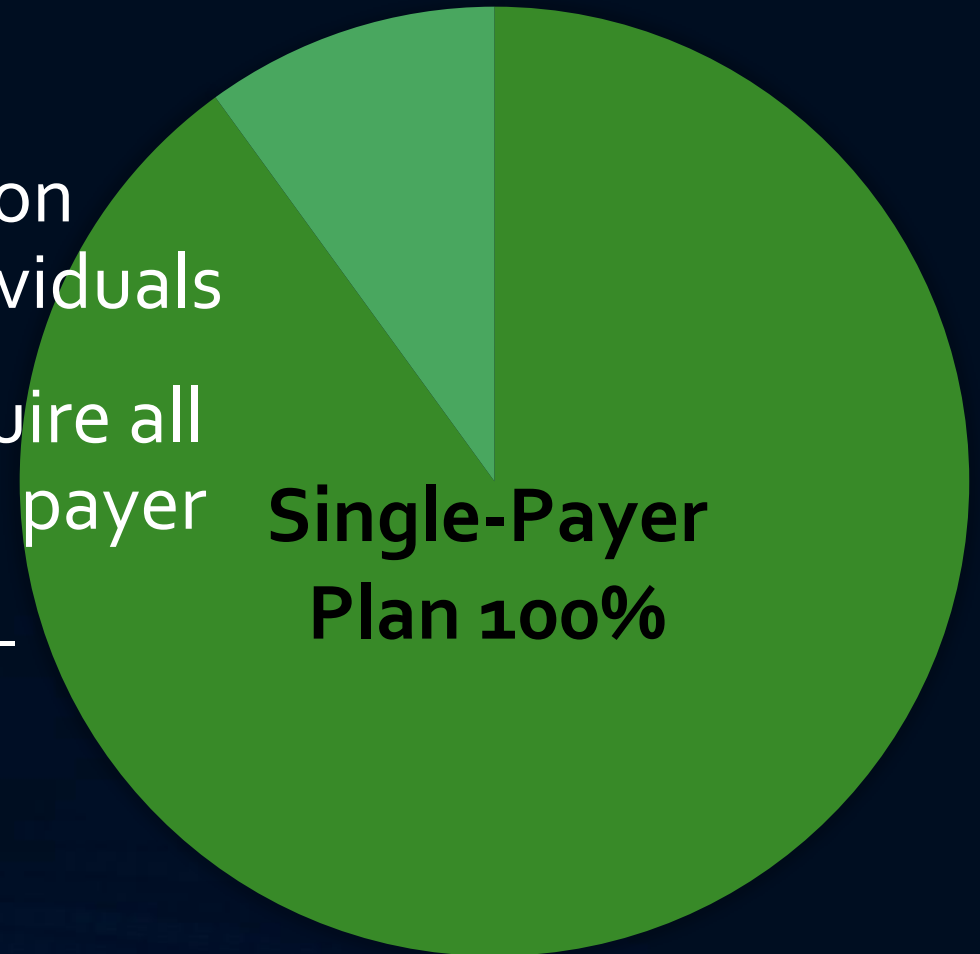
## FUNDING & PARTICIPATION

~~Employer mandate to participate~~

**Type A – Funding Plan** – Payroll tax on employers and/or income tax on individuals

**Type B – Provider Restriction** – Require all provider payments come from single payer

**Type C – Assignment/Subrogation** – Single payer plan pays and seeks reimbursement from other payers



ERISA preempts **any and all** state laws that **relate to employee benefit plans** if they either:

- do not qualify as insurance regulation (*Savings Clause*)
- or*
- relate to self-funded health plans (*Deemer Clause*).

## The ERISA Preemption Trap



# ERISA Applied to State Single-Payer Types

**A – Funding Plan**

✓ Income Tax

? Payroll Tax – *not too high?*

**B – Provider Restriction**

? Probably not preempted

**C – Assignment**

? Probably not preempted

***Combination***

? Probably not preempted

ERISA  
Preemption:



IT'S A  
TRAP

# **ERISA** in Health Care Federalism

State police powers over health care

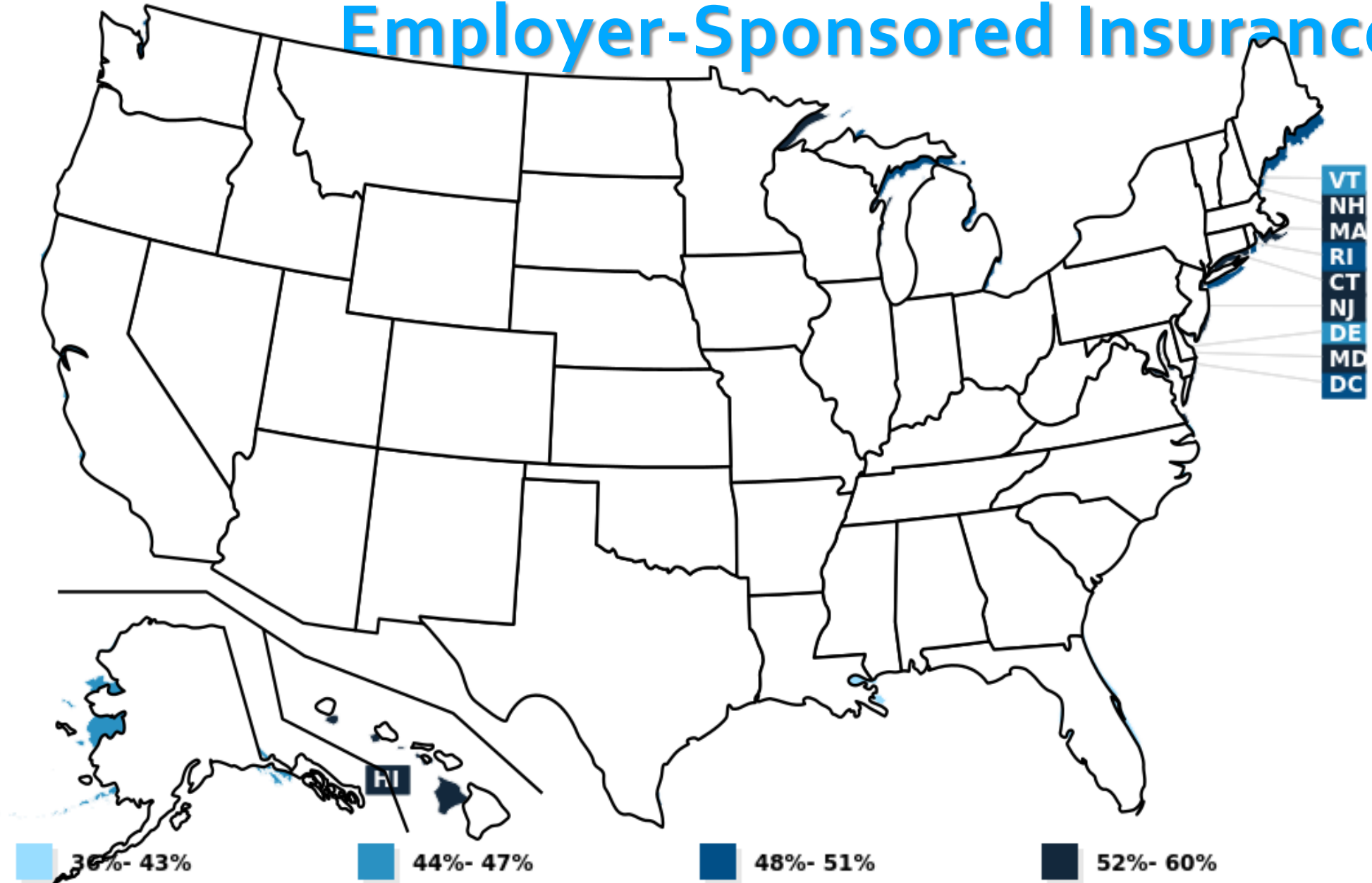
Federal statutory infrastructure

- Medicare
- Medicaid
- ACA
- FDA

Waiver and guided experimentation

Cooperative federalism

# Employer-Sponsored Insurance



# Fixing Health Care Federalism in ERISA

## Floor Preemption

States may add to federal protections

## Deemer Clause

Self-Funded Plans

Bolsters Savings Clause

## Waiver

Agency Expertise

Cooperative Federalism

## Courts

ERISA Intent

Presumption against Preemption

# Elizabeth Y. McCuskey



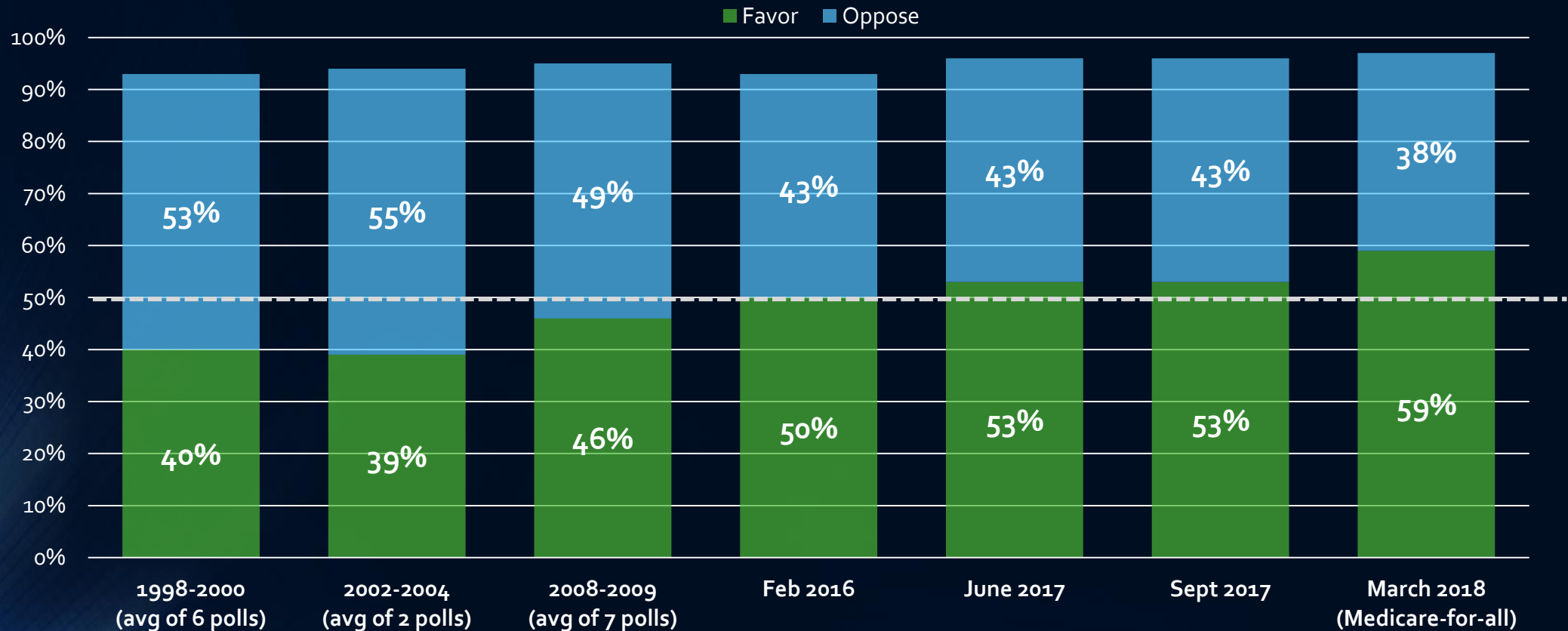
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# Public Support For Single-Payer Health Care

Percent who favor or oppose a national health plan in which all Americans would get their insurance from a single government plan:



NOTE: Question wording varied slightly over time. See topline for full question wording.

SOURCE: KFF Polls