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Pursuing Freedom & Opportunity through Justice & AccountabilitySM

**“OPENING THE STATE HOUSE DOORS”:
EXAMINING TRENDS IN PUBLIC ACCESS TO
LEGISLATIVE RECORDS**

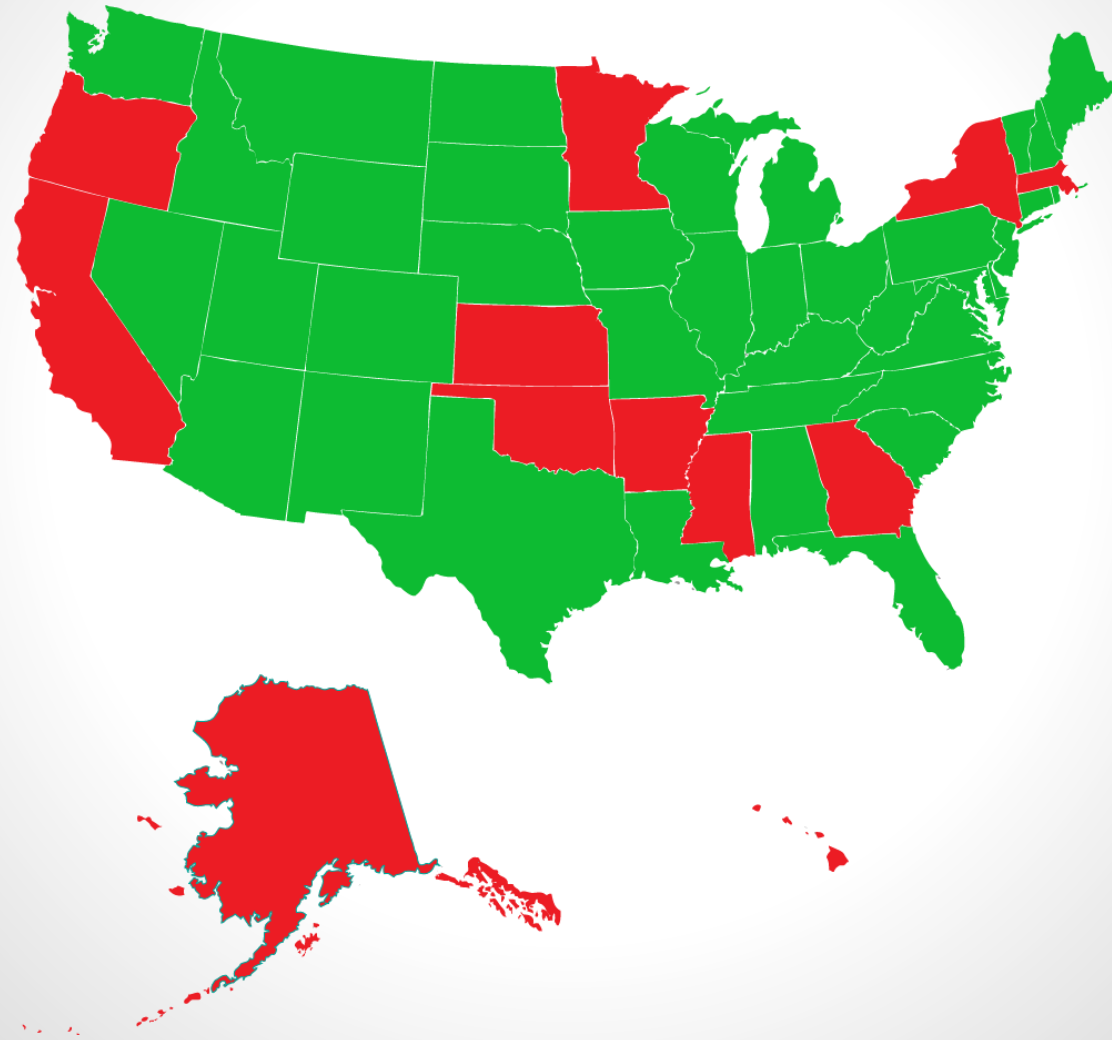
RYAN MULVEY & JAMES VALVO

INTRODUCTORY REMARKS

- The methodological problem of defining “legislative records”
 - Individual legislators, delegations, offices, agencies, *etc.*
- Recent developments:
 - Missouri—Constitutional amendment and legislative reaction
 - South Carolina—Legislative “caucuses”
 - Michigan—“Legislative Open Records Act”

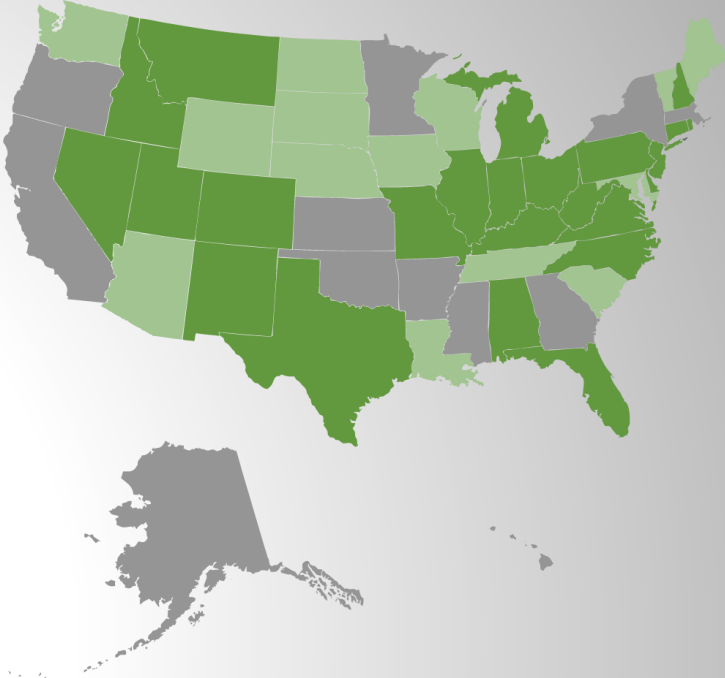
LEGISLATIVE RECORDS UNDER STATE FOI LAWS

**States Excluding
Access to
Legislative
Records**

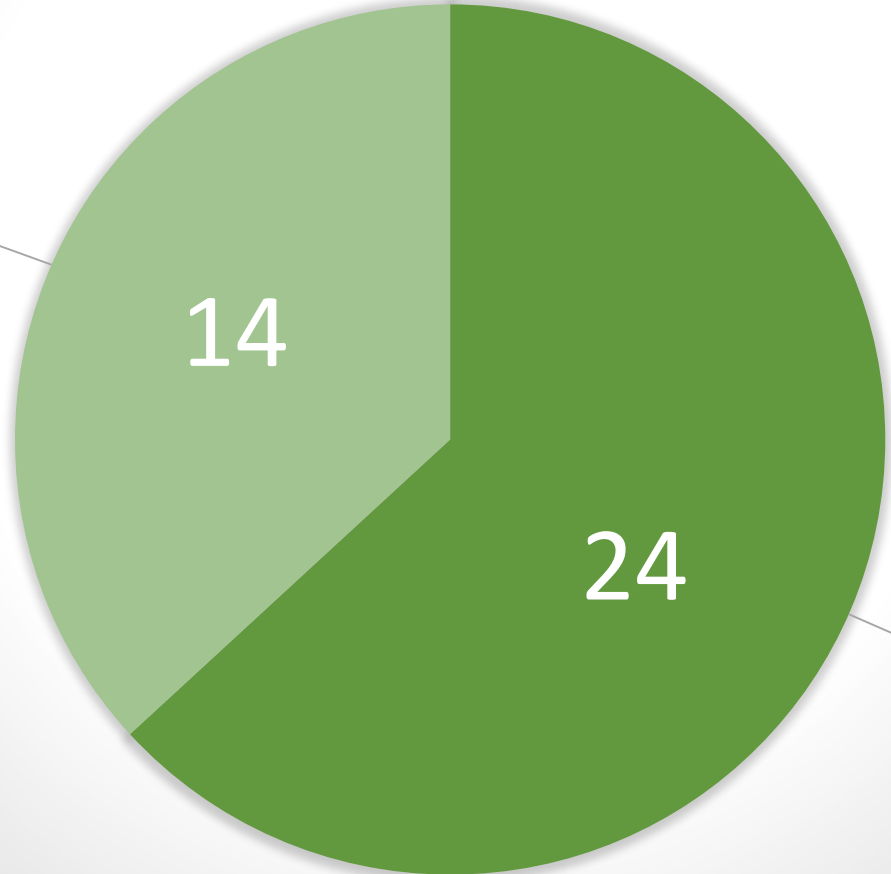


**States Granting
Some Level of
Access to
Legislative
Records**

OF THE STATES THAT PERMIT ACCESS TO VARIOUS LEGISLATIVE RECORDS...

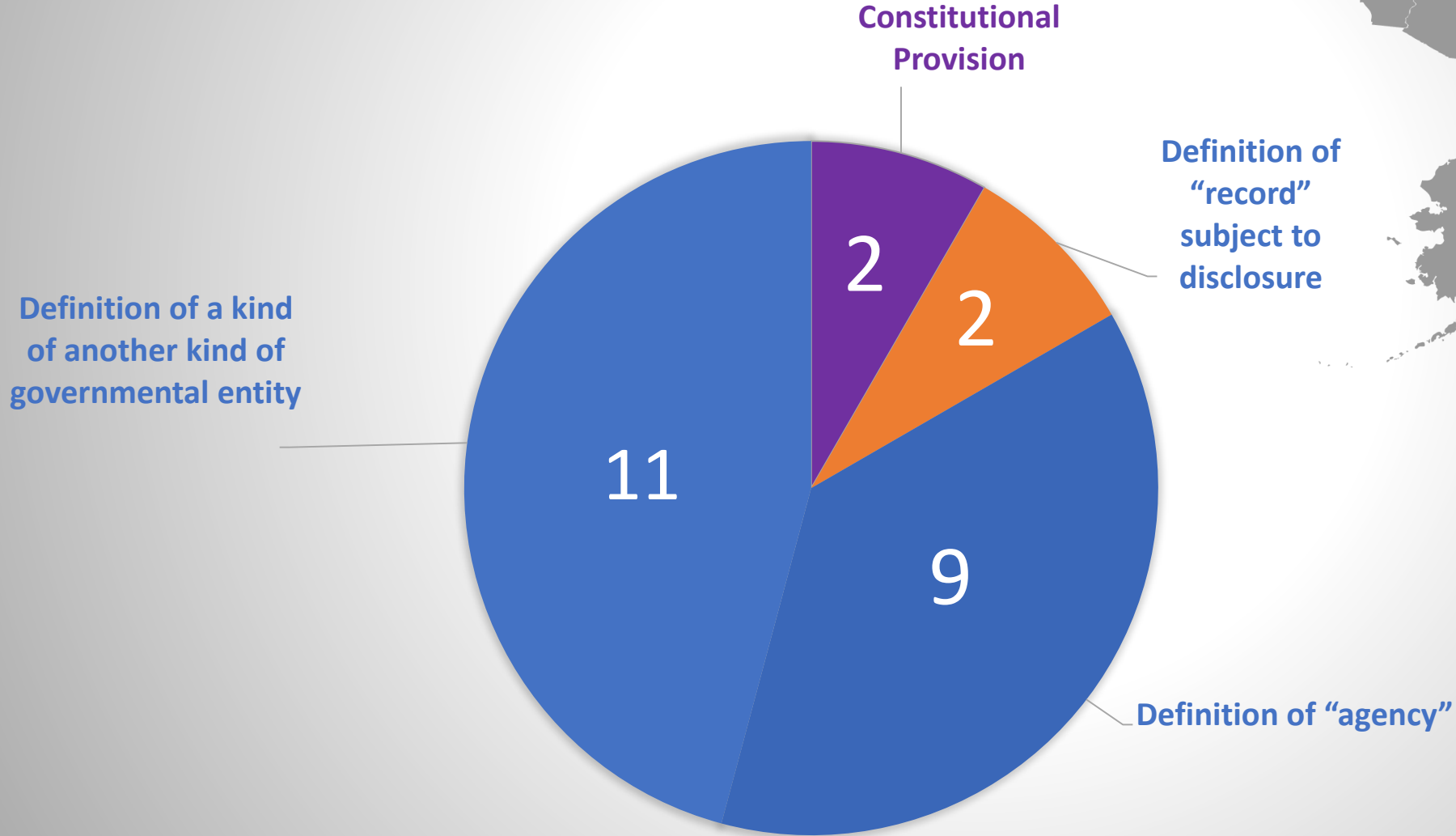
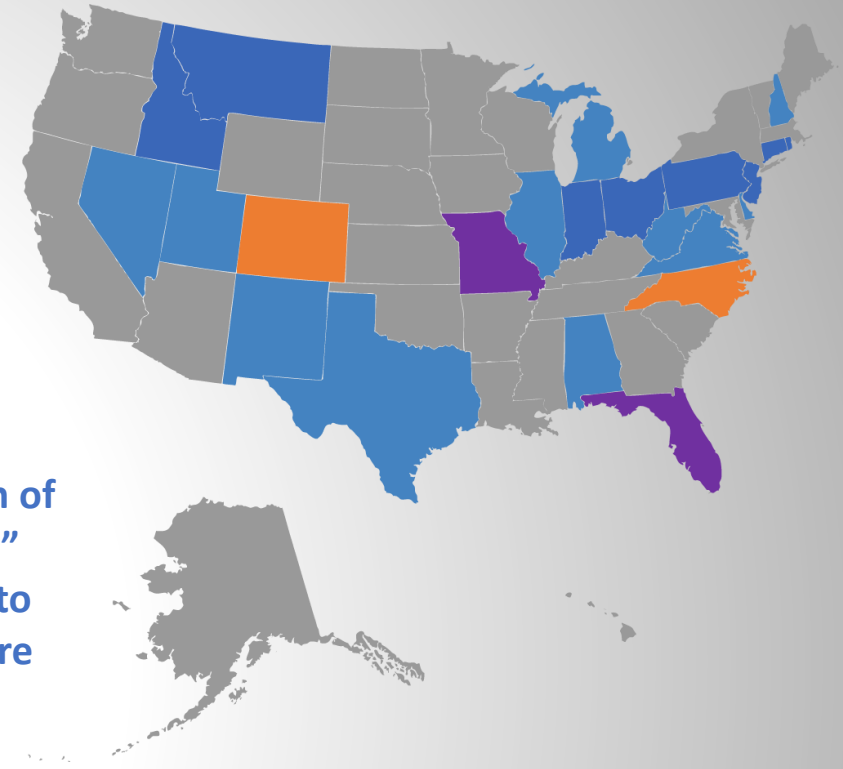


Implied
Access

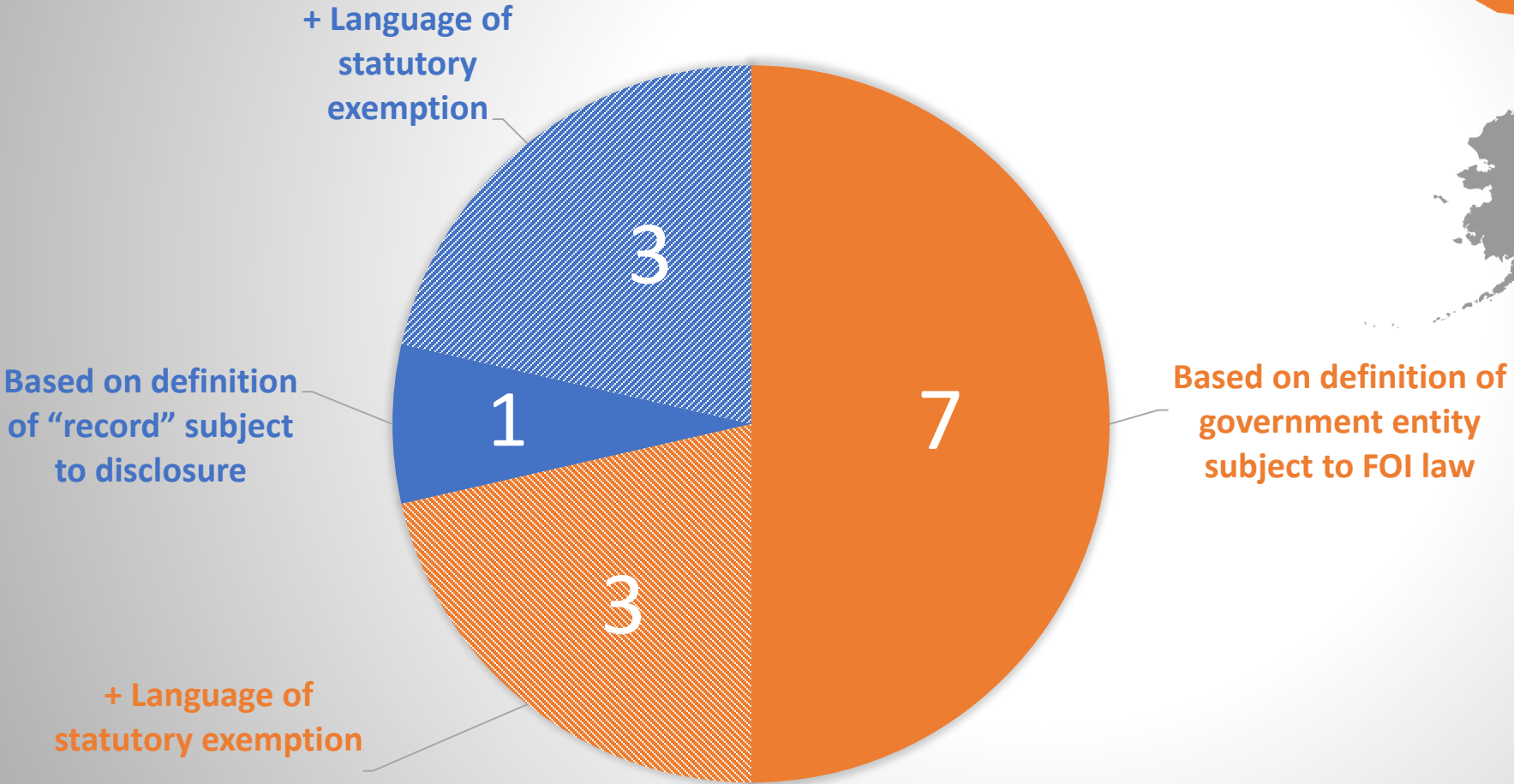
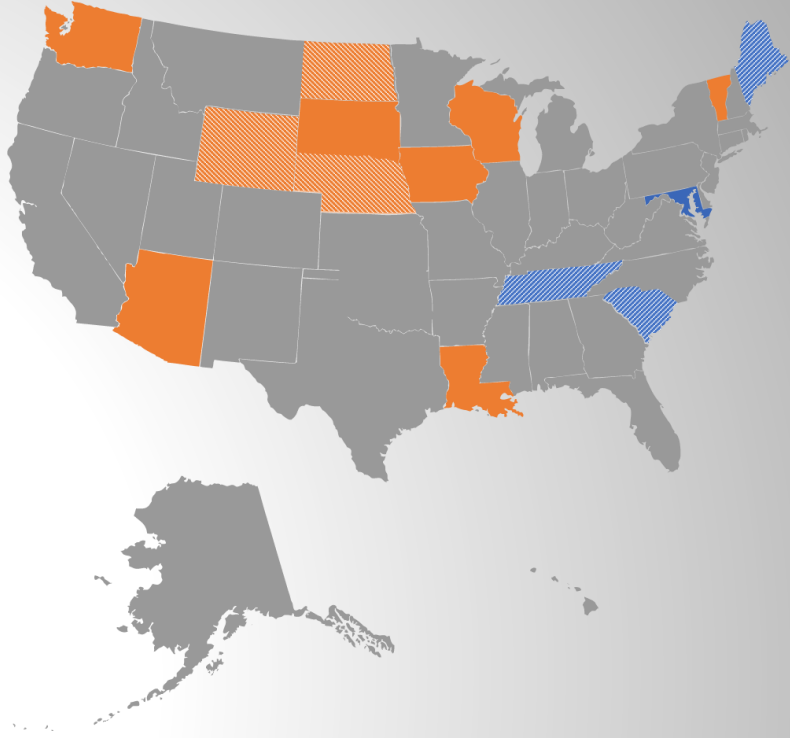


Express
Access

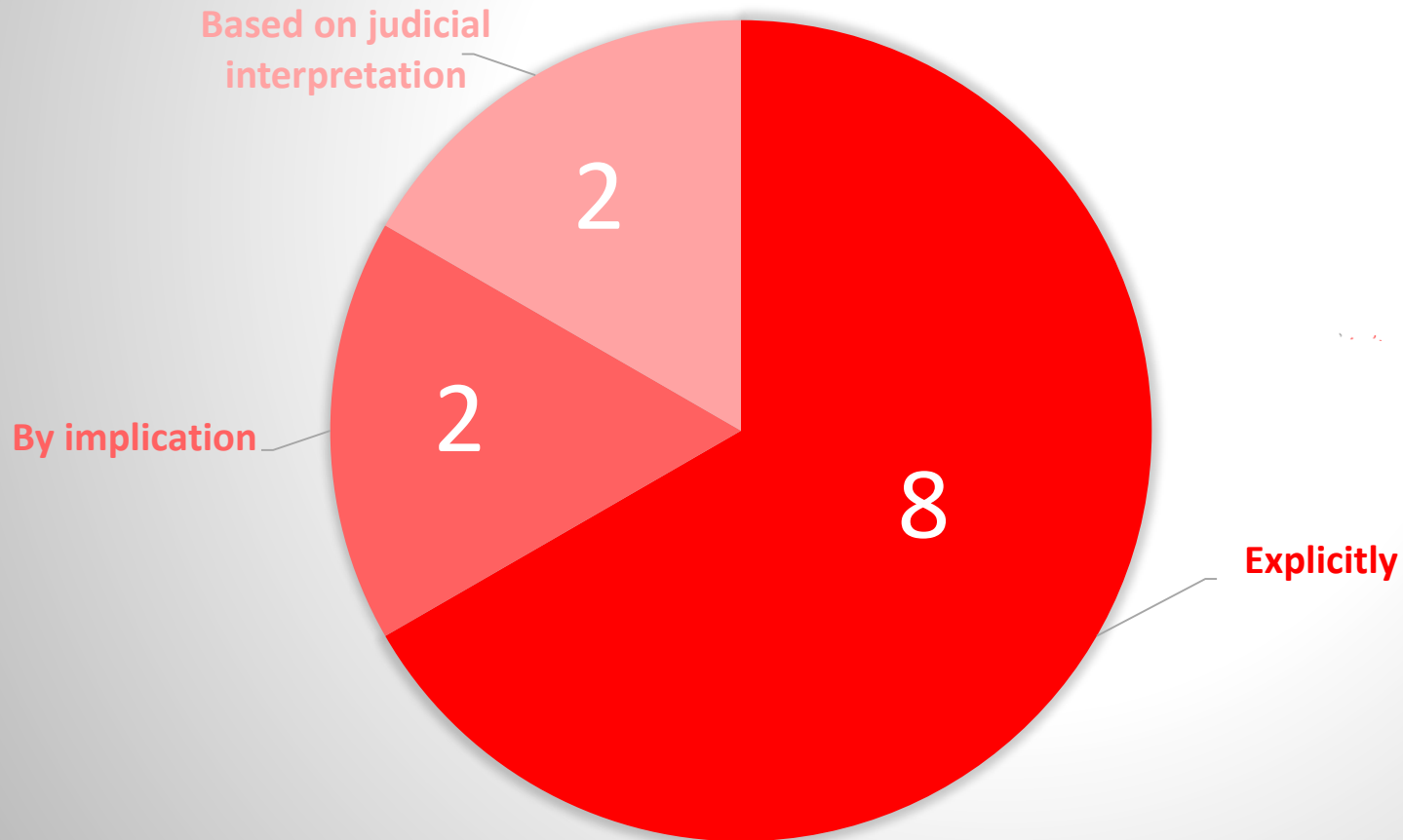
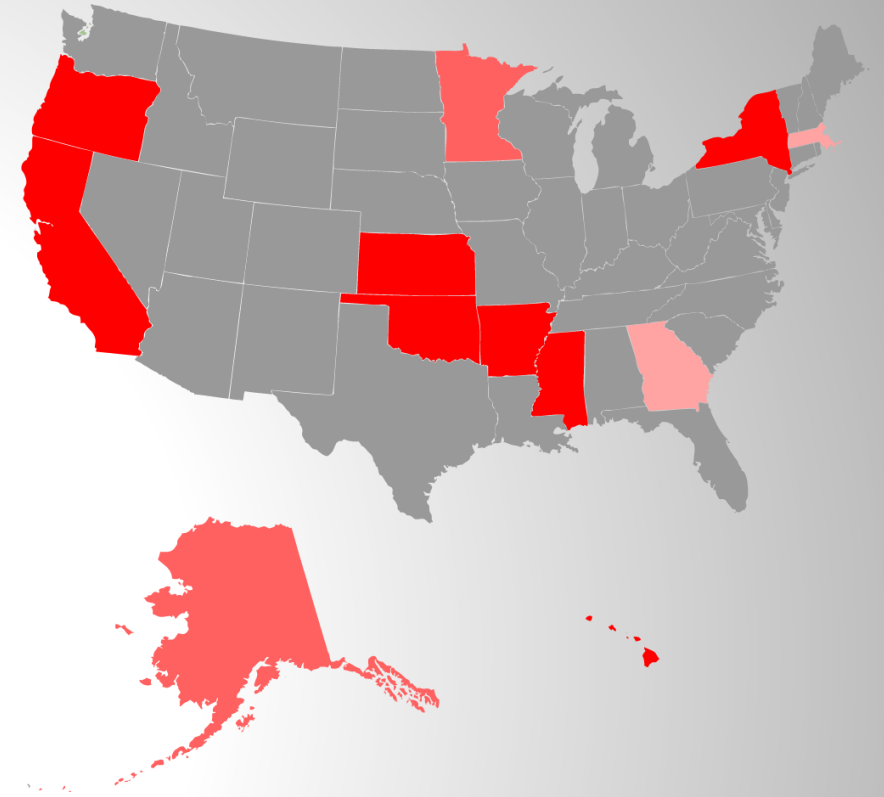
STATES WITH EXPRESS ACCESS TO LEGISLATIVE RECORDS



STATES WITH FOI STATUTES THAT IMPLIEDLY COVER THE LEGISLATURE



STATES THAT EXCLUDE THE LEGISLATURE COMPLETELY



LEGISLATIVE RECORDS UNDER THE FEDERAL FOIA

- The FOIA's definition of an "agency" excludes "Congress" by cross-reference to the Administrative Procedure Act.
- Courts have interpreted the term "Congress" to include its components (*i.e.*, congressional committees) and members (*i.e.*, individual legislators).
- But what about legislative branch agencies?

LEGISLATIVE RECORDS UNDER THE FEDERAL FOIA

- Legislative branch agencies are tasked with aiding Congress in its legislative capacity, but without “executing law” or “exercising authority.”
- Generally, they are excluded from FOIA, but . . .
- Some components are, in fact, subject to the FOIA (*e.g.*, Copyright Office).
- And courts have occasionally been willing to adopt a “functional” approach that examines what a legislative branch agency actually does, and whether it may qualify as a FOIA-subject “agency.”

LEGISLATIVE RECORDS UNDER THE FEDERAL FOIA

- Most requesters encounter difficulty accessing legislative records because they are maintained by Executive Branch agencies.
 - Records may have originated with Congress.
 - Records also may have been created or compiled by an agency in response to a legislative oversight/records request.
- In these cases, the fight turns to the proper application of the “modified control test,” which examines “whether Congress manifested a clear intent to control the document[s].”
- The case law here is still developing.

CONCLUSIONS

- Most states have adopted FOI laws that permit some basic level of access to legislative records. This is usually expressly provided; legislative records are typically excluded on explicit grounds. In cases of ambiguity, the presence of exemptions is particularly useful in interpreting the law. The overall trend favors public access.
- Short of amending the federal FOIA, the requester community should consider legislative branch agencies and novel applications of the agency control test as areas where the needle can be pushed in favor of greater transparency.