

Navigating Legalities in Crisis Standards of Care



James G. Hodge, Jr., J.D., L.L.M.
Peter Kiewit Foundation
Professor of Law
Director, Network - Western
Region Office



Jennifer L. Piatt, J.D.
Research Scholar, ASU Law
Deputy Director, Network –
Western Region Office



Erica N. White, J.D.
Research Scholar, ASU Law
Staff Attorney, Network –
Western Region Office



James G. Hodge, Jr., J.D., L.L.M.

**Peter Kiewit Foundation Professor of Law
Director, Western Region - Network for Public
Health Law, ASU Sandra Day O'Connor
College of Law**



Jennifer L. Piatt, J.D.

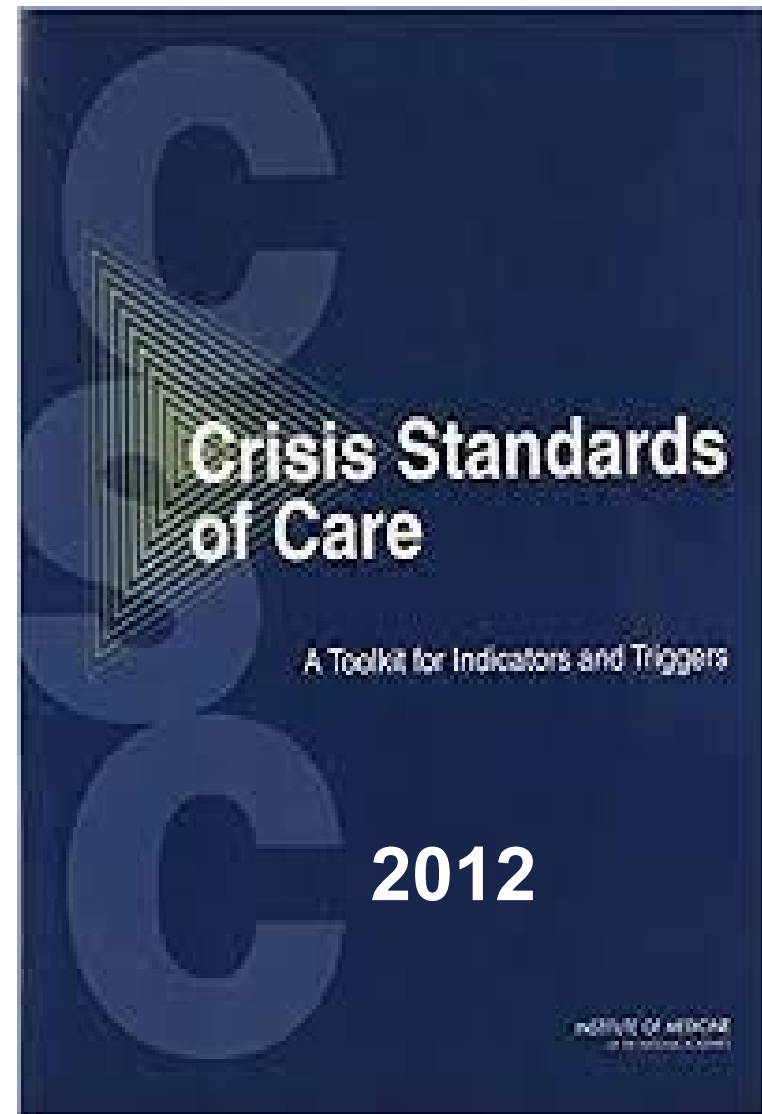
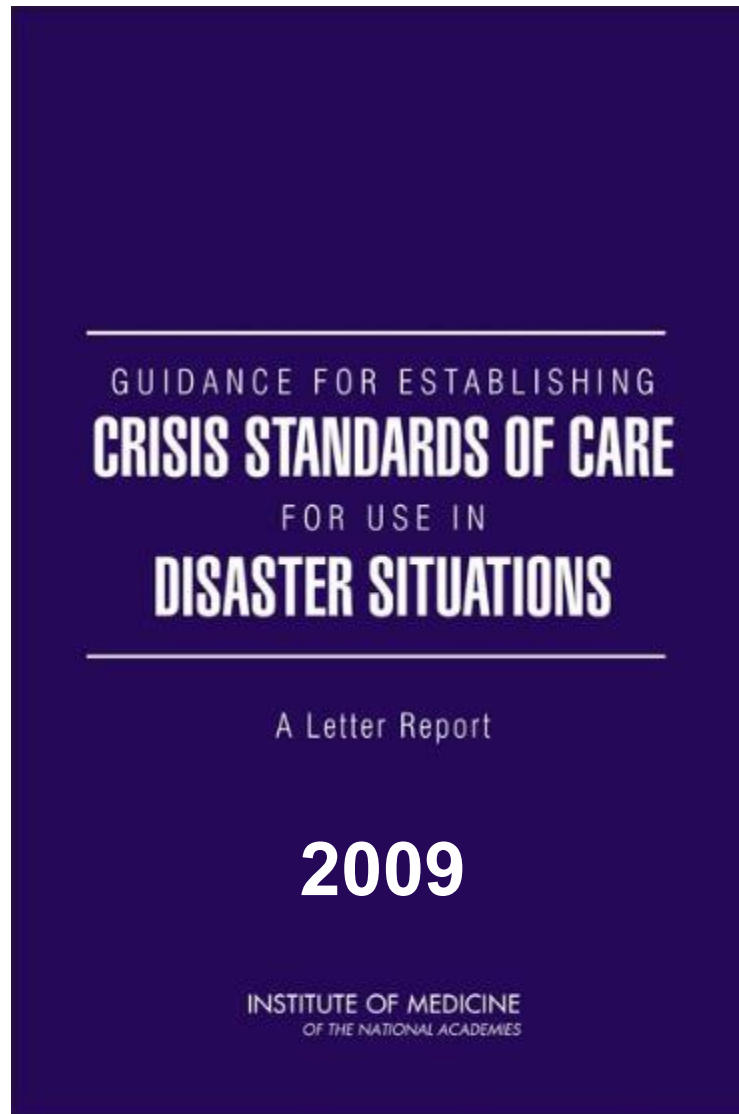
**Research Scholar; Deputy Director, Western
Region - Network for Public Health Law, ASU
Sandra Day O'Connor College of Law**



Erica N. White, J.D.

**Research Scholar; Staff Attorney, Western
Region - Network for Public Health Law, ASU
Sandra Day O'Connor College of Law**

- **CSC In Concept & Practice**
- **CSC On Trial: COVID-19**
- **Major Legal Challenges & Solutions**
 - Legal Triggers
 - Regional Coordination
 - Discriminatory Impacts
 - Tiebreaking Decisions
 - Post COVID CSC?
- **Questions/comments**



CSC = substantial change in usual healthcare operations & level of care due to a pervasive/catastrophic disaster.



CSC = when sustained scarcities warrant real-time resource allocations to protect the public's health

Shortages Implicating CSC



Space
(Available
hospital beds,
ICU beds, etc.)



Staff
(Doctors,
nurses,
respiratory
therapists, etc.)

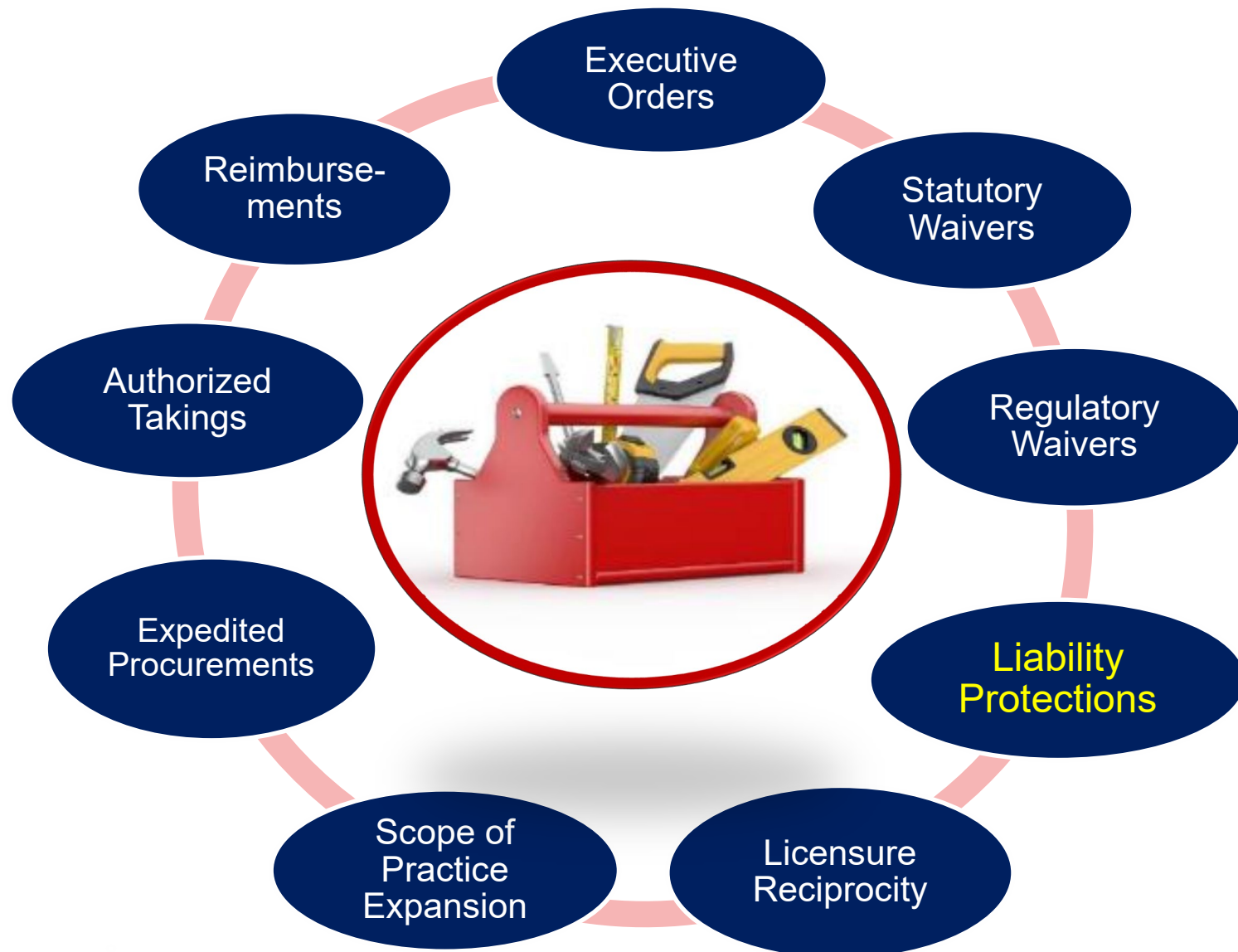


Stuff
(PPE,
treatments,
ventilators, etc.)

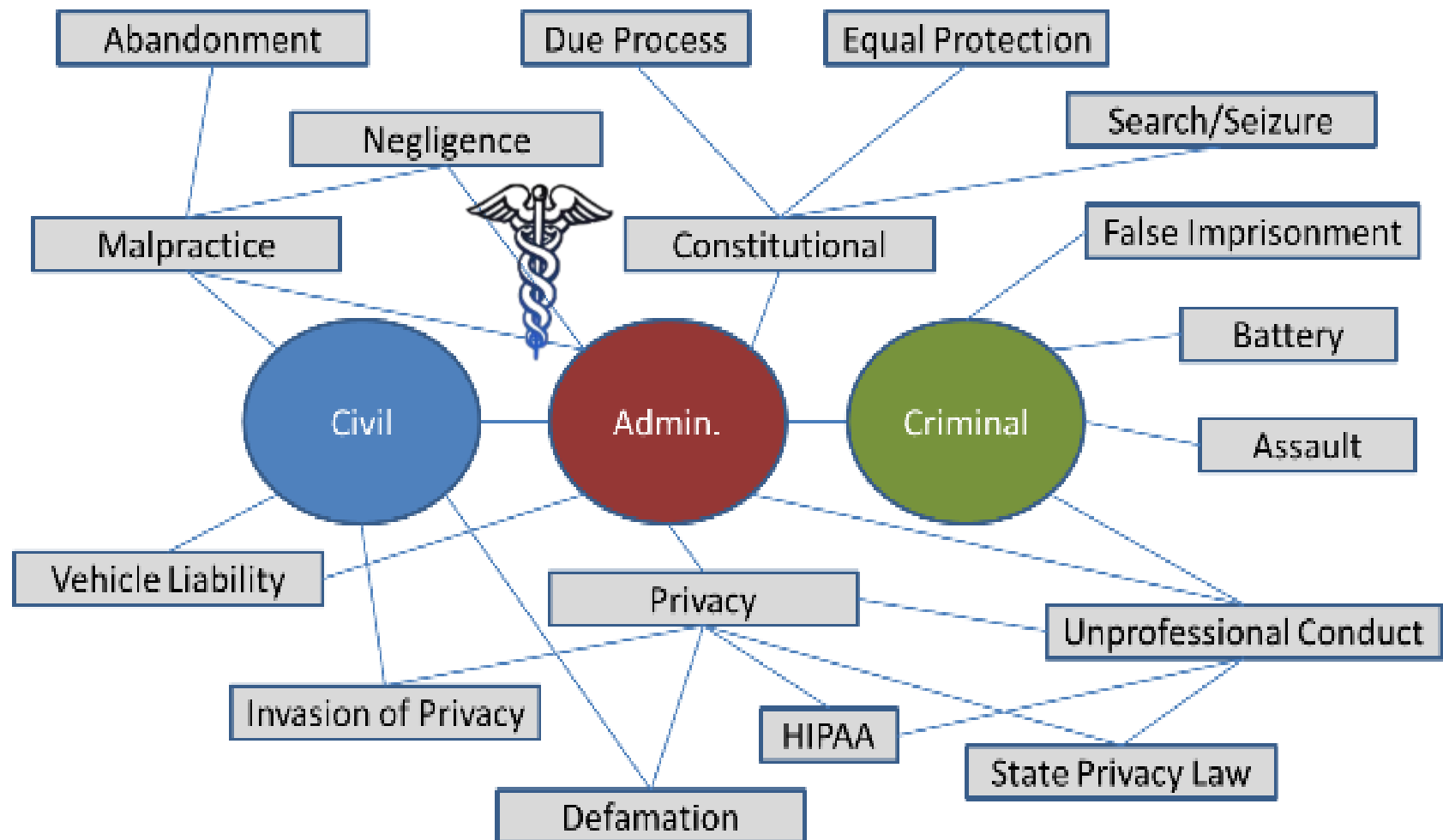
CSC's Legal Foundations



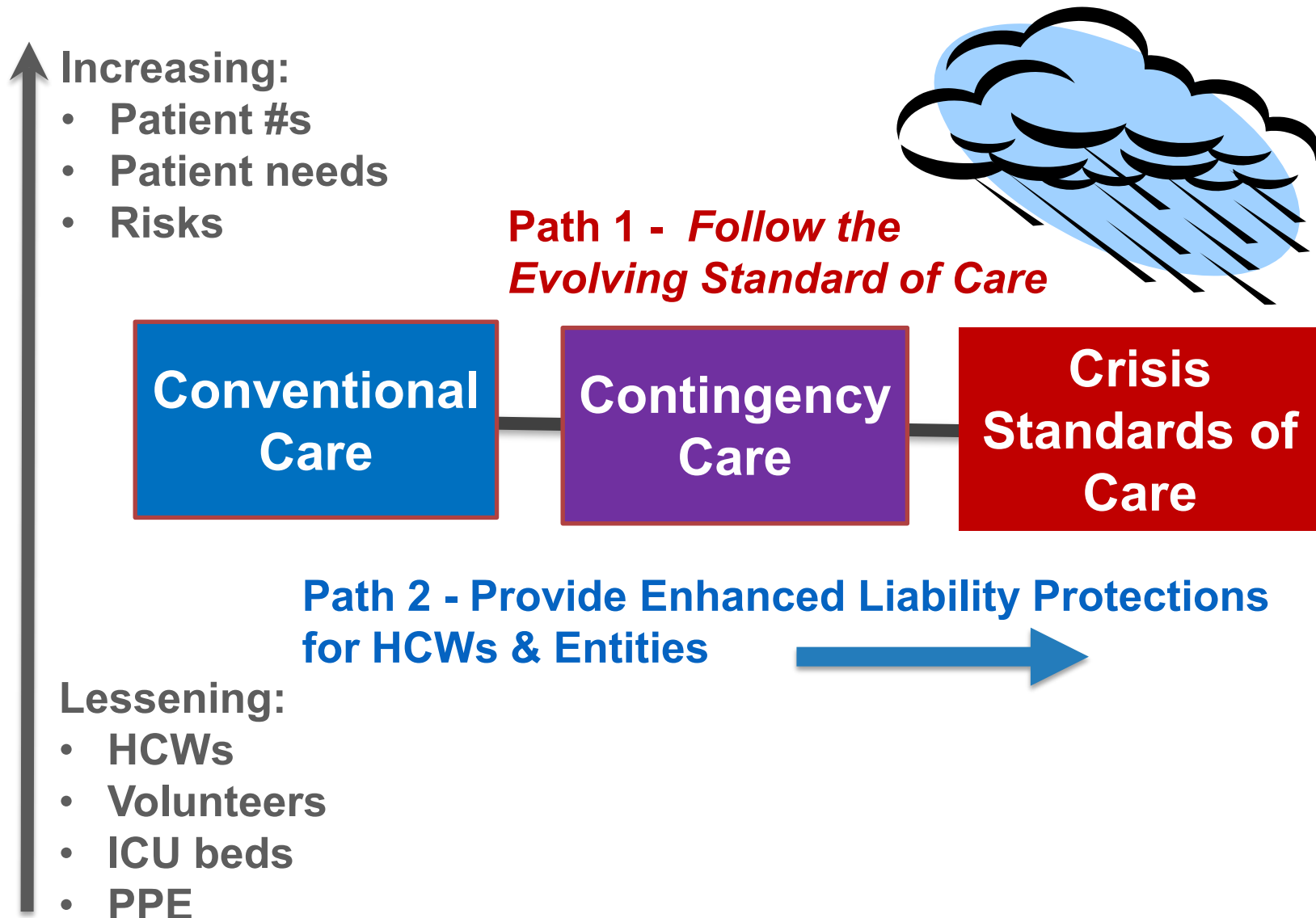
CSC's Legal Tools and Issues



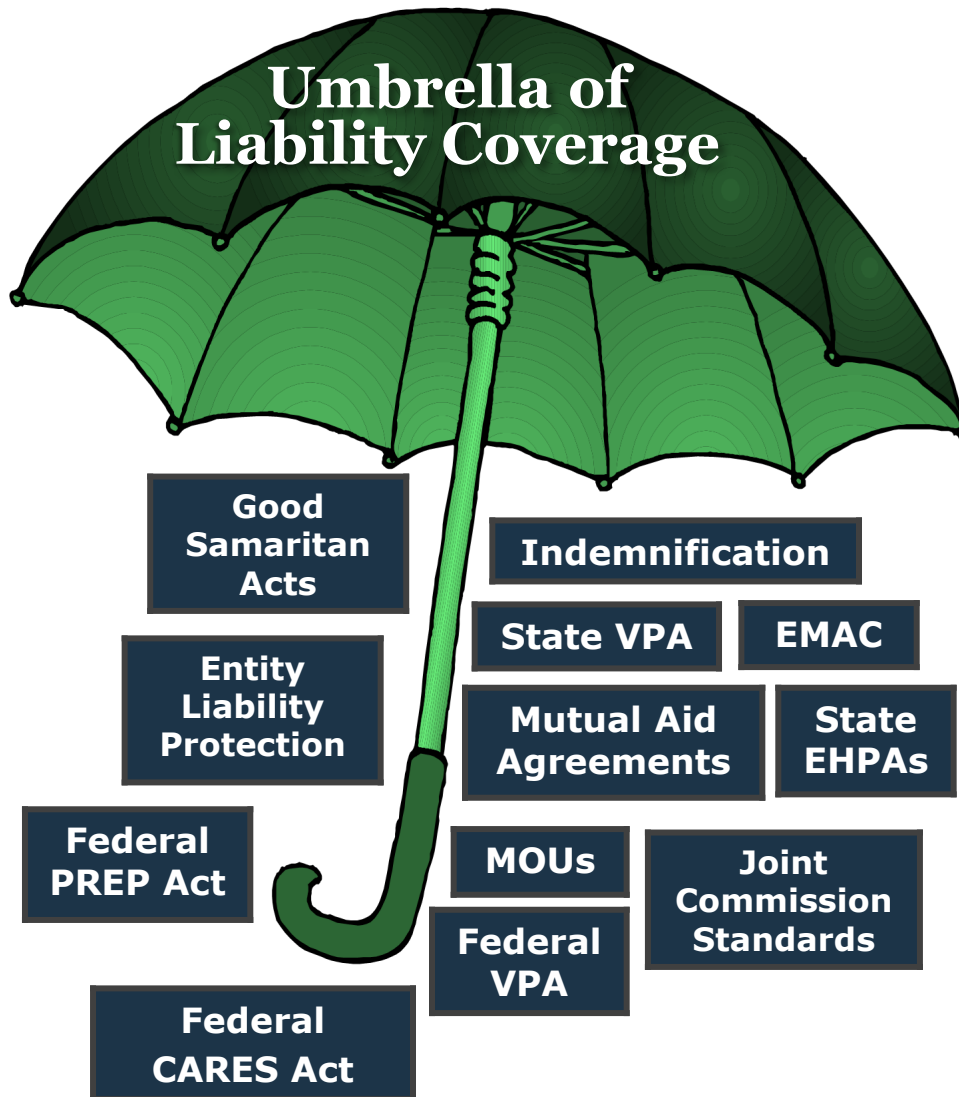
Risks of Liability



Paths Re: CSC Liability Claims



Emergency Liability Protections



Multiple liability protections may apply to HCWs, volunteers & entities for acts of negligence – but not intentional misconduct.

- **CSC In Concept & Practice**
- **CSC On Trial: COVID-19**
- **Major Legal Challenges & Solutions**
 - Legal Triggers
 - Regional Coordination
 - Discriminatory Impacts
 - Tiebreaking Decisions
 - Post COVID CSC?
- **Questions/comments**

Global Cases:
338 m

Global Deaths:
5.57 m

20%

15%



Omicron Variant

U.S. Cases:
68.6 m

U.S. Deaths:
858,000

Federal Emergencies/Invocations

**HHS Public
Health
Emergency**

**Jan.
31**

**HHS
PREP
Act Declar-
ation**

**Feb.
4**

**Stafford
Act
Emergency**

**Mar.
13**

**National
Emer-
gencies
Act**

**Mar.
13**

**Defense
Production
Act**

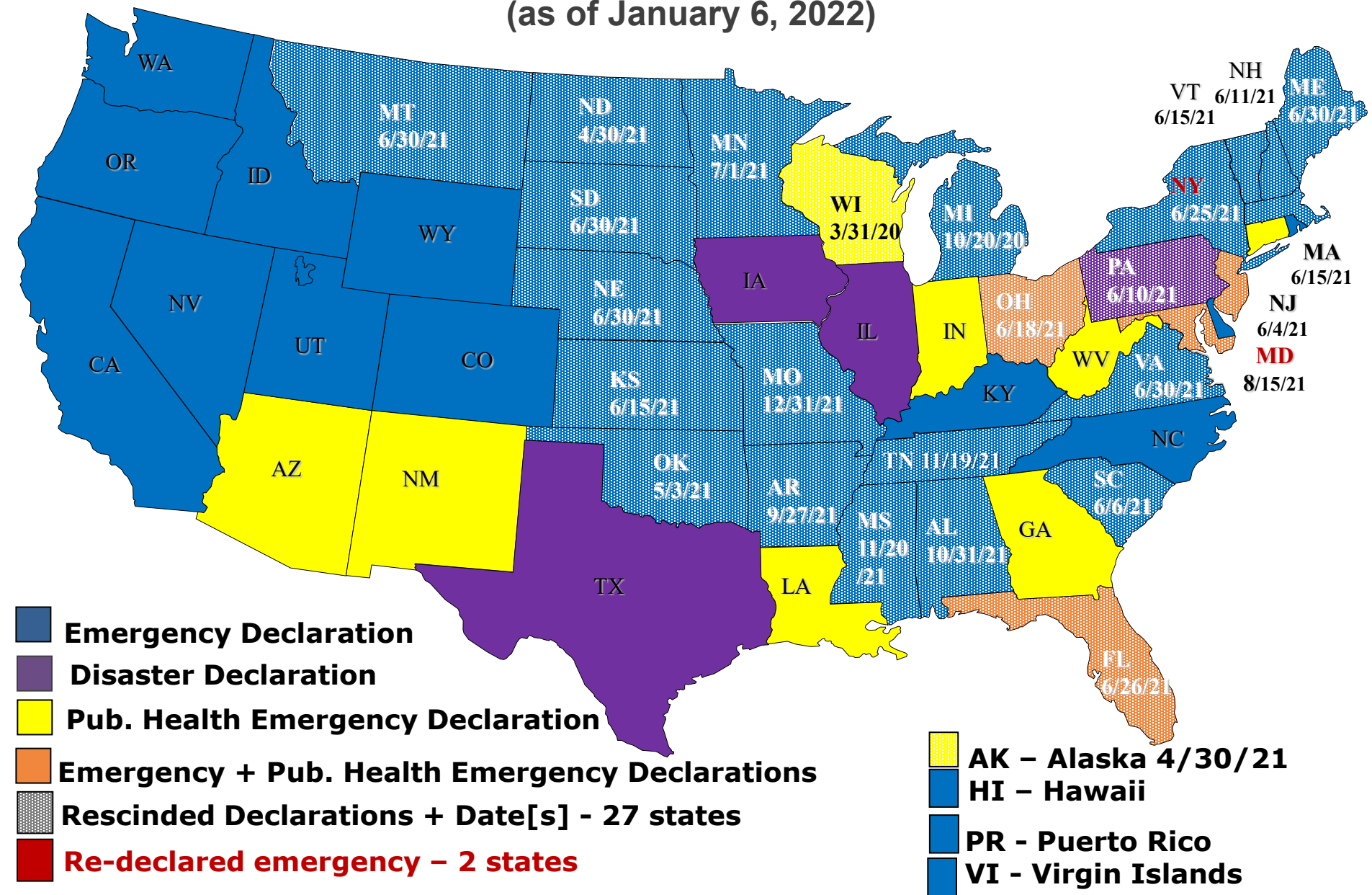
**Mar.
20**



FEMA

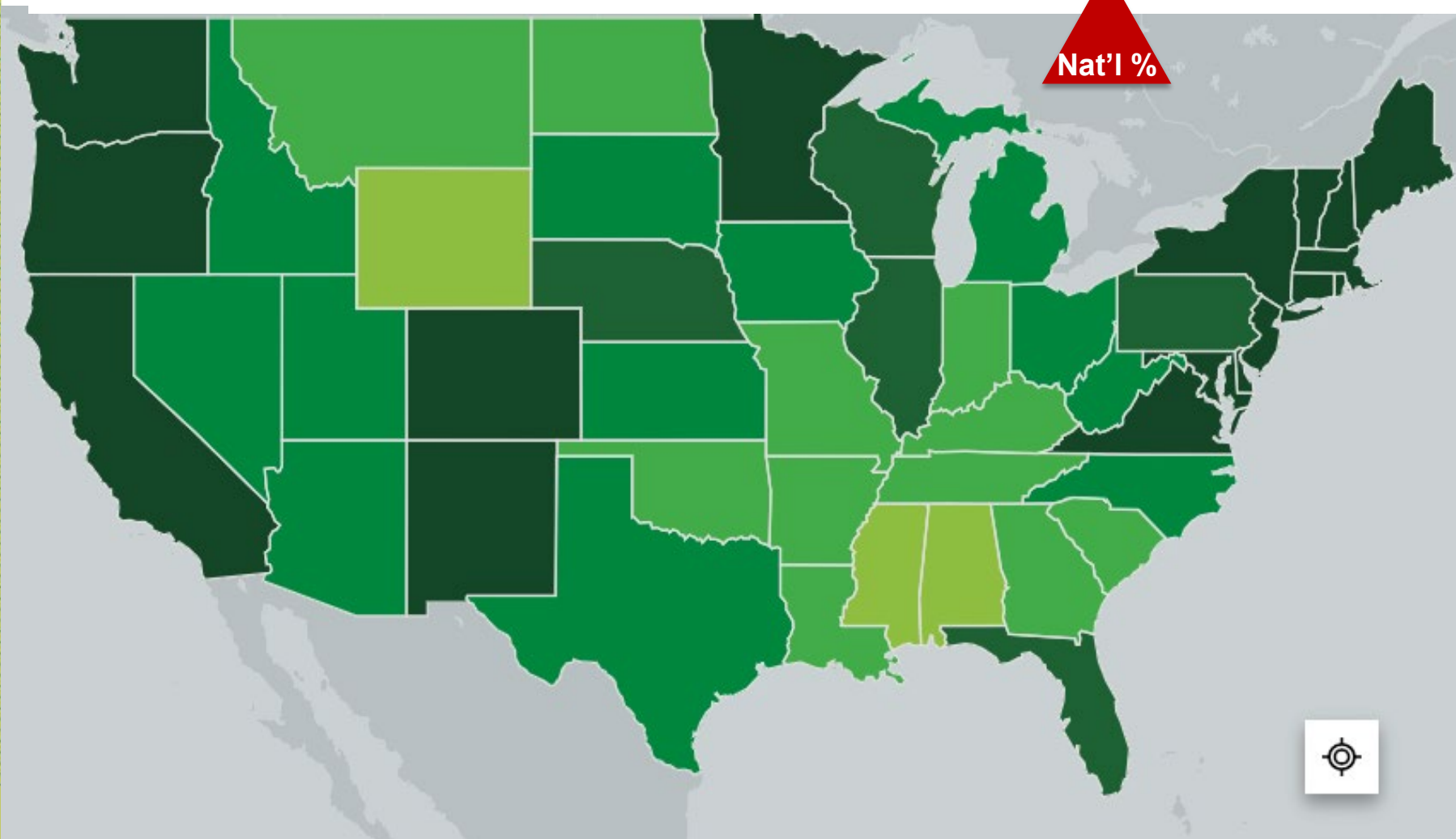
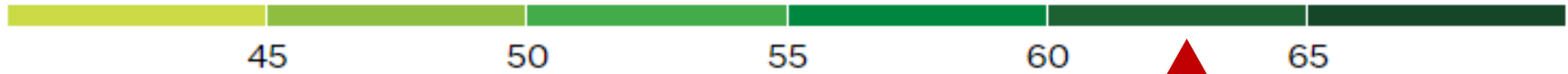
COVID-19 State Emergency Declarations in 2020 + Rescissions

(as of January 6, 2022)



COVID-19 Vaccination Uptake

% of Population Fully Vaccinated (as of 1/17/22)





Rescind
Emergency
Declarations

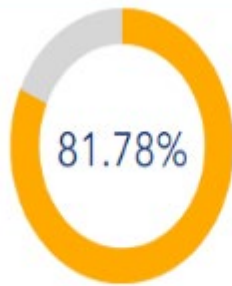
Re-open
Recklessly

Ban Mask
Mandates

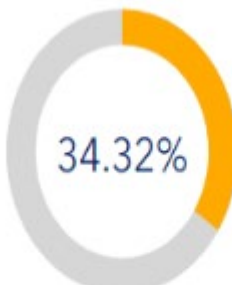
Disavow Social
Distancing

Forbid School
& Business
Closures

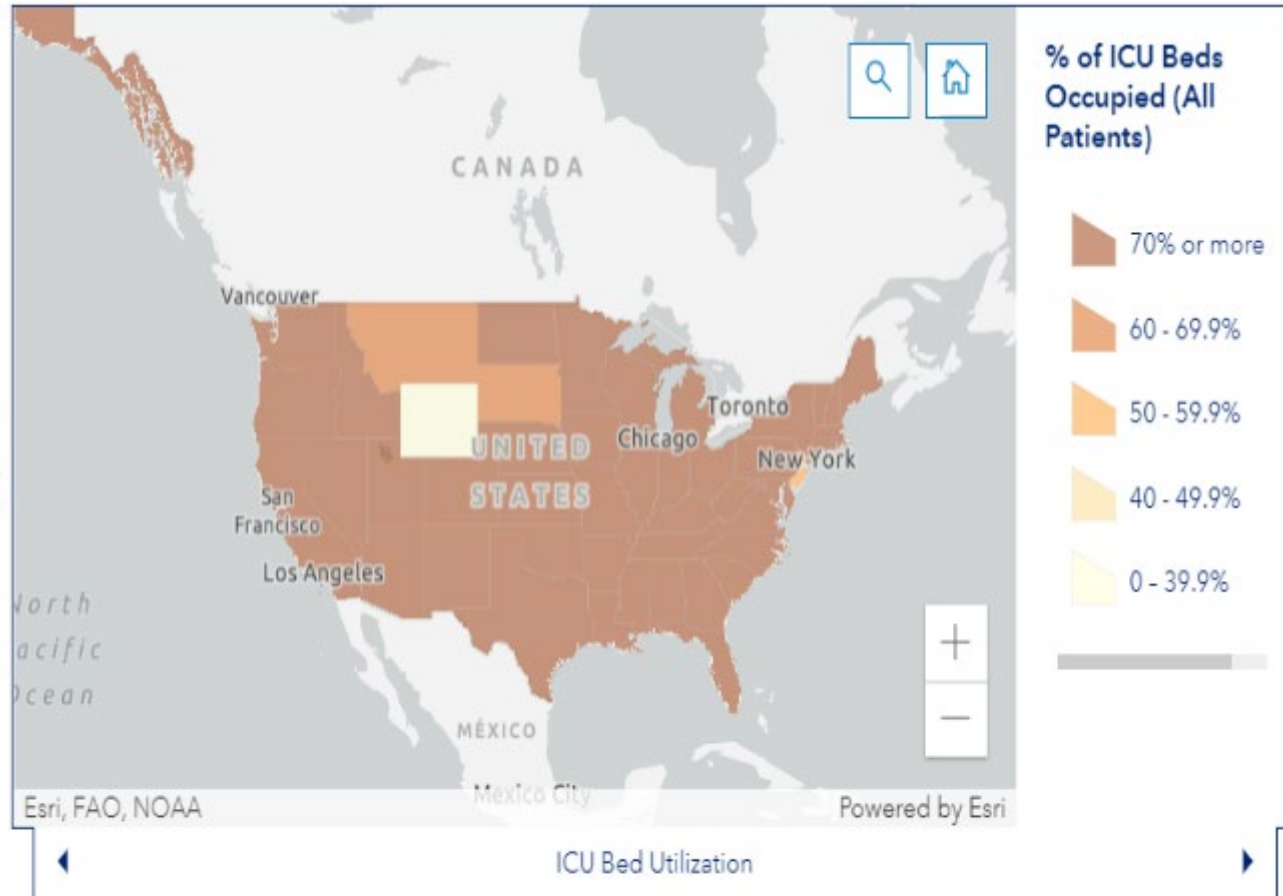
Prohibit Vaccine
Mandates &
Passports



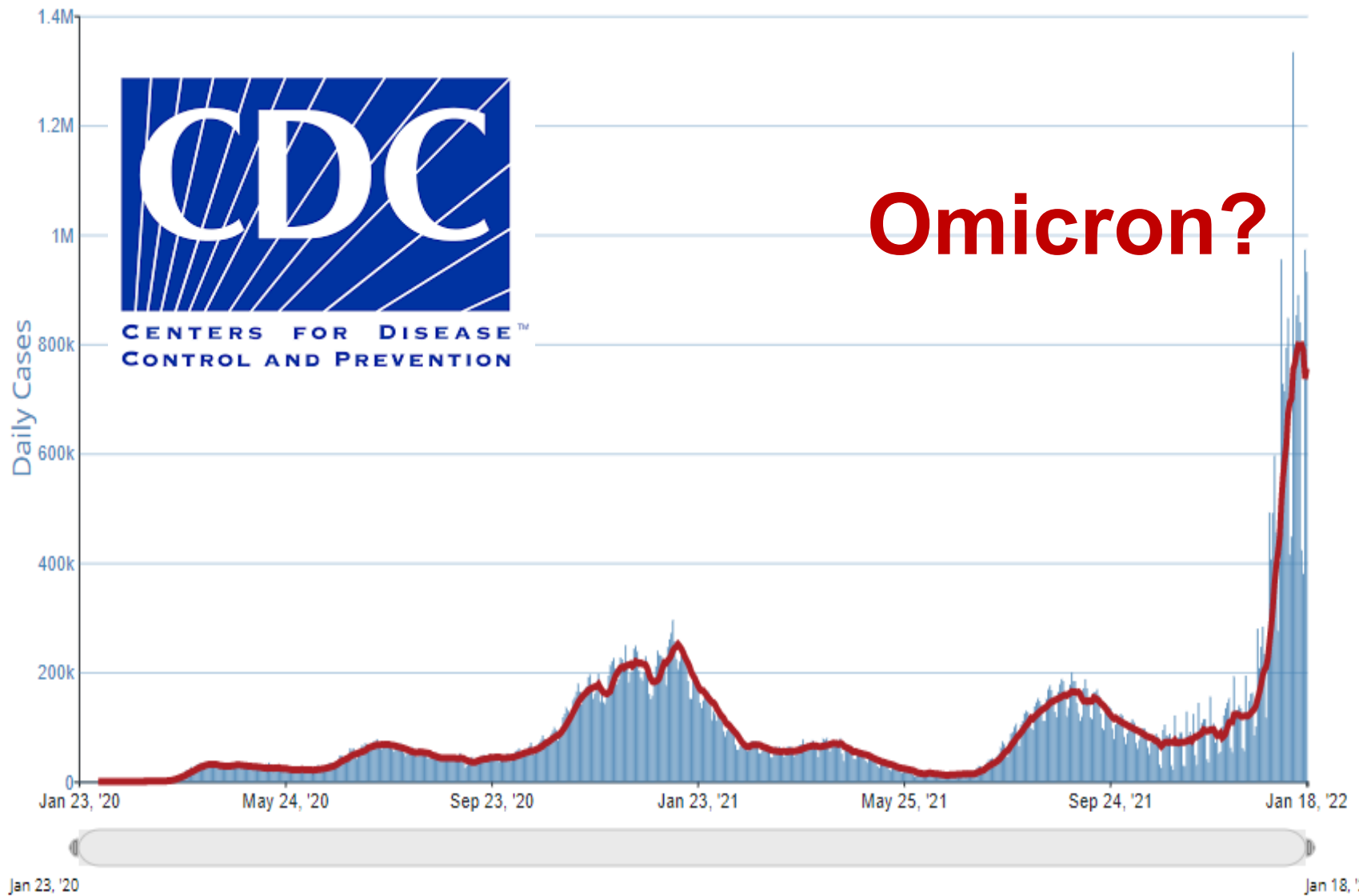
of ICU Beds in Use
5,558 Hospitals Reporting



of ICU Beds in Use for COVID-19
5,438 Hospitals Reporting



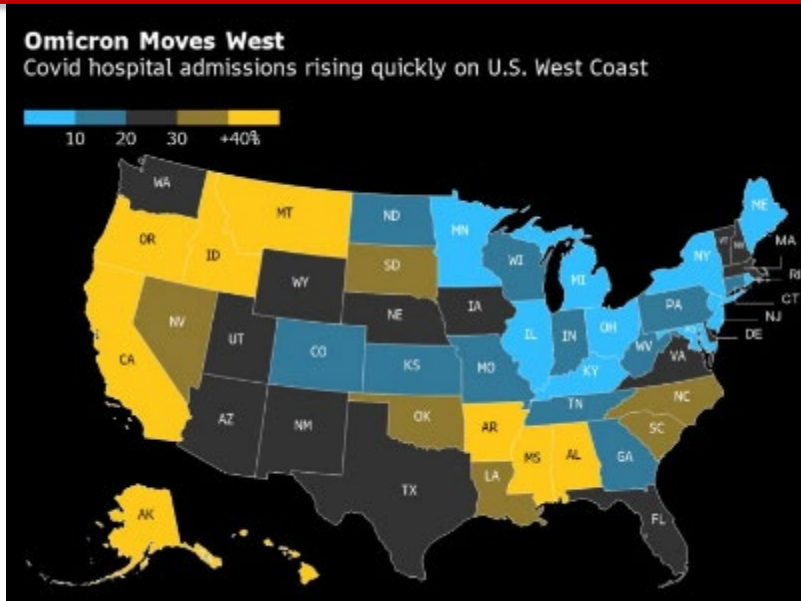
Daily Trends in Number of COVID-19 Cases in The United States Reported to CDC



Fox Valley hospitals reaching 'breaking point' as COVID-19 omicron variant spreads, beg community to get vaccinated, boosted

[Source: Post Crescent](#)

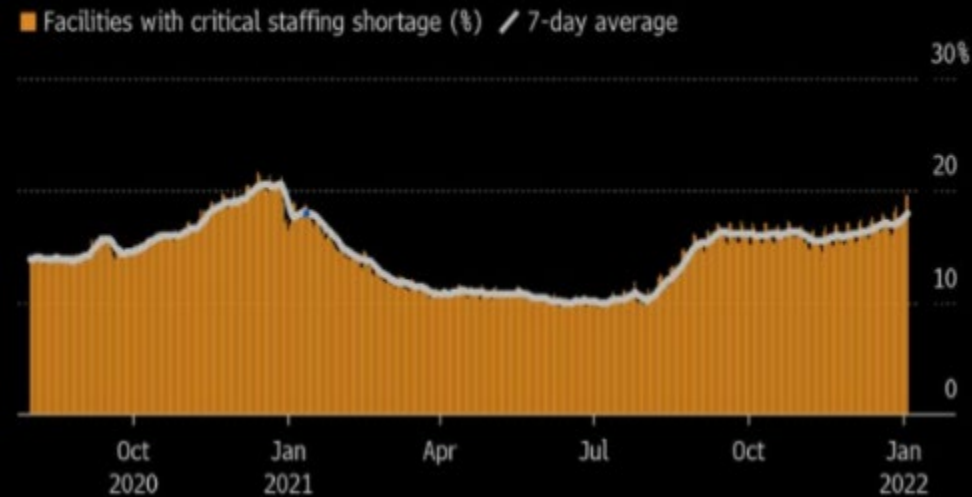
"From the beginning of the omicron surge, hospitals have faced a two-pronged assault of more COVID-19 patients, with fewer health care workers to treat them." [Source: NBC Miami](#)



[Source: Bloomberg News](#)

Staffing Shortages Mount

U.S. sees most hospitals with critical staffing issues in 12 months



[Source: Bloomberg News](#)

More Than 4,000 Children Hospitalized for COVID Nationwide as Omicron Variant Rapidly Spreads

[Source: People](#)

"People Aren't Going To Realize It Until They Call 911 And No One Comes": How Omicron Could Push Hospitals Over The Edge

[Source: BuzzFeed News](#)

- **CSC In Concept & Practice**
- **CSC On Trial: COVID-19**
- **Major Legal Challenges & Solutions**
 - Legal Triggers
 - Regional Coordination
 - Discriminatory Impacts
 - Tiebreaking Decisions
 - Post COVID CSC?
- **Questions/comments**

Resolving CSC Legal Challenges

1. Legal
Triggers

2. Regional
Coordination

3.
Discrimination

4. Making
“Tie-breaking”
Decisions



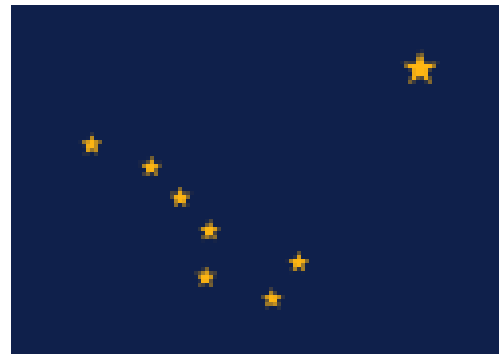
April 2020



June 2020



December 2020; October 2021



September 2021



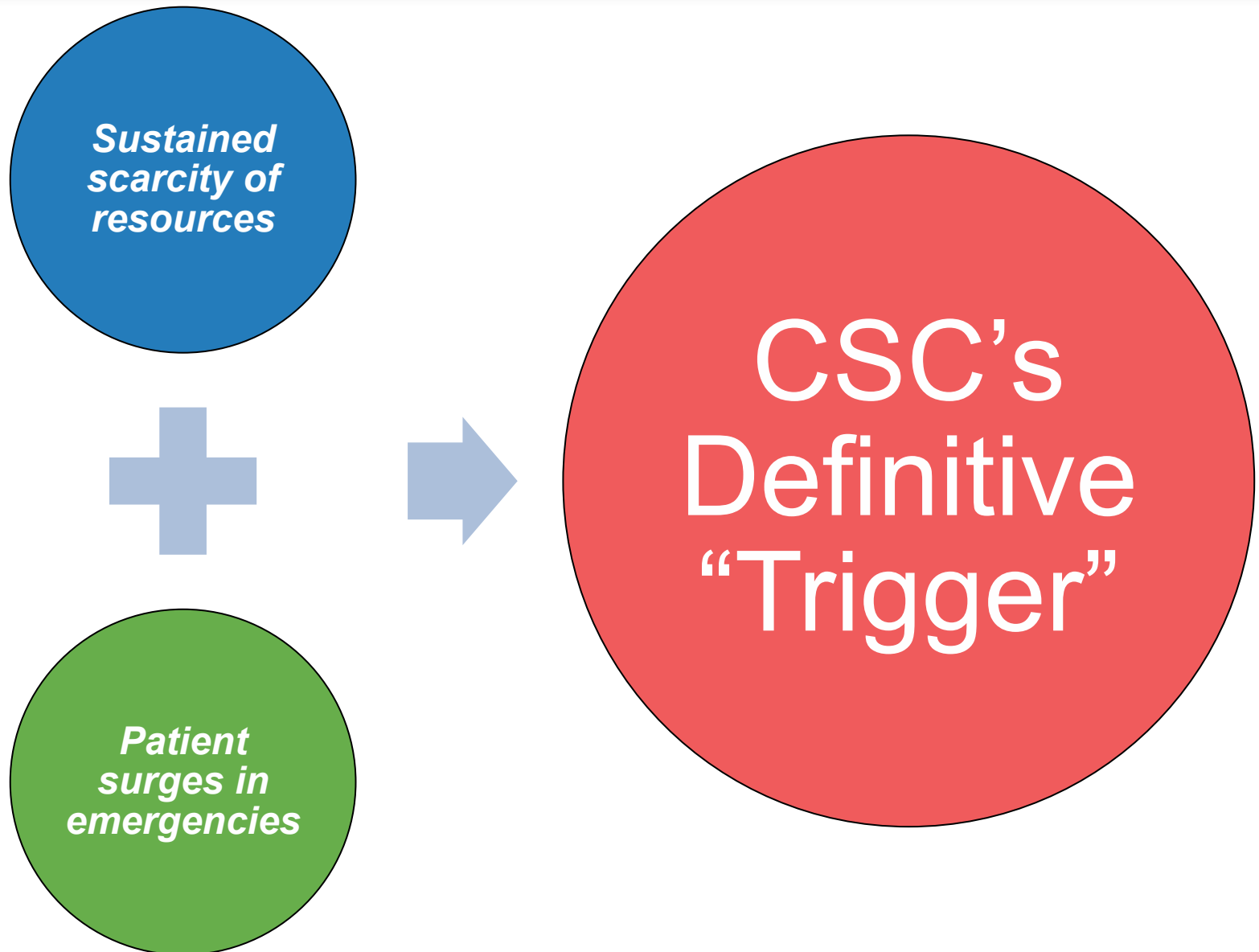
September 2021



January 2022



November 2021; January 2022



Type of Trigger	Source of Trigger	Examples
Federal Guidance	<ul style="list-style-type: none"> National Academies HHS, ASPR, CDC, etc. 	Dec. 18, 2020 – NAM & others expressly call for CSC invocation
Emergency Declarations	<ul style="list-style-type: none"> Federal/state emergency declarations Local PHEs 	July 29, 2021 – Arkansas Gov. Hutchinson declares PHE in response to Delta
Executive Orders	<ul style="list-style-type: none"> Gubernatorial EO State/local health commissioner 	Sept. 21, 2021 – AK DHSS Commissioner issues order to implement CSC in response to COVID-19
Existing CSC Plans	<ul style="list-style-type: none"> Express language of plans Specific addenda/clarifications 	April 10, 2021 – Pennsylvania releases interim CSC guidelines re: COVID-19
Regional Agreements	<ul style="list-style-type: none"> EMAC Hospital resource sharing contracts 	June 6, 2013 – D.C. Emergency Healthcare Coalition issues MoU re: CSC allocations for members
Health Care Entity Experiences	<ul style="list-style-type: none"> Express allowance via state plans Assessed field experiences 	Nov. 3, 2021 – San Juan Regional Medical Center (NM) activates CSC in response to COVID-19

Menus re: Legal Triggers & Powers

State Emergency Declarations Menu

Menu

- Licensure Reciprocity
- Statutory/Regulatory Waivers
- Liability Protections for HCWs
- Scope of Practice Expansions
- Telehealth expansions
- Expedited Procurement or Allocation Powers

Regional Agreements (EMAC) Menu

Menu

- Licensure Reciprocity
- Statutory/Regulatory Waivers
- Liability Protections for HCWs
- Expedited Procurement or Allocation Powers
- Additional Powers Outlined in Supplementary Agreements

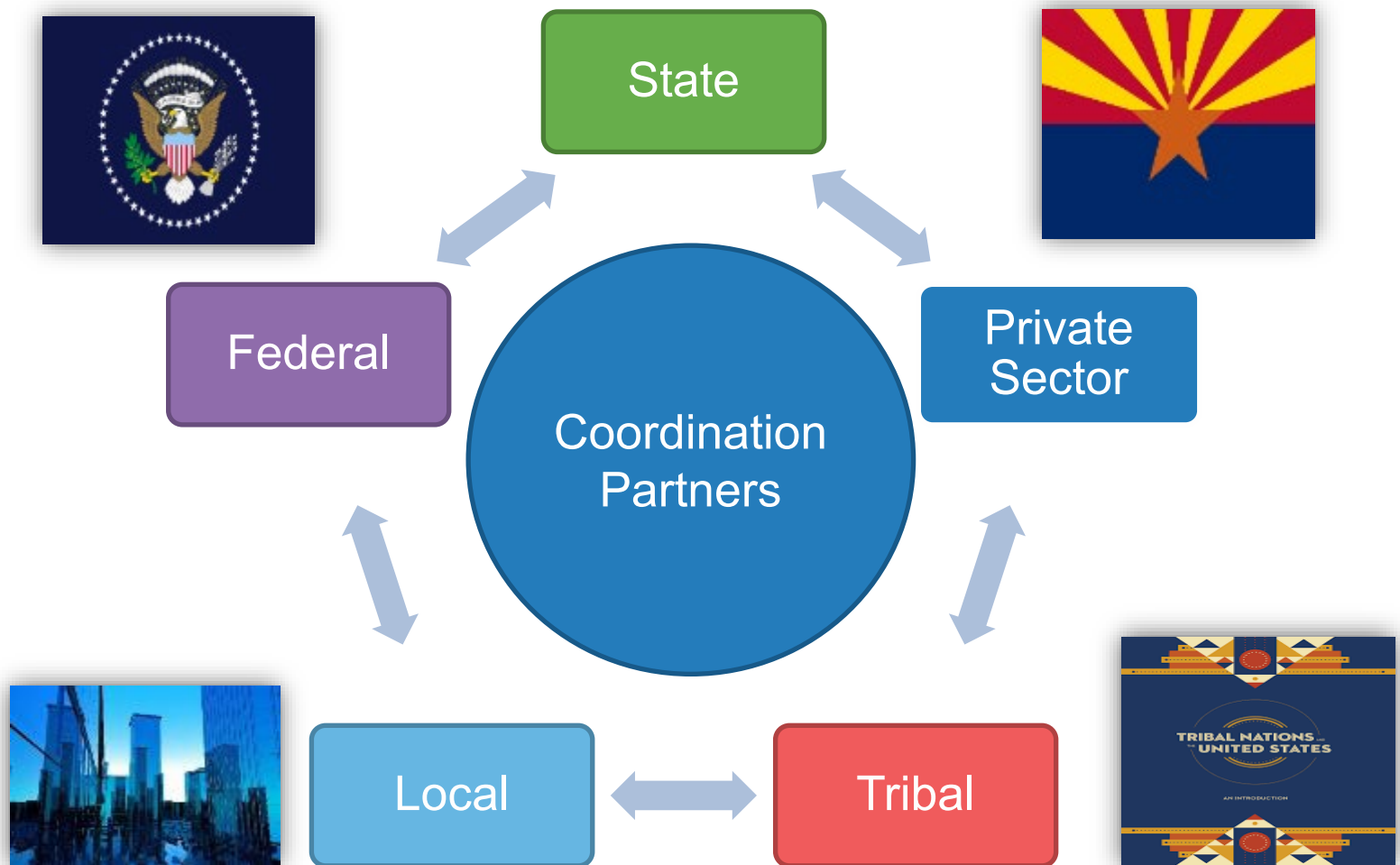
PREP Act Menu

Menu

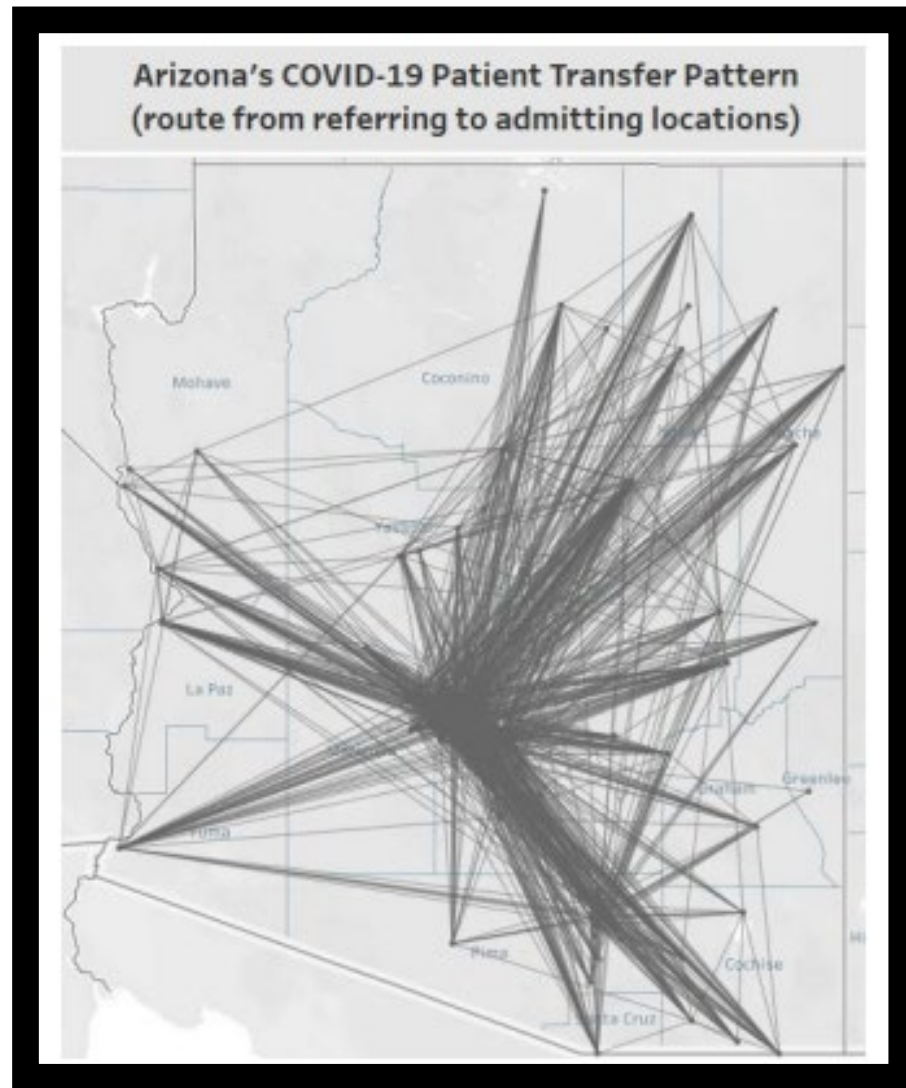
- Licensure Reciprocity
- Statutory/Regulatory Waivers
- Liability Protections for HCWs
- Scope of Practice Expansions
- Telehealth expansions
- Federal Supremacy to Control Uses of MCMS
- Preemption of Conflicting State Laws

Regional Coordination

Emergency declarations/CSC plans differ across jurisdictions, complicating coordination efforts.



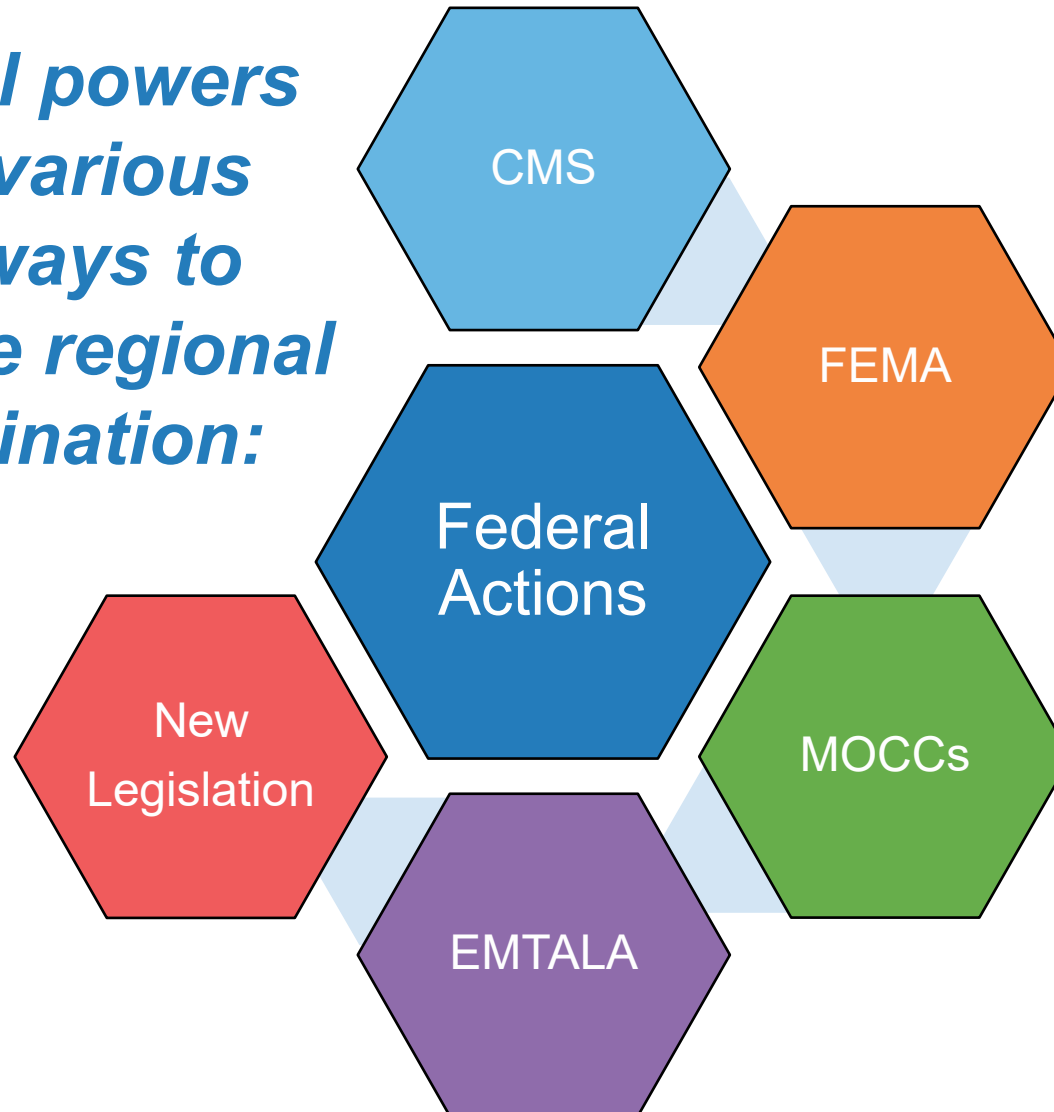
Potential Solutions: AZ Surge Line



Source: <https://www.azdhs.gov/covid19/documents/healthcare-providers-surge-line/equity-and-access-to-hospital-beds.pdf>

Potential Solutions: Federal Action

***Federal powers
offer various
pathways to
increase regional
coordination:***



Disparate Impacts in Implementation

Perspective

[Source: NEJM](#)

Inequity in Crisis Standards of Care

Emily Cleveland Manchanda, M.D., M.P.H., Cheri Couillard, M.A., and Karthik Sivashanker, M.D., M.P.H.



NON-DISCRIMINATION IN CRISIS STANDARDS OF CARE

[Source](#)

COVID-19 Among African Americans: An Action Plan for Mitigating Disparities

Monica E. Peek MD, MPH, MS, Russell A. Simons BS, William F. Parker MD, MS, David A. Ansell MD, MPH, Selwyn O. Rogers MD, MPH, and Brownsyne Tucker Edmonds MD, MPH, MS

[Source: AJPH](#)

Hospitals Serving The Poor Struggled During COVID. Wealthy Hospitals Made Millions

May 18, 2021 - 4:00 PM ET
Heard on All Things Considered

Systemic Racism, the Government's Pandemic Response, and Racial Inequities in COVID-19

[Ruqaiyah Yearby](#)
[Seema Mohapatra](#)

[Source: Emory L.J.](#)

[Source: NPR](#)

Perspective

[Source: NEJM](#)

Respecting Disability Rights — Toward Improved Crisis Standards of Care

Michelle M. Mello, J.D., Ph.D., Govind Persad, J.D., Ph.D., and Douglas B. White, M.D.

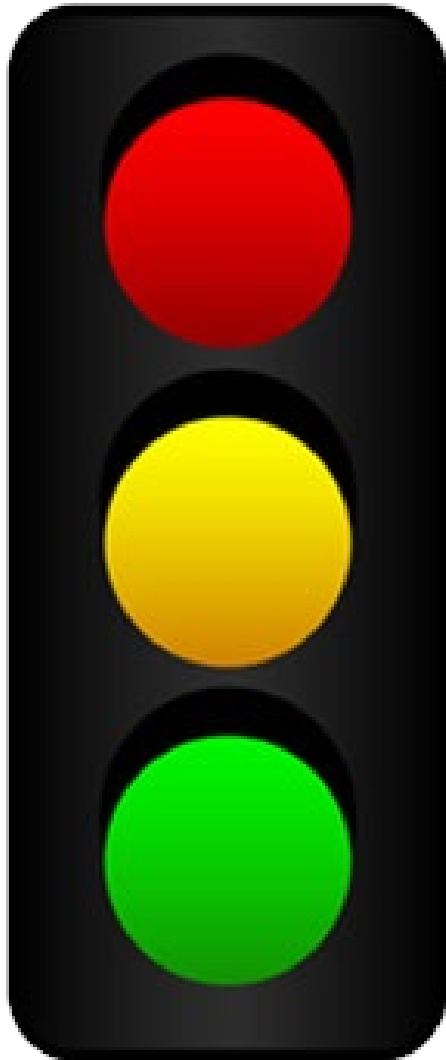
HEALTH CARE

Health providers' scramble for staff and supplies reveals sharp disparities

[Source: Politico](#)

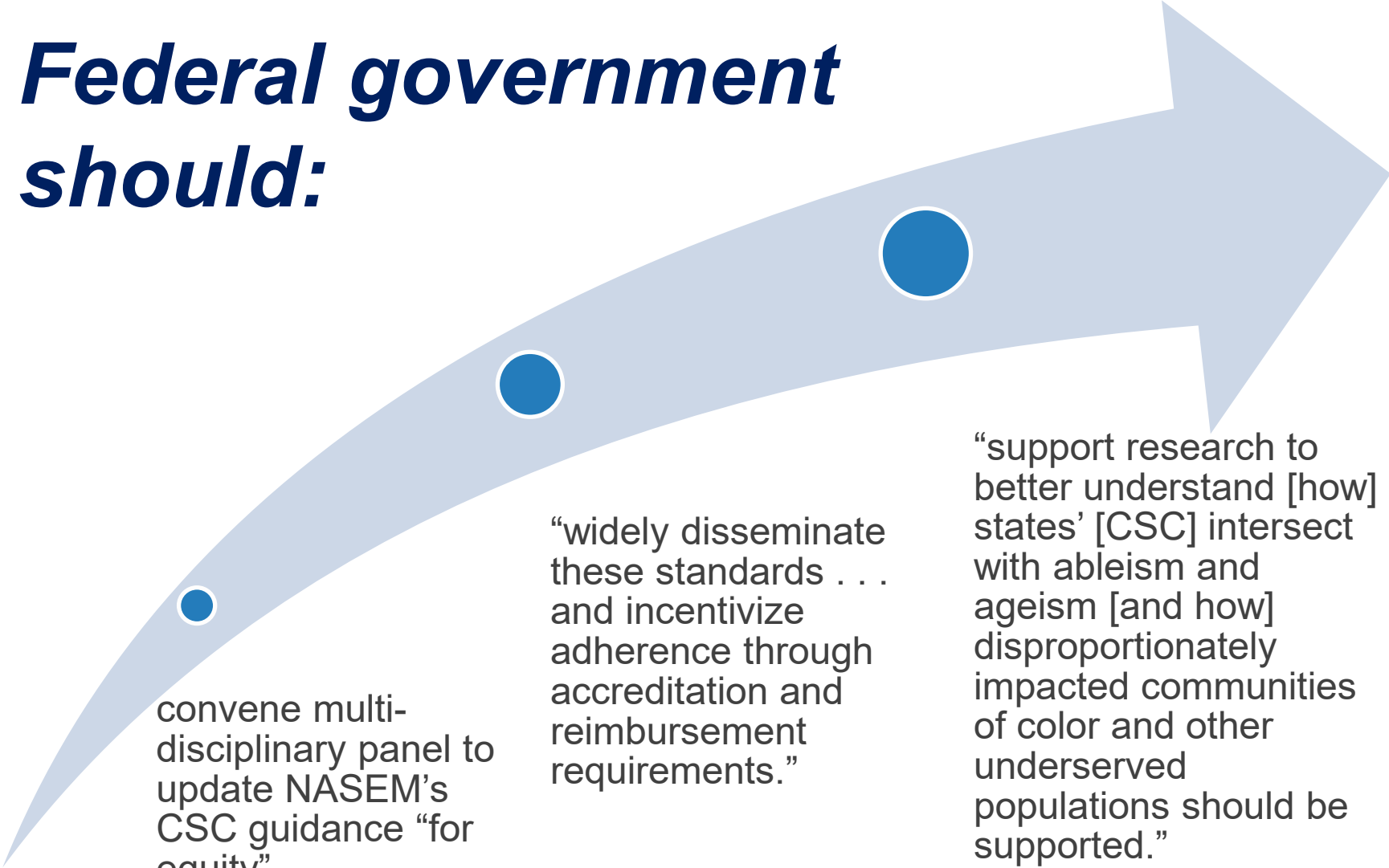
A POLITICO survey of health care workers elicited dozens of stories from the front lines across the country.

Non-Discrimination in CSC



- Categorical exclusions of specific populations
- Exclusions based on discriminatory impact of “color-blind” policies
- Diagnostic tools which are facially valid but can be applied in a discriminatory manner in specific circumstances
- Tools which anticipate discriminatory outcomes and adjust to avoid them (ADI/SVI/equity indices)

Federal government should:



convene multi-disciplinary panel to update NASEM's CSC guidance "for equity"

"widely disseminate these standards . . . and incentivize adherence through accreditation and reimbursement requirements."

"support research to better understand [how] states' [CSC] intersect with ableism and ageism [and how] disproportionately impacted communities of color and other underserved populations should be supported."

- **CSC In Concept & Practice**
- **CSC On Trial: COVID-19**
- **Major Legal Challenges & Solutions**
 - Legal Triggers
 - Regional Coordination
 - Discriminatory Impacts
 - Tiebreaking Decisions
 - Post COVID CSC?
- **Questions/comments**

CSC Tiebreaking Decisions



Potential Legal Concerns

35

Disability



Age



Race



Sex





Legally-prohibited Allocation Bases

- | | | |
|---|--|--|
| <ul style="list-style-type: none">• Race/color• Ethnicity• Sex• Gender• Age• Veteran Status• Marital Status• Religion/Exercise of Conscience• Limited English Proficiency | <ul style="list-style-type: none">• Long-term Mortality or Life Expectancy• Assumptions of Perceived Health Status• Disability – Physical or Mental• Quality of Life• Individual's Relative Worth• Inequitable Clinical Assessment Scores | <ul style="list-style-type: none">• Resource Intensity Due to Disability/Age• Duration of Need Due to Disability/Age• Advanced Planning/Steering Decisions• Categorical Exclusions• Blanket Applications• Stereotypes |
|---|--|--|

State CSC Plan Tie-breaking Guidance - Examples



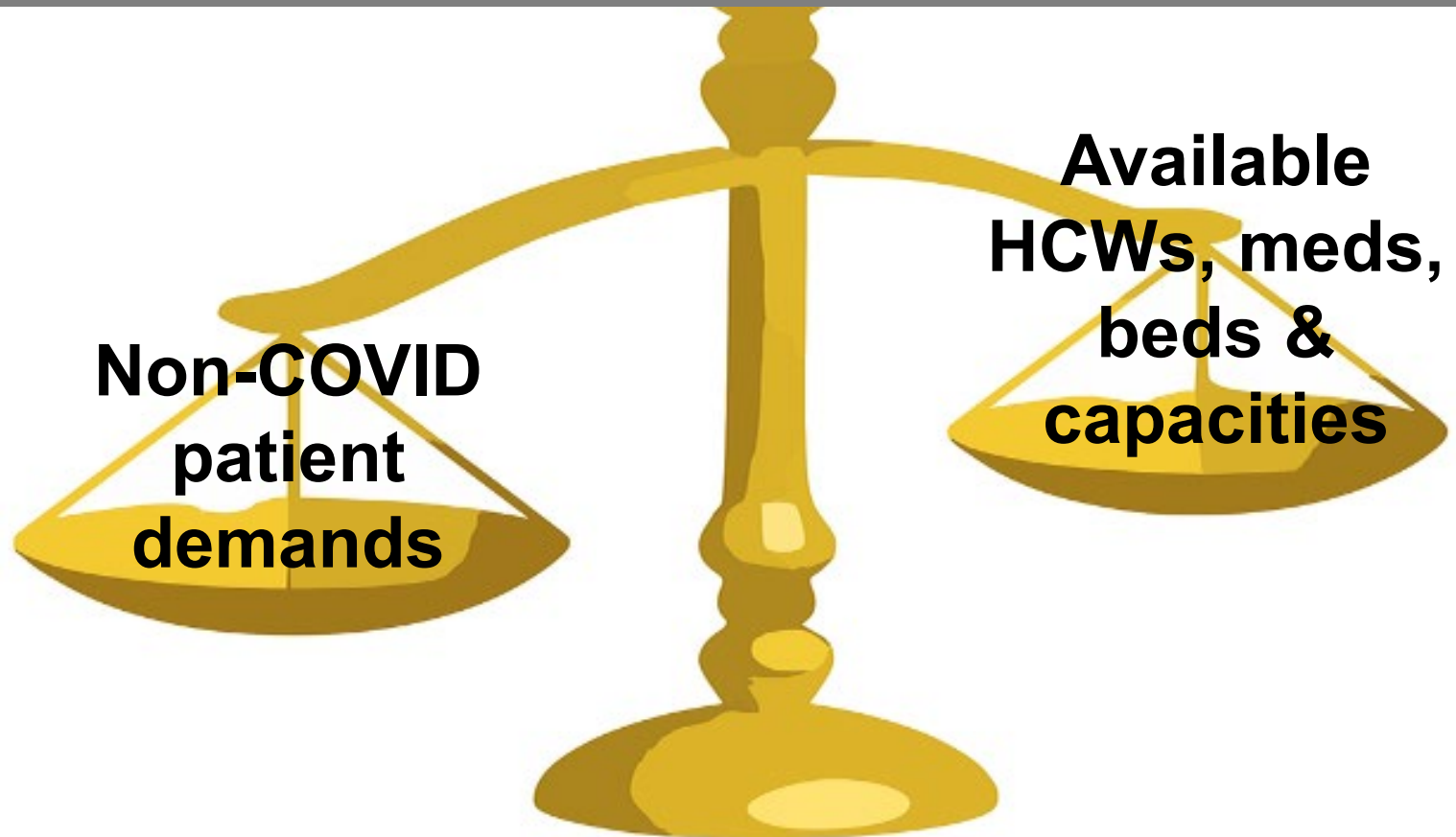


Legally-Possible Allocation Bases

- Specific Resource Limitations or Suitability
- Current Medical/Public Health Information
- Individualized Patient Assessments
- Objective Medical Evidence
- Equitable Clinical Assessment Scores
- Short-term Survival
- Age (as a limited prognostic factor)
- Patient/Surrogate Consent and Choices
- Health Care Worker Status
- Reasonable Modifications to Assure Equal Access for Disabled or Aged Patients
- Appeals

CSC Post-COVID 2022

CSC = substantial change in usual healthcare operations & level of care due to a pervasive/catastrophic disaster.



CSC = when sustained scarcities warrant real-time resource allocations to protect the public's health

Provision



Omission



Questions & Comments



Ask the Network re: additional questions/comments

- james.hodge.1@asu.edu | @jghodgejr
- Jennifer.Piatt@asu.edu | @Jen_Piatt
- ericawhite@asu.edu | @EricaNWhite

Thank you for attending

For a recording of this webinar and information about future webinars, please visit networkforphl.org/webinars



You may qualify for CLE credit. All webinar attendees will receive an email from ASLME, an approved provider of continuing legal education credits, with information on applying for CLE credit for this webinar.

