

## PUBLIC USE OF RECREATIONAL MARIJUANA: A LEGAL LANDSCAPE OF STATE LAW

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### I. INTRODUCTION

In 2012, Colorado and Washington became the first states to legalize recreational marijuana for individuals aged twenty-one years or older and for sale in retail marketplaces.<sup>1</sup> Shortly thereafter, in 2014, Oregon,

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<sup>1</sup> See Steven W. Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV’T L. REV. 359, 370–73 (2013) (explaining how Colorado and Washington legalized the recreational use of marijuana via ballot initiative, as did Alaska, the District of Columbia, and

Alaska, and the D.C. followed suit, with all three jurisdictions legalizing marijuana for users twenty-one years or older, and Oregon and Alaska also allowing marijuana sales in retail marketplaces.<sup>2</sup> Although these jurisdictions have legalized marijuana for recreational use, federal law continues to ban the possession, use and sale of marijuana.<sup>3</sup> However,

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Oregon in 2014); *Amendment 64: Use and Regulation of Marijuana*, CITY OF FORT COLLINS, <http://www.fcgov.com/mmj/pdf/amendment64.pdf>; *Initiative Measure 502*, WASH. SEC'Y OF STATE (July 8, 2011), [http://sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](http://sos.wa.gov/_assets/elections/initiatives/i502.pdf); *Ballot Measure No. 2—13PSUM: An Act to Tax and Regulate the Production, Sale, and Use of Marijuana*, STATE OF ALA. DIV. OF ELECTIONS, <http://www.elections.alaska.gov/doc/bml/BM2-13PSUM-ballot-language.pdf>; *Ballot Initiative: Ballot Initiative 71 Became Law at 12:01am, Thursday, February 26, 2015*, DCMJ, <http://dcmj.org/ballot-initiative/>; *Initiative Petition #5*, OR. SEC'Y OF STATE (Mar. 7, 2014), <http://oregonvotes.org/irr/2014/053cbt.pdf>; see e.g. COLO. CONST. art. XVIII § 16 (showcasing a constitutional amendment); WASH. REV. CODE ANN. § 69.50.360 (West 2016) (showcasing an initiative of the Legislature); K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 222 (2005) (“Ballot initiatives represent a process of creating laws, not through legislatures but by direct citizen vote”); Robert S. Sandoval, *Restricted Subject Matters: Misconceptions of Speech and Ballot Initiatives*, 2015 U. CHI. LEGAL F. 669, 671 (“The ballot initiative is a means of direct democracy for the electorate to vote on issues, and in some states, to bypass the legislature. There are various types of initiatives and many procedural and content-based restrictions on its use. Nearly half of the states currently offer some sort of initiative process, but there is no federal system”); see also David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Lessons Learned*, 8 HARV. L. & POL'Y REV. 359, 359–80 (2014) (discussing Colorado’s implementation of marijuana legalization); John Hudak, *Colorado’s Rollout of Legal Marijuana Is Succeeding: A Report on the State’s Implementation of Legalization*, 65 CASE W. RES. L. REV. 649, 651–87 (2015).

<sup>2</sup> See ALASKA STAT. ANN. § 17.38.020 (West 2016); OR. REV. STAT. ANN. § 475.864 (West 2016); D.C. CODE ANN. § 48-904.01 (West 2016); see Jason Brandeis, *Ravin Revisited: Alaska’s Historic Common Law Marijuana Rule at the Dawn of Legalization*, 32 ALASKA L. REV. 309 (Dec. 2015) (discussing Alaska’s marijuana common law rule). Other states have decriminalized small amounts of marijuana but those provisions are outside the scope of this article.

<sup>3</sup> Under the Controlled Substances Act of 1970, marijuana is illegal and is currently classified as a Schedule 1 controlled substance. 21 U.S.C. § 812 (2012) (stating that Schedule 1 classification means there is “no currently accepted medical use in treatment”); Bender, *supra* note 1, at 365. As a result, the federal government maintains its authority to prosecute the production, distribution, sale, possession, or use of marijuana. Bender, *supra* note 1, at 365. In fact, until Attorney General Eric Holder entered office in 2009, raids of medical marijuana facilities by federal officials during the Obama administration were still common practice. Bender, *supra* note 1, at 378 (quoting Memorandum from David W. Ogden, Deputy Att’y Gen. to Selected U.S. Attorneys (Oct. 19, 2009), available at <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions> states). In 2009, the Attorney General issued a “Memorandum for Selected United States Attorneys” urging them to prosecute “significant marijuana traffickers” as opposed to those producers of and consumers of medical marijuana. Bender, *supra* note 1, at 378 (quoting Memorandum from David W. Ogden (Oct. 19, 2009)). Further, in 2013, the Department of Justice (“DOJ”) issued updated guidance confirming that the DOJ limited funds would be used only to address “significant threats” and that cultivation, distribution, sale, and possession would not be prosecuted unless it affected one of the government’s enforcement priorities set forth in the memorandum. See also Memorandum from James M. Cole, Deputy Att’y Gen. to Selected U.S. Attorneys, p. 1 (Aug. 29, 2013) available at

the Obama administration indicated that its position on recreational marijuana would be similar to that of medical marijuana, stating that there are more important uses of federal resources than prosecuting people who are in compliance with state law.<sup>4</sup> In 2014, the Department of Justice (“DOJ”) issued a memorandum from Deputy Attorney General James M. Cole in order to provide guidance to the states, and indicated that the DOJ will primarily “address the most significant marijuana-related cases,” which included eight priority areas such as preventing distribution to minors and preventing drugged driving.<sup>5</sup> Thus, under the Obama administration policy, although consumption of marijuana is illegal at the federal level, individuals who act in compliance with state law will not currently be prosecuted for marijuana distribution, possession, cultivation, or sale offenses, provided that they do not threaten federal priorities.<sup>6</sup>

Legalization of recreational marijuana in certain jurisdictions has prompted researchers to study the potential public health implications of recreational marijuana use,<sup>7</sup> including dependence;<sup>8</sup> cognitive impairment and mental health;<sup>9</sup> respiratory issues, including lung

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<https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. Given the current status of federal law, some states have enacted laws to prevent marijuana use on federal lands. See, e.g., COLO. REV. STAT. ANN. § 11-33-126 (West 2016).

<sup>4</sup> Cole, *supra* note 3; Bender, *supra* note 2, at 379–80 (quoting Paul Armentano, *Will Obama Go After Legal Pot in Washington and Colorado?*, ALTERNET (Dec. 19, 2012), <http://www.alternet.org/print/drugs/will-obama-go-after-legal-pot-washington-and-colorado> (interview by Barbara Walters)).

<sup>5</sup> Cole, *supra* note 3, at 1-2. For extensive analysis of the Cole Memo, see David M. DiSegna, Esq. & Bruce H. Tobey, Esq., *Medical Marijuana Business Regulatory Landscape in Rhode Island and Other States*, R.I.B.J., May/June 2015, at 11, 14-15; Rachel Cheasty Sanders, *To Weed or Not to Weed? The Colorado Quandary of Legitimate Marijuana Businesses and the Financial Institutions Who Are Unable to Serve Them*, 120 PENN ST. L. REV. 281, 292-94 (2015); Rosalie Winn, *Hazy Future: The Impact of Federal and State Legal Dissonance on Marijuana Businesses*, 53 AM. CRIM. L. REV. 215, 223-25 (2016); Kathryn Reed Edge, *Bank on It: Where Does Mary Jane Bank?*, 51 TENN. B.J. 32, 32-3 (2015); Bradley E. Markano, Note, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 291 (2015).

<sup>6</sup> Cole, *supra* note 3, at 1.

<sup>7</sup> See e.g., Tista Ghosh et al., *The Public Health Framework of Legalized Marijuana in Colorado*, 106 AM. J. OF PUB. HEALTH 1 (2016) <http://ajph.aphapublications.org/doi/pdfsupplus/10.2105/AJPH.2015.302875> (discussing the public health framework for recreational marijuana in Colorado).

<sup>8</sup> See Nora D. Volkow et al., *Adverse Effects of Marijuana of Marijuana Use*, 370 NEW ENG. J. MED. 2219, 2219–21 (2014).

<sup>9</sup> See Volkow et al., *supra* note 8 at 2220–21; NAT’L. INST. ON DRUG ABUSE, NAT’L. INSTS. HEALTH, MARIJUANA 7, 9 (2015), [https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/mjrrs\\_9\\_15.pdf](https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/mjrrs_9_15.pdf); see also Alecia Schweinsburg, *The Influence of Marijuana Use on Neurocognitive Functioning in Adolescents*, 1 CURR DRUG ABUSE REV. 1, 99 (Jan. 2008) (discussing the influence of marijuana use on neurocognitive functioning in adolescents).

cancer;<sup>10</sup> and occupational health<sup>11</sup> and public safety, including motor vehicle accidents.<sup>12</sup> The potential harm of secondhand exposure to combusted or aerosolized marijuana due to its use in public places is one such important public health impact. Laws that serve to limit the public use of *tobacco* have been effective in reducing tobacco-associated diseases.<sup>13</sup> This success suggests the potential for parallels between laws limiting the use of *marijuana* in public in order to reduce secondhand exposure to marijuana and its byproducts.

This article offers a summary of legal provisions in Alaska, Colorado, Oregon, Washington, and D.C. that address the use of recreational marijuana in public, and how they can be used as a tool for other jurisdictions grappling with similar policy issues.<sup>14</sup> First, this article provides the landscape of state<sup>15</sup> laws that expressly address the public use of marijuana, particularly highlighting the importance of the definition of “public place” in the state’s ability to implement effective prohibitions on public use in all settings. Second, this article provides examples in states that have opted to implement additional public use limitations in certain settings. Next, this article outlines state-based

<sup>10</sup> See Volkow et al., *supra* note 8, at 2222.

<sup>11</sup> See Volkow et al., *supra* note 8, at 2219; NAT’L INST. ON DRUG ABUSE, *supra* note 9; Schweinsburg, *supra* note 9 (discussing the influence of marijuana use on neurocognitive functioning in adolescents).

<sup>12</sup> See Volkow et al., *supra* note 8, at 2221–22; see also *The Public Health Consequences of Marijuana Legalization*, OFF. NAT’L DRUG CONTROL POL’Y, [https://www.whitehouse.gov/sites/default/files/ondcp/issuescontent/marijuana\\_and\\_public\\_health\\_one\\_pager\\_final.pdf](https://www.whitehouse.gov/sites/default/files/ondcp/issuescontent/marijuana_and_public_health_one_pager_final.pdf); *How Does Marijuana Use Affect School, Work, and Social Life?*, NAT’L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/research-reports/marijuana/how-does-marijuana-use-affect-school-work-social-life>; Jorgen Bramness et al., *Impairment Due to Cannabis and Ethanol: Clinical Signs and Additive Effects*, 105 ADDICTION 1080, 1080 (2010); see also Carl Soderstrom et al., *Marijuana and Alcohol Use Among 1,023 Trauma Patients: A Prospective Study*, 123 ARCH. SURG. 733, 733 (1988).

<sup>13</sup> *Smokefree Policies Improve Health*, CTRS. FOR DISEASE CONTROL, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/secondhand\\_smoke/protection/improve\\_health/](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/protection/improve_health/) (last updated May 12, 2014).

<sup>14</sup> CDC’s Public Health Law Program (“PHLP”) collected statutes and regulations related to marijuana on January 7, 2016, using WestlawNext, a legal research database. Statutes and regulations were collected in the following jurisdictions: Alaska, Colorado, Oregon, Washington, and the District of Columbia. Quoted language from state statutory and regulatory provisions were pulled directly from WestlawNext. Because this is a constantly evolving area of the law, additional provisions have been added as the authors have become aware of new developments in the law. For summaries on current state marijuana laws not specific to public use provisions, see *Marijuana Overview*, NAT’L CONF. OF STATE LEG. (Apr. 13, 2016), available at <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> (last visited May 6, 2016); *Recreational Marijuana Laws*, PUB. HEALTH LAW RESEARCH (Nov. 1, 2014), available at <http://publichealthlawresearch.org/product/recreational-marijuana-laws> (last visited May 6, 2016).

<sup>15</sup> For the purposes of this article, “states” includes D.C.

smoke-free air law provisions and their potential applicability in the marijuana setting depending upon the law's definition of "smoke." Finally, this article ends with a discussion of potential gaps in these legal strategies to address the use of marijuana in certain workplaces and at cannabis clubs.

## II. STATE LAWS RELATED TO THE PUBLIC USE OF RECREATIONAL MARIJUANA

The public use of marijuana refers to various types of consumption – such as smoking marijuana or ingesting products that are made with marijuana or its derivatives – in both indoor and outdoor public settings.<sup>16</sup> Alaska, Colorado, Oregon, Washington, and D.C. have enacted laws through ballot measures, statutes, and regulations limiting the public use of marijuana.<sup>17</sup> These statutes and regulations include (1) express prohibition of public use of marijuana; (2) express prohibitions of use in certain facilities; and (3) existing smoke-free air laws with potential application to marijuana use.

### A. *Express Prohibitions of the Public Use of Recreational Marijuana*

One legal lever used to prevent the public use of marijuana is each state's marijuana public use provision.<sup>18</sup> In general, the marijuana public use provisions specifically define the bounds of marijuana use, while broadly prohibiting consumption of marijuana in public.<sup>19</sup> "Consumption" includes not only smoking or inhaling marijuana, but also ingestion or introducing marijuana into the body in any form.<sup>20</sup> Generally, the term public includes places where a large group of people have access and might specifically include places such as parks, playgrounds, schools, hallways, lobbies, and places of business.<sup>21</sup> However, each state has a different definition of "public," and even within the same state, the definition within marijuana provisions might differ from the definitions in other sections of the state's law, such as in

<sup>16</sup> See, e.g., ALASKA STAT. ANN. § 17.38.900(3) (West 2016) (defining consumption as "the act of ingesting, inhaling, or otherwise introducing marijuana into the human body").

<sup>17</sup> See *id.* §§ 17.38.020 (4), .040; COLO. CONST. art. XVIII, § 16(3)(d) (West 2016); COLO. REV. STAT. ANN. § 18-18-406 (West 2016); OR. REV. STAT. ANN. § 475B.280 (West 2016); WASH. REV. CODE ANN. § 69.50.445 (West 2016); D.C. CODE ANN. § 48-911.01(a) (West 2016).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., ALASKA STAT. ANN. § 17.38.900 (3) (West 2016) (defining consumption in its marijuana statutory code).

<sup>21</sup> See, e.g., ALASKA ADMIN. CODE tit. 3, § 306.990 (West 2016).

smoke-free laws.<sup>22</sup> Largely, marijuana public use laws define public use to mean both indoor and outdoor locations. Whereas, smoke-free public use provisions are more likely to be defined to include just indoor spaces, but are also more likely to indicate that restrictions apply in specific indoor settings such as workplaces, bars, and restaurants.<sup>23</sup>

For example, Alaska law legalizes the consumption of marijuana for individuals aged twenty-one years or older, but it does not allow individuals to consume marijuana in public.<sup>24</sup> In Alaska, “in public” is defined as “a place to which the public or a substantial group of persons has access” and “includes highways, transportation facilities, schools, places of amusement or business, parks, playgrounds, prisons, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.”<sup>25</sup> The regulations specifically exclude retail marijuana shops from the definition of “in public.”<sup>26</sup>

Under Colorado law, recreational use of marijuana is permitted, but marijuana consumption that is “conducted openly and publicly or in a manner that endangers others” is not allowed.<sup>27</sup> Furthermore, Colorado law states that “a person who openly and publicly displays, consumes, or uses two ounces or less of marijuana commits a drug petty offense.”<sup>28</sup> Colorado’s marijuana law does not define public.<sup>29</sup> However, Colorado’s official state web portal list places such as sidewalks, parks, businesses,

<sup>22</sup> Outdoor spaces are referenced in marijuana public use provisions. *See, e.g.*, OR. REV. STAT. ANN. § 475B.015 (West 2016); OR. ADMIN. R. 845-025-101 (West 2016); WASH. REV. CODE ANN. §§ 69.50.445, 66.04.010 (West 2016). Whereas, the smoke-free provisions may specify that protections are for indoor places. *See, e.g.*, COLO. REV. STAT. ANN. § 25-14-204 (West 2016); ALASKA ADMIN. CODE tit. 3, § 306.990 (West 2016); ALASKA STAT. ANN. § 18.35.305 (West 2016).

<sup>23</sup> *Id.*

<sup>24</sup> *See* ALASKA STAT. ANN. §§ 17.38.900 (3), (4) (West 2016) (defining “consumption” as “the act of ingesting, inhaling, or otherwise introducing marijuana into the human body”), ALASKA STAT. ANN. § 17.38.040 (West 2016); *See* ALASKA ADMIN. CODE tit. 3, § 306.990(a)(6) (West 2016).

<sup>25</sup> ALASKA ADMIN. CODE tit. 3, § 306.990(a)(6) (West 2016).

<sup>26</sup> ALASKA ADMIN. CODE tit. 3, § 306.990(6)(c) (West 2016) (“‘in public’ . . . does not include an area on the premises of a licensed retail marijuana store designated for onsite consumption . . .”).

<sup>27</sup> COLO. CONST. art. XVIII, § 16; *see also* COLO. REV. STAT. ANN. § 18-18-406 (West 2016).

<sup>28</sup> COLO. REV. STAT. ANN. § 18-18-406 (West 2016).

<sup>29</sup> *See, e.g.*, COLO. REV. STAT. ANN. § 18-1-901 (West 2016) (highlighting that Colorado’s recreational marijuana provisions do not define “public,” however, other sections of the Colorado code define public broadly); Colorado law does define public but does not necessarily apply to the marijuana section. *See, e.g.*, 7 COLO. CODE. REGS. § 1101-9:1-5 (West 2016).

restaurants, and bars as locations in which marijuana use is prohibited.<sup>30</sup>

In Oregon, it is “unlawful for any person to engage in the use of marijuana items in a public place,” and such violation results in a fine.<sup>31</sup> A “public place” in Oregon is a place “the general public has access [to],” including common areas of hotels and apartments, roads, schools, public transportation, and outdoor spaces, such as parks and playgrounds, among other areas.<sup>32</sup>

Likewise, under Washington’s marijuana laws, “[i]t is unlawful to open a package containing marijuana, useable marijuana, marijuana-infused products, or marijuana concentrates, or consume marijuana, useable marijuana, marijuana-infused products, or marijuana concentrates, in view of the general public or in a public place.”<sup>33</sup> In Washington, “public place” is defined to include places such as public roads and highways, public transportation, school buildings and grounds, dance halls, theatres, stores, “those parts of establishments where beer may be sold,” “soft drink establishments,” common areas of hotels, as well as outdoor places, such as playgrounds, parks, and beaches.<sup>34</sup>

Similarly, D.C. makes it “unlawful for any person to smoke or otherwise consume marijuana in or upon a public space.”<sup>35</sup> Although the public use provision does not define “public space,” other provisions in the D.C. code define “public space” as a “publicly-owned property within the property lines of a street, park, or other public property, as such property lines are shown on the land records of the District, and includes any roadway, tree space, sidewalk, or parking within such property

<sup>30</sup> See *Laws About Marijuana Use*, COLO. OFFICIAL STATE WEB PORTAL, <https://www.colorado.gov/pacific/marijuana/laws-about-marijuana-use> (last accessed May 16, 2017); see also, Letter from David W. Broadwell, Assistant City Attorney, to the Denver City Council (Aug. 10, 2015), <http://big.assets.huffingtonpost.com/denvercityattorneymemo1.pdf> (regarding an explanation of initiated ordinance concerning the open and public consumption of marijuana) (demonstrating how local governments have taken action to define “public” under local law).

<sup>31</sup> OR. REV. STAT. ANN. § 475B.280 (West 2016); OR. REV. STAT. ANN. §§ 153.012, .008 (West 2016).

<sup>32</sup> OR. REV. STAT. ANN. § § 475B.280 (West 2016); OR. REV. STAT. ANN. § 475B.015 (West 2016); OR. ADMIN. R. 845-025-1015 (West 2016).

<sup>33</sup> WASH. REV. CODE ANN. § 69.50.445(1) (West 2016). The controlled substances chapter of Washington’s statutory code does not provide a definition of the word “consume.” See *id.* §§ 69.50.401–465. In the alcohol and beverage control title in the statutory code, where the definition of public use is found, “consume” is defined to include “the putting of liquor to any use, whether by drinking or otherwise.” *Id.* § 66.04.010(10).

<sup>34</sup> *Id.* § 66.04.010(36). See also WASH. REV. CODE ANN. § 69.50.445(2) (West 2016), “[F]or the purposes of this section, ‘public place’ has the same meaning as defined in RCW 66.04.010, but the exclusions in RCW 66.04.011 do not apply.”

<sup>35</sup> D.C. CODE ANN. § 48-911.01(a) (West 2016).

lines.”<sup>36</sup> Moreover, D.C.’s law expressly states that it is unlawful to consume marijuana in areas such as streets, parks, sidewalks, parking lots, vehicles in these locations or “[a]ny place the public is invited.”<sup>37</sup> Individuals consuming marijuana in public are guilty of a misdemeanor and are subject to a \$500.00 fine or imprisonment for no more than 60 days.<sup>38</sup>

**Table 1:** Marijuana Public Use Laws

| Jurisdiction | Does state statute or regulation prohibit the public use of marijuana? | Citations  | If yes, does the state’s marijuana public use law provide a definition of public? | Citations   |
|--------------|--|--|---|---|
| Alaska       | Yes  | Alaska Stat. Ann. §§ 17.38.020, .040 (West 2015)                               | Yes   | AS 17.38.040<br>ALASKA ADMIN. CODE tit. 3, § 306.990 (West 2016)                            |
| Colorado     | Yes  | Colo. Const. Art. XVIII, § 16<br>COLO. REV. STAT. ANN. § 18-18-406 (West 2016) | No  |   |
| Oregon       | Yes  | OR. REV. STAT. ANN. § 475B.280 (West 2016)                                     | Yes   | Or. Rev. Stat. Ann. §§ 475B.015, .280 (West 2016)<br>Or. Admin. R. 845-025-1015 (West 2016) |

<sup>36</sup> See, e.g., *id.* §§ 10-1101.01(6), 10-1181.01(5).

<sup>37</sup> *Id.* § 48-911.01(a).

<sup>38</sup> *Id.* § 48-911.01(c).



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|----------------------|-----|--|-----|--|
| Washington           | Yes | WASH. REV. CODE ANN. § 69.50.445 (West 2016) | Yes | WASH. REV. CODE ANN. §§ 66.04.010, 69.50.445 (West 2016) |
| District of Columbia | Yes | D.C. CODE ANN. § 48-911.01 (West 2016)       | No  |  |

*B. Express Prohibitions on Public Use in Specific Facilities*

In addition to the states' general prohibitions on recreational marijuana use in public, all four states and D.C. have express prohibitions on marijuana use in certain facilities.<sup>39</sup> These facilities fall into three main categories: (1) marijuana production, distribution, or retail facilities;<sup>40</sup> (2) childcare facilities or schools;<sup>41</sup> and (3) facilities for intellectually or developmentally disabled persons.<sup>42</sup> Generally, consuming marijuana at these facilities might already be prohibited under the states' marijuana public use laws;<sup>43</sup> however, states have implemented additional protections for particular facilities. In some circumstances a violation of one of these laws may result in the facility

<sup>39</sup> Laws regarding marijuana use prohibitions in detention facilities were not reviewed as part of this research. Laws that ban controlled substances generally in various facilities also were not reviewed as part of this research.

<sup>40</sup> See, e.g., COLO. REV. STAT. ANN. §§ 12-43.4-402, -404, -901 (West 2016); 1 COLO. CODE REGS. §§ 212-2.402, .502, .602, .604, .702, .802 (West 2016); WASH. REV. CODE ANN. § 69.50.357 (West 2016).

<sup>41</sup> See, e.g., COLO. REV. STAT. ANN. §§ 22-32-109.1, 25-14-103.5, 26-6-108(2) (West 2016); OR. ADMIN. R. 414-205-0100, 414-300-0070, 414-350-0090, 416-530-0060, 461-165-0180 (West 2016); WASH. ADMIN. CODE §§ 388-145-1650, 495C-121-050, 495D-121-590, 495D-140-070, 495E-110-030, 132C-120-065, 132F-121-110, 132I-125-100, 132L-350-080, 132M-125-035, 132Q-10-228, 132Y-125-001, 132Z-115-025 (West 2016).

<sup>42</sup> See, e.g., COLO. REV. STAT. ANN. §§ 25.5-10-202(5), 25.5-10-214, 27-10.5-102(27), 27-10.5-301 (West 2016).

<sup>43</sup> See § 306.990, *supra* note 17. See also ALASKA STAT. § 11.81.900 (defining a "public place" to include both schools and businesses); *supra* notes 27, 28, 29 (interpreting broadly the definition of public place in Colorado); OR. REV. STAT. ANN. § 475B.280 (in Oregon, it is any place in which the public has access); WASH. REV. CODE ANN. § 66.04.010 (West 2016) (in Washington, schools are explicitly listed in the definition of "public place" and public places also include "all other places of like or similar nature to which the general public has unrestricted right of access, and which are generally used by the public."); D.C.'s definition of public place includes both public land and facilities, but also "[a]ny place to which the public is invited."; D.C. CODE ANN. §§ 48-911.01, 10-1181.01, 10-1101.01 (West 2016).

losing its license.<sup>44</sup>

The first type of facility where marijuana use may be explicitly prohibited is at marijuana production, distribution, or retail facilities. For example, in Washington, a marijuana retailer and its employees cannot consume any marijuana products on the premises of the facility.<sup>45</sup> Similarly, in Colorado the consumption of marijuana at various marijuana retail, production, manufacturing, testing, transportation, and storage facilities is prohibited.<sup>46</sup>

The second type of facility where marijuana may be expressly prohibited is at childcare facilities. For example, in Oregon no person may smoke marijuana, including medical marijuana, on the premises of a childcare provider's facility when a child is present or during business hours.<sup>47</sup> Similar prohibitions exist for other types of childcare facilities in Oregon, such as childcare homes and centers.<sup>48</sup> In Colorado, the Department of Human Services may deny, suspend, revoke, or put on probation a childcare facility's license if an individual at the facility uses recreational marijuana.<sup>49</sup> There may also be additional restrictions on marijuana use among individuals who care for children under state control. For example, in Washington, child-placing agency or adoption services staff may not have contact with children in state care when they are under the influence of marijuana.<sup>50</sup> Correspondingly, in Oregon, foster parents must store marijuana and related paraphernalia in a secure location, and marijuana cannot be smoked in sight of "youth offenders."<sup>51</sup>

Additionally, all five jurisdictions prohibit marijuana use in schools.<sup>52</sup> For instance, in Colorado, the law goes beyond a general

<sup>44</sup> See, e.g., COLO. REV. STAT. ANN. § 26-6-108(2) (West 2016).

<sup>45</sup> See WASH. REV. CODE ANN. § 69.50.357 (West 2016) (stating that "[n]o licensed marijuana retailer or employee of a retail outlet may open or consume, or allow to be opened or consumed, any marijuana concentrates, useable marijuana, or marijuana-infused product on the outlet premises.").

<sup>46</sup> See, e.g., COLO. REV. STAT. ANN. §§ 12-43.4-402, .4-403, .4-404, .4-901 (West 2016); 1 COLO. CODE REGS. §§ 212-2.402, .502, .602, .702, .802 (West 2016).

<sup>47</sup> See OR. ADMIN. R. 461-165-0180 (West 2016).

<sup>48</sup> See *id.* 414-350-0090, -205-0100, -300-0070 (West 2016).

<sup>49</sup> See COLO. REV. STAT. ANN. § 26-6-108(2) (West 2016) (this prohibition applies to "the licensee, an affiliate of the licensee, a person employed by the licensee, or a person who resides with the licensee at the facility").

<sup>50</sup> See WASH. ADMIN. CODE § 388-145-1650 (West 2016).

<sup>51</sup> OR. ADMIN. R. 416-530-0060, -0010 (West 2016) (defining a youth offender as a "person who has been found to be within the jurisdiction of the juvenile court under ORS 419C.005 for an act committed when the person was under 18 years of age.").

<sup>52</sup> See ALASKA STAT. ANN. § 306.990 (West 2016), (naming schools in Alaska's definition of a public place); OR. REV. STAT. ANN. § 475B.280 (West 2016); WASH. REV. CODE ANN. § 69.50.445(1) (West 2016); WASH. REV. CODE ANN. § 66.04.010 (West 2016); D.C. Code Ann. § 48-911.01 (West 2016) (D.C. broadly defines "public place" to include

prohibition on marijuana use in public by requiring each school district's board of education to adopt policies prohibiting marijuana use on school grounds by staff and students and that those policies are properly enforced.<sup>53</sup> Further, Washington's laws ban recreational marijuana use in schools,<sup>54</sup> including on college campuses or during college activities.<sup>55</sup>

The third type of facility where marijuana may be expressly prohibited is residential facilities for intellectually and developmentally disabled people. For example, in specific facilities operated by the Colorado Department of Human Services to support people with intellectual and developmental disabilities,<sup>56</sup> the consumption of recreational marijuana on the premises is banned.<sup>57</sup>

### C. *Smoke-Free Laws*

Smoking of any kind is harmful to the lungs, and marijuana smoke contains "toxins, irritants, and carcinogens" which are also found in tobacco smoke.<sup>58</sup> Of the four states and D.C. that have recreational marijuana laws, each jurisdiction has some level of smoke-free laws in place, originally passed to protect the public from the harmful effects of tobacco smoke.<sup>59</sup> In Washington, Oregon, Colorado, and D.C., smoking is prohibited at all times in all indoor areas of restaurants, private work

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places that the general public has access to); COLO. REV. STAT. ANN. § 25-14-103.5(3)(A)(I) (West 2016); *see also id.* at § 22-32-109.1.

<sup>53</sup> COLO. REV. STAT. ANN. § 25-14-103.5(3)(A)(I) (West 2016); *see also id.* at § 22-32-109.1.

<sup>54</sup> WASH. REV. CODE ANN. § 69.50.445(1) (West 2016); WASH. REV. CODE ANN. § 66.04.010 (West 2016).

<sup>55</sup> *See, e.g.,* WASH. ADMIN. CODE §§ 132C-120-065, 132F-121-110, 132I-125-100, 132L-350-080, 132M-125-035, 132Q-10-228, 132Y-125-001, 132Z-115-025, 495C-121-050, 495D-121-590, 495D-140-070, 495E-110-030 (West 2016).

<sup>56</sup> COLO. REV. STAT. ANN. § 27-10.5-102(27) (West 2016).

<sup>57</sup> *Id.* at § 27-10.5-301.

<sup>58</sup> *Marijuana and Lung Health*, AM. LUNG ASSOC. (Mar. 23, 2015), <http://www.lung.org/stop-smoking/smoking-facts/marijuana-and-lung-health.html?referrer=https://www.google.com/> (citing Donald P. Tashkin, *Effects of Marijuana Smoking on the Lung*, 10 ANNALS OF THE AM. THORACIC SOC'Y 239 (2013); David Moir et al., *A Comparison of Mainstream and Sidestream Marijuana and Tobacco Cigarette Smoke Produced Under Two Machine Smoking Conditions*, 21 CHEM. RESEARCH IN TOXICOLOGY 494 (2008); Milos Novotný et al., *Fractionation and Capillary Gas Chromatographic—Mass Spectrometric Characterization of the Neutral Components in Marijuana and Tobacco Smoke Condensates*, 238 J. OF CHROMATOGRAPHY A 141 (1982); D. Hoffmann et al., *On the Carcinogenicity of Marijuana Smoke*, in RECENT ADVANCES IN PHYTOCHEMISTRY 63–81 (V.C. Runeckles ed., 1975)).

<sup>59</sup> *See* ALASKA STAT. ANN. §§ 18.35.300–365 (West 2016); COLO. REV. STAT. ANN. § 25-14-204 (West 2016); OR. REV. STAT. ANN. § 433.845 (West 2016); WASH. REV. CODE ANN. § 70.160.030 (West 2016); D.C. MUN. REGS. tit. 20, §§ 2106-2199 (West 2016); D.C. MUN. REGS. tit. 16, § 3632 (West 2016).

sites, and bars, and therefore these jurisdictions have been categorized by CDC as having comprehensive smoke-free laws.<sup>60</sup> The U.S. Surgeon General has concluded that there is no risk-free level of secondhand smoke exposure, and therefore comprehensive smoke-free laws are the only way to fully protect people from the harms of secondhand smoke exposure.<sup>61</sup> In contrast, Alaska's smoke-free law requires only the establishment of designated smoking areas in restaurants, and has no statewide restriction for workplaces or bars.<sup>62</sup>

Smoke-free laws not only provide examples of potential legal interventions that can be used to address public use of marijuana, but also may govern the public use of marijuana in certain instances.<sup>63</sup> However, the potential impact of smoke-free laws varies. Each state's law defines "smoking" differently, and thus, by definition, smoke-free laws might or might not apply to marijuana. Colorado expressly incorporates marijuana into its existing comprehensive smoke-free laws by defining "smoking" as "the burning of a lighted cigarette, cigar, pipe, or any other matter or substance that contains tobacco or marijuana."<sup>64</sup> Similarly, Oregon's smoke-free laws include both tobacco and marijuana smoke and vapor in its definitions.<sup>65</sup> Conversely, D.C. limits its definition of "smoking" to "the act of burning a cigar, cigarette, pipe, or any other matter or substance that contains tobacco."<sup>66</sup>

In Alaska and Washington, the matter is not as clear. These two

<sup>60</sup> See *State Tobacco Activities Tracking and Evaluation (STATE) System*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/statesystem/> (last visited May 2, 2016).

<sup>61</sup> OFFICE ON SMOKING AND HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL*, (2006), <http://www.ncbi.nlm.nih.gov/books/NBK44321/#rpt-smokeexp.ch2.s31>.

<sup>62</sup> ALASKA STAT. ANN. § 18.35.300 (West 2016) ("Smoking in any form is a nuisance and a public health hazard and is prohibited in the following vehicles and indoor places, except as allowed under AS 18.35.310: . . . a food service establishment that has a seating capacity of at least 50 persons"); ALASKA STAT. ANN. § 18.35.310 (West 2016) ("the prohibition set out in AS 18.35.300 does not apply to . . . a portion of a place or vehicle that is designated as a smoking section under AS 18.35.320"); ALASKA STAT. ANN. § 18.35.320 (West 2016) (designation of smoking sections).

<sup>63</sup> See KERRY CORK, TOBACCO CONTROL LEGAL CONSORTIUM, *TOKING, SMOKING & PUBLIC HEALTH: LESSONS FROM TOBACCO CONTROL FOR MARIJUANA REGULATION* (2015), [http://publichealthlawcenter.org/sites/default/files/resources/tclc-synopsis-marijuana-tobacco-2015\\_0.pdf](http://publichealthlawcenter.org/sites/default/files/resources/tclc-synopsis-marijuana-tobacco-2015_0.pdf) (discussing lessons learned from tobacco to marijuana); Rosalie Liccardo Pacula et al., *Developing Public Health Regulations for Marijuana: Lessons From Alcohol and Tobacco*, 104 AM. J. PUB. HEALTH 1021 (2014).

<sup>64</sup> COLO. REV. STAT. ANN. § 25-14-203(16) (West 2016).

<sup>65</sup> See OR. REV. STAT. ANN. § 433.835 (West 2016); see also OR. ADMIN. R. 333-015-0200 (West 2016).

<sup>66</sup> See D.C. MUN. REGS. tit. 20, § 2199 (West 2016).

states do not specifically reference marijuana by definition in their smoke-free laws.<sup>67</sup> However, smoking is not specifically limited to tobacco by definition, either.<sup>68</sup> In Alaska, the smoke-free laws apply broadly to “smoking in any form.”<sup>69</sup> Washington’s smoke-free air laws define “smoking” as “the carrying or smoking of any kind of lighted pipe, cigar, cigarette, or any other lighted smoking equipment,”<sup>70</sup> but its smoke-free air laws do reference tobacco smoke elsewhere in the section.<sup>71</sup> It could be argued that Alaska and Washington’s broad definitions of smoking includes marijuana, yet it could also be argued that they do not. Express inclusion of marijuana in the definition of “smoking” could serve as a legal tool to prevent the smoking of marijuana in many public places.

Local governments can also have a role in smoke free laws, which in turn can impact the public use of marijuana.<sup>72</sup> For example, Colorado’s smoke-free laws expressly state that local governments maintain authority to regulate smoking so long as they do not adopt regulations that are “less stringent” than the smoke-free laws.<sup>73</sup> As a result, local governments have taken additional steps to prevent public use of marijuana. As an example, on January 1, 2015, the city of Golden, Colorado, issued an ordinance expanding on the state’s smoke-free law to include marijuana smoke, in areas such as “all city of Golden owned or controlled parks, open space, indoor or outdoor pools and associated spectator areas, indoor or outdoor sport or athletic fields and associated spectator areas, indoor or outdoor water parks and associated spectator areas.”<sup>74</sup>

<sup>67</sup> ALASKA STAT. ANN. § 18.35.300 (West 2016); WASH. REV. CODE ANN. § 70.160.020 (West 2016).

<sup>68</sup> *Id.*

<sup>69</sup> ALASKA STAT. ANN. § 18.35.300 (West 2016); *see also id.* § 18.35.305.

<sup>70</sup> WASH. REV. CODE ANN. § 70.160.020 (1) (West 2016).

<sup>71</sup> *Id.* § 70.160.075.

<sup>72</sup> *See, e.g.,* COLO. REV. STAT. ANN. § 25-14-207 (West 2016).

<sup>73</sup> *Id.*

<sup>74</sup> Golden, Colo., Ordinance 1985 (Aug. 28, 2014). For additional examples of local government marijuana laws, *see* Local Recreational Marijuana Laws in Washington State Map, LAW ATLAS: THE POLICY SURVEILLANCE PORTAL, <http://workbench.lawatlas.org/query?dataset=local-recreational-marijuana-laws-in-washington-state-1462815896&id=58deb59ed42e07ce25146088> (last visited Apr. 11, 2017) (summarizing local government laws in Washington).

**Table 2: Smoke-Free Air Laws**

| <b>Jurisdiction</b>  | <b>Does state statute or regulation prohibit or regulate smoking in public?</b> | <b>Citations</b>                                 | <b>Does state smoke-free air laws expressly include marijuana in its definition of smoking?</b> | <b>Citations</b>  |
|----------------------|---|--|---|---|
| Alaska               | Yes   | Alaska Stat. Ann. §§ 18.35.300, .305 (West 2016) | No  |   |
| Colorado             | Yes   | COLO. REV. STAT. ANN. § 25-14-204 (West 2016)    | Yes   | COLO. REV. STAT. ANN. § 25-14-203 (West 2016)                           |
| Oregon               | Yes   | Or. Rev. Stat. Ann. §§ 433.850, .845 (West 2016) | Yes   | Or. Rev. Stat. Ann. § 433.835<br>Or. Admin. R. 333-015-0200 (West 2016) |
| Washington           | Yes   | WASH. REV. CODE ANN. § 70.160.030 (West 2016)    | No  |   |
| District of Columbia | Yes   | D.C. MUN. REGS. tit. 20, § 2100 (West 2016)      | No  |   |

### III. DISCUSSION: “PUBLIC USE” IN WORKPLACES AND CANNABIS CLUBS

Although the differences are subtle at first glance, the locations in which smoking is restricted compared to where marijuana is restricted do not mirror one another, leaving some possible gaps. Smoking in public places is prohibited in each jurisdiction, but the definition of “public place” varies by state. Generally, in all states, “public place” is broadly defined to include publically accessible indoor spaces, such as healthcare

facilities,<sup>75</sup> schools,<sup>76</sup> and public transportation.<sup>77</sup> Under most circumstances, marijuana public use laws restrict marijuana use at more places, including outdoor spaces, than the state's smoke-free laws.

There are, however, some situations in which marijuana public use provisions are less explicit than smoke-free laws about where marijuana may be consumed, such as workplaces and private cannabis clubs.<sup>78</sup> This section discusses the potential gaps in both marijuana public use provisions and state smoke-free laws that may allow the use of marijuana in locations such as workplaces and cannabis clubs.

#### A. *Workplaces*

To date, courts have generally upheld employers' decisions to ban consumption of marijuana at work and to require drug screening, even in states where marijuana is legal.<sup>79</sup> In affirming employers' rights to establish policies regulating the use of and screening for marijuana, states also may have provided employers the discretion to allow marijuana use at work. A news story from Colorado reported that at least one employer is allowing marijuana consumption at work.<sup>80</sup>

A discussion of Colorado law highlights this potential gap. The state's marijuana public use provision allows for consumption of marijuana provided that consumption is not "conducted openly and publicly or in a manner that endangers others."<sup>81</sup> The regulations state that "a person who openly and publicly displays, consumes, or uses two

<sup>75</sup> ALASKA STAT. ANN. §§ 18.35.300-365, .305 (West 2016); COLO. REV. STAT. ANN. § 25-14-204 (j) (West 2016); WASH. REV. CODE ANN. § 70.160.020; D.C. MUN. REGS. tit. 20, § 2199 (West 2016).

<sup>76</sup> ALASKA STAT. ANN. § 18.35.300-365 (West 2016); COLO. REV. STAT. ANN. § 25-14-204 (1)(aa) (West 2016); WASH. REV. CODE ANN. § 70.160.020; D.C. MUN. REGS. tit. 20, § 2199 (West 2016).

<sup>77</sup> ALASKA STAT. ANN. § 18.35.300-365 (West 2016); COLO. REV. STAT. ANN. § 25-14-204 (c) (West 2016); D.C. MUN. REGS. tit. 20, § 2199 (West 2016).

<sup>78</sup> ALASKA STAT. ANN. § 18.35.300-365 (West 2016); COLO. REV. STAT. ANN. § 25-14-204 (c) (West 2016); D.C. MUN. REGS. tit. 20, § 2199 (West 2016).

<sup>79</sup> See *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010); *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 257 P.3d 586 (Wash. 2011); see also G.M. Filisko, *Employers and Workers Grapple with Laws Allowing Marijuana Use*, AM. BAR ASS'N J. (Dec. 2015), [http://www.abajournal.com/magazine/article/employers\\_and\\_workers\\_grapple\\_with\\_laws\\_allowing\\_marijuana\\_use](http://www.abajournal.com/magazine/article/employers_and_workers_grapple_with_laws_allowing_marijuana_use) (discussing the legal challenges in the legalization of marijuana in the workplace).

<sup>80</sup> See Parija Kavilanz, *Take a Weed Break at Work. It's Allowed!*, CNN MONEY (Jan. 18, 2016), <http://money.cnn.com/2016/01/18/smallbusiness/marijuana-workplaces/index.html>; Jackie Salo, *Pot Smoking on The Job? Colorado Cannabis Companies Experiment with Marijuana Policies*, INT'L. BUS. TIMES (Feb. 12, 2016), <http://www.ibtimes.com/pot-smoking-job-colorado-cannabis-companies-experiment-marijuana-policies-2300607>.

<sup>81</sup> COLO. CONST. art. XVIII, § 16 (3).

ounces or less of marijuana commits a drug petty offense.”<sup>82</sup> However, neither provision defines “publicly.” Without a definition of “public,” employers could argue that a workplace is not a public space. Therefore, with employer approval, the consumption of marijuana at a place of business could be permissible. Further, even though smoking marijuana inside a place of business would be explicitly prohibited through Colorado’s comprehensive smoke-free law,<sup>83</sup> smoke-free laws in Colorado do not apply to the consumption of marijuana in other forms, such as edibles. In addition, Colorado’s smoke-free laws do not prohibit smoking in outdoor spaces, and thus smoking is often allowed outside of a workplace while still on work premises.<sup>84</sup>

Unlike Colorado, the other jurisdictions with legalized recreational marijuana all define what “public use” means in their laws. However, only Alaska explicitly specifies that public use includes use at a place of business.<sup>85</sup> Therefore, even though Washington and D.C. define “public” to include some specific places of businesses, such as hotels,<sup>86</sup> restaurants,<sup>87</sup> or places of amusement,<sup>88</sup> those states do not use broad language to ban marijuana at places of employment as seen in comprehensive smoke-free laws.<sup>89</sup> As a result, similar to Colorado, there are gaps in laws that allow employers to argue that their places of business are private, so employees could consume or smoke marijuana on work premises. Thus, there will likely be more examples of workplaces allowing marijuana consumption on the business premises. Given what is known about the effect of smoking on occupational health and safety, dependency, and respiratory health, in all likelihood, this will continue to be a challenge for states.

### B. *Cannabis Clubs*

The existence of cannabis clubs can be partially attributed to the lack

<sup>82</sup> COLO. REV. STAT. ANN. § 18-18-406 (West 2016).

<sup>83</sup> See *id.* § 25-14-204 (specifying that “tobacco and marijuana smoke” is prohibited at “(a)ny place of employment that is not exempted . . . . In the case of employers who own facilities otherwise exempted from this part 2, each such employer shall provide a smoke-free work area for each employee requesting not to have to breathe environmental tobacco smoke. Every employee shall have a right to work in an area free of environmental tobacco smoke.”); see also *id.* § 25-14-203 (providing a definition of smoking which includes marijuana).

<sup>84</sup> *Id.*

<sup>85</sup> See ALASKA ADMIN. CODE tit. 3, § 306.990 (West 2016).

<sup>86</sup> See WASH. REV. CODE ANN. § 66.04.010 (West 2016).

<sup>87</sup> *Id.*

<sup>88</sup> OR. ADMIN. R. 845-025-1015 (West 2016).

<sup>89</sup> See, e.g., WASH. REV. CODE ANN. § 70.160.030 (West 2016) (“No person may smoke in a public place or in any place of employment.”); WASH. REV. CODE ANN. § 70.160.020 (West 2016) (defining “place of employment”); D.C. MUN. REGS. tit. 20, § 2100 (West 2016).



of clarity in the definition of “public” space under the law. Under Colorado law, the argument for developing clubs is that they are not public places like bars or restaurants, but rather they are private social clubs.<sup>90</sup> Although public use of marijuana is still prohibited in Colorado, the lack of definition of “public” in both the marijuana public use statute and the regulation leaves room for interpretation. Thus, club owners have argued that their clubs are not public places but rather private clubs.<sup>91</sup> Further, even though marijuana smoke is explicitly prohibited at places of employment<sup>92</sup> under Colorado’s smoke-free laws, there is an exception for a place of employment that is “not open to the public and that is under the control of an employer that employs three or fewer employees.”<sup>93</sup> Club owners argue that they are not open to the public, but rather involve paid membership to a social club.<sup>94</sup> In addition, clubs do not charge for marijuana; instead, they collect club dues and members can either access marijuana or bring their own.

While Colorado has made efforts at the state level to both ban and legalize cannabis clubs, the legislative response is happening largely at the local level.<sup>95</sup> For example, in Nederland, Colorado, club owners were able to push for re-zoning to accommodate private clubs.<sup>96</sup> By contrast,

<sup>90</sup> See COLO. CONST. art. XVIII, § 16; COLO. REV. STAT. ANN. § 18-18-406 (West 2016).

<sup>91</sup> The argument that individuals should be allowed to smoke in private clubs began with arguments for exceptions to smoke free laws application to tobacco smoke. See Michael B. Cabral, *Smoked Out: Massachusetts Bans Smoking in Restaurants and Bars*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 401, 407 (2005); Keith Woodeshick, *Smoking Ban Legislation in New Jersey: Should Casinos Be Immune from Smoke?*, 3 RUTGERS J. L. & URB. POL’Y 496, 496 (2006); Patrick Kabat, *Till Naught but Ash Is Left to See: Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere*, 9 YALE J. HEALTH POL’Y, L. & ETHICS 128, 144 (2009).

<sup>92</sup> See COLO. REV. STAT. ANN. §§ 25-14-203, -204 (West 2016).

<sup>93</sup> *Id.* at § 25-14-205.

<sup>94</sup> See *Pot Clubs: Public or Private?* (Editorial), DENVER POST (Mar. 10, 2014), <http://www.denverpost.com/2014/03/10/pot-clubs-public-or-private/>; Michael Roberts, *Adams County Moves to Shut Down iBake Pot Club Three Years After It Opened*, WESTWORD (May 25, 2016), <http://www.westword.com/news/adams-county-moves-to-shut-down-ibake-pot-club-three-years-after-it-opened-7939229>; Billie Stanton Anleu, *Colorado Springs City Council Bans Marijuana Clubs, Setting 8-year Phase-out*, COLO. SPRINGS GAZETTE (Mar. 8, 2016), <http://gazette.com/colorado-springs-city-council-bans-marijuana-clubs-setting-8-year-phase-out/article/1571720>; Benjamin Freed, *DC Bans Private Marijuana Clubs, Making Legalization Even Murkier*, WASHINGTONIAN (Apr. 19, 2016), <https://www.washingtonian.com/2016/04/19/dc-bans-private-marijuana-clubs-making-legalization-even-murkier/>.

<sup>95</sup> See Lindsay Watts, *Lawmaker Wants Cannabis Clubs in Colorado Where Weed Could be Purchased and Used*, DENVER 7 – ABC (Mar. 5, 2016), <http://www.thedenverchannel.com/news/local-news/marijuana-lawmaker-to-propose-allowing-cannabis-clubs-in-colorado-where-weed-could-be-purchased-and-used>; Megan Schrader, *Colorado Springs Lawmaker Joins Marijuana Social Clubs Bill*, COLO. SPRINGS GAZETTE (Jan. 11, 2016), <http://gazette.com/colorado-springs-lawmaker-joins-marijuana-social-clubs-bill/article/1567320>.

<sup>96</sup> See Jacob Sullum, *Colorado Couple to Open First Officially Approved Cannabis*

in September 2015, Colorado Springs passed Ordinance No. 15-76, which banned the development of any new marijuana consumption clubs.<sup>97</sup> In March 2016, the city council voted to ban the development of new clubs and to require that existing clubs be phased out.<sup>98</sup> Also, in March 2016, a ballot measure that would allow for cannabis clubs in Denver was submitted to the city.<sup>99</sup>

Cannabis clubs have also been developing in Alaska, where retail stores are already exempt from public use laws.<sup>100</sup> Club owners argue that their clubs are not places of business but rather private clubs.<sup>101</sup> As a result, some cannabis clubs were developed.<sup>102</sup> Additionally, in early 2016, new regulations amended the definition of “in public” to exclude “the premises of a licensed retail marijuana store designated for onsite consumption.”<sup>103</sup> While these regulations would make Alaska the first state to legalize marijuana in a public place, as of the date of the writing of this article, “it continues to be a violation of AS 17.38.040 to consume marijuana in a public place, including unlicensed, unregulated marijuana smoking clubs.”<sup>104</sup> The lack of clarity about the status of the exemption

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*Caféacute*, FORBES (Mar. 11, 2014), <http://www.forbes.com/sites/jacobsullum/2014/03/11/colorado-couple-to-open-first-officially-approved-cannabis-club/#4475a77a5aca>.

<sup>97</sup> Colorado Springs, Colo., Ordinance No. 15-76 An Ordinance Creating a Six (6) Month Moratorium on the Establishment of Any New Marijuana Consumption Club Facility Within the City Limits (Oct. 26, 2015), [https://coloradosprings.gov/sites/default/files/communications/files/ordinance\\_1576\\_marijuana\\_consumption\\_club\\_moratorium\\_nov\\_2015.pdf](https://coloradosprings.gov/sites/default/files/communications/files/ordinance_1576_marijuana_consumption_club_moratorium_nov_2015.pdf); Billie Stanton Anleu, *Colorado Springs City Council Weighs Extension of Moratorium on Medical Marijuana Businesses*, COLO. SPRINGS GAZETTE (Mar. 21, 2016) <http://coloradosprings.com/colorado-springs-city-council-weighs-extension-of-moratorium-on-medical-marijuana-businesses/article/1572664>.

<sup>98</sup> See Ordinance No. 15-76; see also Anleu, *supra* note 94.

<sup>99</sup> Associated Press, *Denver Voters Could Consider Allowing Marijuana Clubs*, CBS DENVER (Mar. 25, 2016), <http://denver.cbslocal.com/2016/03/25/denver-voters-could-consider-allowing-marijuana-clubs/>; *Retail Marijuana Use Within the City of Denver - Residents & Visitors*, COLO. OFFICIAL STATE WEB PORTAL, <https://www.colorado.gov/pacific/marijuanainfodenver/residents-visitors> (indicating that “social clubs” or “coffee shops” are not permitted within the City of Denver).

<sup>100</sup> See, e.g., Elizabeth Jenkins, *Alaska’s Pot Cafes Will Give Patrons a Taste Of Cannabis*, NAT’L PUBLIC RADIO (Dec. 24, 2015), <http://www.npr.org/2015/12/24/460843950/alaskas-pot-cafes-will-give-patrons-a-taste-of-cannabis>.

<sup>101</sup> D.J. Summers, *Marijuana Social Clubs Dwindle in Alaska as Legal Confusion Reigns*, ALASKA DISPATCH NEWS (Apr. 17, 2016), <http://www.adn.com/cannabis-north/article/marijuana-social-clubs-dwindle-alaska-legal-confusion-reigns/2016/04/18/>. For examples of cannabis clubs in other states see *The Denver Post*, *supra* note 94; Roberts, *supra* note 94; Anleu, *supra* note 94; Freed, *supra* note 94; Watts, *supra* note 95; Schrader, *supra* note 95.

<sup>102</sup> *Id.*

<sup>103</sup> Alaska Admin. Code tit. 3, § 306.990 (West 2016).

<sup>104</sup> *Marijuana FAQs, Personal Use Questions: AS 17.38.040 Bans Public Consumption. How Is “Public” Defined?*, ALCOHOL & MARIJUANA CONTROL OFFICE, <https://www.commerce.alaska.gov/web/amco/MarijuanaFAQs.aspx>; see also Emily Gray

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has contributed to a reduction of cannabis clubs in Alaska.<sup>105</sup> In addition, although the smoke-free provisions in Alaska regulate smoking at places of employment, exemptions allow for the development of smoking sections.<sup>106</sup> Therefore, it is unlikely that, even if Alaska's smoke-free law applies to marijuana smoke, it would limit development of cannabis clubs. Because of this ambiguity, local governments have begun to take steps to regulate marijuana clubs. For example, the city of Wasilla, Alaska, already bans cannabis clubs,<sup>107</sup> and in January 2016, Anchorage proposed similar regulations within its city limits.<sup>108</sup>

Alternatively, both Washington and D.C. have taken steps to ban cannabis clubs through marijuana public use laws. Washington explicitly makes it illegal to maintain or help someone else to maintain or conduct a marijuana club.<sup>109</sup> Washington's law also makes it clear that a public place is not just one that charges admission but rather one that receives "any pecuniary gain."<sup>110</sup> In D.C., a bill that passed on April 5, 2016 clarified that a private club is considered "a place to which the public is invited," so consuming marijuana at a club is consuming marijuana in public, and is therefore illegal.<sup>111</sup>

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Brosious, *Alaska Is the First State to Okay Limited Public Marijuana Use*, CHI. SUN TIMES (Nov. 22, 2015), <http://extract.suntimes.com/news/10/153/8443/alaska-is-the-first-state-to-okay-marijuana-use-pot-shops>.

<sup>105</sup> See D.J. Summers, *Marijuana Social Clubs Dwindle in Alaska as Legal Confusion Reigns*, ALASKA DISPATCH NEWS (Apr. 17, 2016), <http://www.adn.com/cannabis-north/article/marijuana-social-clubs-dwindle-alaska-legal-confusion-reigns/2016/04/18/>.

<sup>106</sup> See ALASKA STAT. ANN. §§ 18.35.300 (2), .310 (A)(1), .320 (West 2016).

<sup>107</sup> See Wasilla, Alaska, Ordinance No. 15-08(AM) (Feb. 23, 2015), <http://www.cityofwasilla.com/home/showdocument?id=10476>; Wasilla, Alaska, Ordinance 16-07(AM) (Jan. 26, 2016), <http://www.w.cityofwasilla.com/Home/ShowDocument?id=12524>; Zaz Hollander, *Wasilla Enacts Strict New Marijuana Rules as Legalization Dawns*, ALASKA DISPATCH NEWS (Feb. 23, 2015), <http://www.adn.com/article/20150223/wasilla-enacts-strict-new-marijuana-rules-legalization-dawns>.

<sup>108</sup> See Devin Kelly, *Anchorage Marijuana License Rules Would Ban Pot Use in Retail Stores*, ALASKA DISPATCH NEWS (Jan. 15, 2016), <http://www.adn.com/article/20160115/anchorage-marijuana-license-rules-would-ban-pot-use-retail-stores>; Wasilla Municipal Code, tit. 9, ch. 9.40.

<sup>109</sup> See WASH. REV. CODE ANN. § 69.50.465 (West 2016) ("It is unlawful for any person to conduct or maintain a marijuana club by himself or herself or by associating with others, or in any manner aid, assist, or abet in conducting or maintaining a marijuana club. False 'Marijuana club' means a club, association, or other business, for profit or otherwise, that conducts or maintains a premises for the primary or incidental purpose of providing a location where members or other persons may keep or consume marijuana on the premises.").

<sup>110</sup> See *id.*

<sup>111</sup> Washington D.C. Act 21-391, Washington D.C. Council Period Twenty-One (2016), <http://lms.dccouncil.us/Download/33480/B21-0107-SignedAct.pdf>; Aaron C. Davis, *D.C. Council Bans Pot Clubs, Reversing Itself—Again*, WASH. POST (Apr. 5, 2016), [https://www.washingtonpost.com/local/dc-politics/dc-council-bans-pot-clubs-reversing-itself-again/2016/04/05/9b539b50-fb4c-11e5-886fa037dba38301\\_story.html](https://www.washingtonpost.com/local/dc-politics/dc-council-bans-pot-clubs-reversing-itself-again/2016/04/05/9b539b50-fb4c-11e5-886fa037dba38301_story.html).

In Oregon today cannabis clubs and cafes are now closed. However, initially the law was not as clear. Oregon's marijuana public use laws prohibit marijuana consumption in a public place.<sup>112</sup> "Public place" is often broadly defined as "a place to which the general public has access."<sup>113</sup> When examples are provided, they include common spaces in hotels and public transportation, however, bars and restaurants are not explicitly referenced.<sup>114</sup> In addition, until 2015, Oregon's smoke-free laws did not explicitly include marijuana smoke.<sup>115</sup> As a result of the public use law failing to explicitly ban marijuana use in places such as restaurants and bars, in combination with a smoke-free law that failed to include marijuana smoke within its prohibition on smoking in bars and restaurants, some business owners interpreted this as a potential loophole allowing for the consumption of marijuana in cannabis clubs and cafes.<sup>116</sup>

Unlike Washington and D.C., Oregon has limited development of cannabis clubs through the use of the state's smoke-free law rather than its marijuana public use statutes. When marijuana was explicitly added to Oregon's smoke-free law, smoking and vaporizing marijuana in all places of employment, including cannabis clubs and cafes, became illegal.<sup>117</sup> As a result, cannabis clubs and cafes, which are considered places of employment, are now closed.<sup>118</sup> Although both tobacco smoke shops and cigar bars are allowed in the state, an amendment to a law considered in 2016 that would have exempted cannabis clubs and cafes did not pass.<sup>119</sup>

<sup>112</sup> See OR. REV. STAT. ANN. § 475B.280 (West 2016).

<sup>113</sup> OR. REV. STAT. ANN. § 475B.015 (West 2016); OR. ADMIN. R. 845-025-1015 (West 2016).

<sup>114</sup> OR. REV. STAT. ANN. § 475B.015 (West 2016); OR. ADMIN. R. 845-025-1015 (West 2016).

<sup>115</sup> 2015 Oregon Laws Ch. 158 (H.B. 2546).

<sup>116</sup> See Noelle Crombie, *World Famous Cannabis Cafe to Close Due to Oregon's Clean Air Law*, OREGONIAN (Feb. 29, 2016), [http://www.oregonlive.com/marijuana/index.ssf/2016/02/world\\_famous\\_cannabis\\_cafe\\_to.html](http://www.oregonlive.com/marijuana/index.ssf/2016/02/world_famous_cannabis_cafe_to.html).

<sup>117</sup> See OR. REV. STAT. ANN. §§ 433.845, .835 (West 2016).

<sup>118</sup> *Id.*; OR. REV. STAT. ANN. § 433.850 (West 2016); Noelle Crombie, *World Famous Cannabis Cafe to Close Due to Oregon's Clean Air Law*, OREGONIAN (Feb. 29, 2016), [http://www.oregonlive.com/marijuana/index.ssf/2016/02/world\\_famous\\_cannabis\\_cafe\\_to.html](http://www.oregonlive.com/marijuana/index.ssf/2016/02/world_famous_cannabis_cafe_to.html).

<sup>119</sup> See OR. REV. STAT. ANN. § 433.850 (2)(c)-(d) (West 2016); SB 1511-4, LC 180 (Or. 2016), <https://olis.leg.state.or.us/liz/2016R1/Downloads/ProposedAmendment/8388>; see also, Noelle Crombie, *World Famous Cannabis Cafe to Close Due to Oregon's Clean Air Law*, OREGONIAN (Feb. 29, 2016), [http://www.oregonlive.com/marijuana/index.ssf/2016/02/world\\_famous\\_cannabis\\_cafe\\_to.html](http://www.oregonlive.com/marijuana/index.ssf/2016/02/world_famous_cannabis_cafe_to.html) ("Sen. Floyd Prozanski, D-Eugene, introduced an amendment during the Legislature's 35-day session that would have exempted cannabis cafes from the clean air law, but it did not have enough support to pass.").

#### IV. CONCLUSION

Given the serious public health implications of the public use of marijuana, the first states to legalize recreational marijuana have used various legal levers to limit public use. The primary mechanism is through instituting public use limitations in the new marijuana laws. However, the way that public use is defined within these provisions can have a significant impact on the use of marijuana in various settings such as workplaces and cafes. As a result, states have looked to other legal interventions to reduce the public's environmental exposure to marijuana, including specific prohibitions in certain facilities as well as smoke-free laws.

Looking to the future, as other states consider legalizing recreational marijuana, policymakers might consider these various legal frameworks as potential tools to reduce the public use of marijuana and to identify potential gaps in coverage in certain settings. Policymakers also may want to closely consider the definition of public use within any newly written marijuana public use law in order to ensure that marijuana can be easily regulated in all of the lawmakers' intended settings. In addition, the comprehensive regulation of marijuana can be achieved with additional laws in other sectors, such as smoke-free air laws.