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Brent Resh
Nevada Law Journal

Alysa Grimes
Nevada Law Journal

Beatriz Aguirre
Nevada Law Journal

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THE ELEPHANT IN NEVADA’S HOTEL ROOMS: SOCIAL CONSUMPTION OF RECREATIONAL MARIJUANA, A SURVEY OF LAW, ISSUES, AND SOLUTIONS

Nevada Law Journal Staff*

“[We have] an increasing problem in Nevada. On the November 2016 ballot, 55 percent of voters approved Question No. 2, legalizing recreational marijuana. However, there is no place tourists can use marijuana. Nevada residents can buy marijuana and use it at home, but it cannot be used anywhere else. Tourists will want to buy marijuana, but with nowhere to use it, they may smoke it while walking down [Las Vegas Boulevard] or in downtown Reno. No one wants that.”

“I view the problem as the elephant in the room that needs to be looked at.”¹

EXECUTIVE SUMMARY

The state-level movement to decriminalize marijuana is in full bloom. At present, twenty-nine states and the District of Columbia allow patients to consume marijuana medicinally; Nine states and the District of Columbia allow of-age adults to consume marijuana recreationally.² And more states are poised to join this ongoing experiment in public policy and law.

As with most social movements, the advance to “regulate marijuana like alcohol”³ has largely outpaced the law’s ability to adapt to the new changes.

* Written and edited by, in order of contribution: co-authors Brent Resh, Alysa Grimes, and Beatriz Aguirre; contributing authors Alma Orozco, Ebeth Palafox, Molly Higgins, Alexis Wendl, Shannon Zahm, and Natice Locke; and contributing editors Stephanie Glantz, Andrew Clark, Elise Conlin, and Hayley Cummings. We would like to thank Justice James Hardesty and Justice Michael Cherry for their support and guidance on this project, as well as Deonne Contine, Tick Segerblom, Steve Sisolak, Steve Yeager, and Professors Sam Kamin, Ruben Garcia, and Francine Lipman. © 2018 Nevada Law Journal.

¹ *Hearing on S.B. 236 Before the S. Comm. on Judiciary*, 2017 Leg., 79th Leg. Sess. (Nev. Mar. 9, 2017) (statements of Sen. Richard “Tick” Segerblom, Chair, S. Comm. on Judic’y).

² These states are Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, and Washington. *State Marijuana Laws in 2018 Map*, GOVERNING (Jan. 8, 2018), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> [<https://perma.cc/L6KA-TXH8>] (map showing eight states that have decriminalized recreational use of marijuana as of January 8, 2018); Tom Angell, *Vermont Governor Signs Marijuana Legalization into Law*, FORBES (Jan. 22, 2018, 2:05 PM), <https://www.forbes.com/sites/tomangell/2018/01/22/vermont-governor-signs-marijuana-legalization-into-law/#42692d23526a> [<https://perma.cc/A6U3-5Z2L>] (“Vermont is . . . the ninth state to legalize marijuana[.]”).

³ See *Campaign to Regulate Marijuana Like Alcohol*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/about/campaigns/> [<https://perma.cc/Y9X3-YSRE>] (last visited March 6, 2018) (listing state campaigns to decriminalize recreational use of marijuana). *But see*

The history of this movement is, in many respects, a history of states struggling to bring their laws and regulations into accord with the will of their citizens. The people of nine states and the District of Columbia have spoken: they want commonsense laws to bring the sale and use of marijuana out of the shadows cast by a federally-led prohibition that has proved largely unsuccessful, inequitably enforced, and disproportionately impactful. The movement has its opponents and skeptics. But regardless of their personal opinions on the matter, lawmakers in a majority of states now face a host of issues that will impact their constituents.

Well known for its longstanding tradition of sanctioning and regulating the indulgence of activities almost universally considered “vices” (such as gambling, and even prostitution), Nevada now stands in a unique position on the frontlines of the state-level social experiment in marijuana decriminalization. Las Vegas—a mecca for tourists from around the world—has over forty-million annual visitors⁴ who can now legally (at least under Nevada law) purchase up to one ounce of marijuana for recreational use.⁵ However, any consumption of that marijuana in a “public place,”⁶ retail marijuana store,⁷ or in a moving vehicle is a misdemeanor punishable by a fine of up to \$600.⁸

For Nevadans, this restriction on public consumption simply means that they must consume their recreational marijuana in the privacy of their residences. For Nevada’s tourists, however, this restriction presents a catch-22: Nevada’s tourists may lawfully purchase marijuana, but they have nowhere to law-

generally Angela Macdonald, *Why Marijuana Is Not Regulated Like Alcohol in Colorado: A Warning for States Seeking to Legalize Recreational Marijuana*, 2015 UTAH L. REV. ONLAW 1 (2015). A federal bill uses the same language. See Regulate Marijuana Like Alcohol Act, H.R. 1841, 115th Congress (2017).

⁴ L.V. VISITORS AND CONVENTION AUTH. RES. CTR., HISTORICAL LAS VEGAS VISITOR STATISTICS: 1970–2016 (2017), <http://www.lvcva.com/includes/content/images/media/docs/Historical-1970-to-2016.pdf> [https://perma.cc/YX8F-UU2D].

⁵ NEV. REV. STAT. § 453D.110(1) (2017) (“[I]t is lawful, in [Nevada], . . . for persons 21 years of age or older to . . . [p]ossess, use, consume, [and] purchase[] . . . marijuana[.]”). Most of the tourists who visit Las Vegas are of-age. See L.V. VISITORS AND CONVENTION AUTH. RES. CTR., 2016 LAS VEGAS VISITOR PROFILE: MATRIX OF LAS VEGAS VISITOR SEGMENTS, <http://www.lvcva.com/includes/content/images/media/docs/2016-XTAB-Las VegasVPS-CombinedSnapshot.pdf> [https://perma.cc/NYM7-SN29] (Out of 3,600 tourists surveyed, 11 percent reported they had traveled to Las Vegas with someone under 21.).

⁶ “Public place” is defined broadly as “an[y] area to which the public is invited or in which the public is permitted regardless of age.” NEV. REV. STAT. § 453D.030(17) (2017). However, it expressly excludes “retail marijuana stores” from the definition. *Id.*

⁷ “‘Retail marijuana store’ means an entity licensed to purchase marijuana from marijuana cultivation facilities, to purchase marijuana and marijuana products from marijuana product manufacturing facilities and retail marijuana stores, and to sell marijuana and marijuana products to consumers.” NEV. REV. STAT. § 453D.030(18).

⁸ NEV. REV. STAT. § 453D.400(2); see also State of Nev., *Legal Use: Penalties*, MARIJUANA IN NEVADA, <http://marijuana.nv.gov/Legal/Penalties/> [https://perma.cc/RGX8-UU2S] (last visited Mar. 13, 2017).

fully consume it. “What happens in Vegas”⁹ will (inevitably) happen in Las Vegas, and Nevada law must adapt to provide sensible and safe accommodations for tourists who want to lawfully consume a product that they may lawfully purchase. In the absence of such change, many tourists will inevitably consume marijuana unlawfully and unsafely. Ignoring this “elephant in the room” will not make it go away. The situation must be addressed directly.

Necessity is not the only valid reason for change. Integrating Nevada’s new recreational-marijuana industry with its longstanding tourism industry will prove a boon to Nevada’s economy and citizens. Last year, Las Vegas tourists spent nearly thirty-five billion dollars.¹⁰ A 2016 forecast predicted a potential market value in 2018 of over \$200 million in sales of recreational marijuana to tourists—in Clark County alone.¹¹ However, regardless of the economic benefits of this new market, the consumption catch-22 must be resolved in such a way that is sensible for Nevada and safe for Nevada’s residents and visitors. This has proved to be no easy feat for lawmakers, who understandably hesitate to make significant changes with uncertain consequences in an area of law that has just recently begun to emerge in a handful of other states and cities.

Regardless of its effectiveness as a rallying cry for proponents of decriminalizing marijuana, the mantra “regulate marijuana like alcohol” is overly simplistic. In many respects, marijuana and alcohol are *not* alike. But regardless of whether marijuana *should* be regulated like alcohol, lawmakers in several states have considered, but nonetheless have hesitated, in extending that mantra to its logical conclusion: If there are taverns for onsite alcohol consumption, then shouldn’t there also be “taverns” for marijuana consumption? The logic of “regulate marijuana like alcohol” says “yes,” but—and even despite valid social-policy reasons why so-called “consumption lounges” or “consumption clubs” should exist—lawmakers across jurisdictions and levels of government have, for the most part, answered “no” (or at least “not yet”¹²).

The consumption of marijuana in a tavern-like setting raises a host of is-

⁹ See generally Erik Oster, *Las Vegas’ Ad Agency Explains Why ‘What Happens Here, Stays Here’ Isn’t Going Anywhere*, ADWEEK (Feb. 14, 2018), <http://www.adweek.com/agencies/las-vegas-ad-agency-explains-why-what-happens-here-stays-here-isnt-going-anywhere/> [https://perma.cc/Q2LB-C7FZ].

¹⁰ L.V. VISITORS AND CONVENTION AUTH. RES. CTR., *THE ECONOMIC IMPACT OF SOUTHERN NEVADA’S TOURISM INDUSTRY AND CONVENTION SECTION 1* (2018), <http://www.lvcva.com/includes/content/images/media/docs/eis-economic-impacts-april-2018-final.pdf> [https://perma.cc/CQC9-VWHQ].

¹¹ RCG ECON. & MARIJUANA POLICY GRP., *NEVADA ADULT-USE MARIJUANA: ECONOMIC & FISCAL BENEFITS ANALYSIS* at ES-2–3 (2016), <http://www.rcg1.com/wp-content/uploads/2012/01/2016-7-12-Final-NV-MJ-Initiative-Rpt-v.2.pdf> [https://perma.cc/76NZ-KAEH]. For comparison, the report predicted a Nevada-wide potential market value of nearly \$400 million in total recreational sales to both tourists and residents. *Id.*

¹² See, e.g., Chris Kudialis, *Las Vegas Officials Say No Pot Lounges Until 2019, Despite Openings in Colorado, Massachusetts*, L.V. SUN (Mar. 5, 2018, 2:00 AM) <https://lasvegassun.com/news/2018/mar/05/las-vegas-officials-say-no-pot-lounges-until-2019/> [https://perma.cc/5RNJ-GUBP].

sues and regulatory challenges—several, but not all, of which are analogous to the regulation of alcohol consumption in taverns. What level of government should implement the requirements and regulations that will ultimately govern such marijuana-consumption taverns? Should such establishments be permitted to produce and/or sell marijuana and marijuana products directly to patrons for onsite consumption? If yes, then what limitations and restrictions should be specifically placed on that production and/or sale of marijuana? Should such establishments be permitted to operate as restaurants or entertainment venues? Should they be permitted to sell and serve alcohol in addition to marijuana? How should they be regulated for indoor air quality? Should they be treated the same as alcohol taverns in terms of statutorily imposed or limited liability for the torts of their patrons? How should nuisance complaints (e.g., for odor or noise) by neighbors of such an establishment be addressed? And where should social-consumption establishments be zoned?

Laws, regulations, and ordinances that have already been enacted or proposed in several states offer varying answers to each of these questions regarding marijuana taverns—what this White Paper calls “social-consumption establishments.” A comparison of those answers should prove useful for lawmakers who either are or will be considering similar laws, regulations, or ordinances for their states or local governments. Although this Paper will focus on solutions for Nevada (and for Las Vegas in particular), its analysis should prove useful to any jurisdiction that has already considered, is currently considering, or will at some point consider, a social-consumption industry. A brief summary of the approaches to solving the primary issues impeding a consumption industry follows.

Virtually all states that have decriminalized possession of recreational and medical marijuana prohibit public consumption.¹³ Thus, the first major substantive impediment to social consumption is the general prohibition on consumption in “public places,” usually defined either as places to which the public is invited or permitted, or as places where consumption can be seen from a public place.¹⁴ These definitions can be ambiguous, leaving lawmakers and marijuana consumers confused as to what, exactly, constitutes a public place: while it seems clear that persons can consume marijuana in their private residences with impunity,¹⁵ what about patrons in private businesses? Or members of members-

¹³ See, e.g., COLO. REV. STAT. § 18-18-406(5)(b) (2018); NEV. REV. STAT. § 453D.400(2) (2017); see also, e.g., D.C. CODE § 48-911.01 (2016).

¹⁴ See, e.g., NEV. REV. STAT. 453D.030(17); see also, e.g., D.C. CODE § 48-911.01(a).

¹⁵ The District of Columbia’s code goes even one step farther, imposing an additional restriction on recreational users by allowing marijuana use but prohibiting excessive impairment, even in private residences. D.C. CODE § 48-911.01(b) (“No person, whether in or on public or someone else’s private property, shall be impaired due to smoking or otherwise consuming marijuana and endanger the safety of himself, herself, or any other person or property.”). More generally, individuals who rent their homes (or are subject to homeowner’s association rules, etc.) may be contractually precluded from consuming cannabis in their homes. See generally, e.g., Haley Fox, *You Can Sort of Legally Smoke Weed in California*

only clubs? The general approach to resolving this issue in social-consumption legislation is to create a carve-out to the general prohibition for consumption in licensed consumption establishments.¹⁶ (New business models have, however, nonetheless emerged that attempt to sidestep the general public-consumption prohibition. For instance, Oregon homeowners have begun marketing “weed-friendly short-term rentals” through “Airbnb”¹⁷ for those wish to partake (lawfully) in recreational-marijuana consumption.¹⁸)

States and cities have taken or considered a wide array of approaches to the issue of whether and to what extent points of sale and production should overlap with the point of consumption in a single business establishment. For instance, several approaches outright prohibit any sale of marijuana on the premises of a consumption establishment.¹⁹ Most approaches, however, would create hybrid retail-consumption establishments, generally which have a designated area for consumption that is physically walled off from the rest of the premises.²⁰ Alaska’s regulation is one such approach.

Although in the minority, several approaches would allow for at least some limited overlap between the point of production of marijuana products and the point of their consumption.²¹ As one notable example, San Francisco has different permit types based on how the business plans to serve the product—either “pre-packaged” (defined in the ordinance as a product “served to a customer in its original [general retail] packaging”²²) or “prepared” (defined as

but Maybe Not in Your Apartment, LA WEEKLY (Apr. 24, 2017, 6:23 AM), <http://www.laweekly.com/news/can-landlords-crack-down-on-renters-marijuana-use-8145314> [<https://perma.cc/P2S3-9BQ4>].

¹⁶ See, e.g., S.B. 17-063 § 10, 71st Gen. Assemb., Reg. Sess. (Colo. 2017) (unenacted).

¹⁷ Short for “air bed and breakfast,” Airbnb is an online service that links homeowners with short-term renters as an alternative to hotel rooms. See generally AIRBNB, <https://www.airbnb.com/> [<https://perma.cc/HZL4-34RF>] (last visited Apr. 19, 2018).

¹⁸ Elise Herron, *We Found a Rare Spot in Portland Where Cannabis Tourists Can Legally Smoke Up*, WILLAMETTE WEEK, (July 14, 2017), <http://www.wweek.com/news/business/2017/06/21/we-found-a-rare-spot-in-portland-where-cannabis-tourists-can-legally-smoke-up/> [<https://perma.cc/GSW6-B8M3>].

¹⁹ See, e.g., S.B. 307, 2017 Leg., 79th Sess. (Or. 2017) (unenacted); see also, e.g., Las Vegas City Council, *Draft Marijuana Consumption Lounge Regulation*, CITY OF L.V., NEV. (Dec. 2017), <https://www.lasvegasnevada.gov/cs/groups/public/documents/document/chjk/mdcz/~edisp/prd073346.pdf> [<https://perma.cc/X6QF-45LM>] (unenacted).

²⁰ See, e.g., Marijuana Control Bd., *Proposed Regulations—Marijuana Retail Store Onsite Consumption Endorsement*, ST. OF ALASKA: ONLINE PUBLIC NOTICES (Aug. 21, 2017), <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=109020> [<https://perma.cc/J6JD-DZR3>] (unenacted); W. Hollywood, Cal., Ordinance 17-1016 (Nov. 20, 2017), <https://www.weho.org/home/showdocument?id=35309> [<https://perma.cc/6M9N-NNWJ>] (codified at W. HOLLYWOOD, CAL., MUN. CODE tit. 5, art. 2, §§ 5.16–.120 (2018)).

²¹ See, e.g., S.B. 17-063 (Colo.); S.F., Cal., Dep’t Pub. Health, Regulation of Cannabis Businesses Ordinance 230-17 (Dec. 5, 2017), <https://www.sfdph.org/dph/files/csl/RegulationofCannabisBusinessesOrdinance230-17.pdf> [<https://perma.cc/A2FC-YLLL>] (codified at S.F., CAL., HEALTH CODE art. 8A, §§ 8A.1–8A.8 (2018); S.F., CAL., POLICE CODE art. 16, §§ 1600–1639 (2018)).

²² S.F., CAL., HEALTH CODE § 8A.1(b) (2018).

“heating, reheating, or serving of Cannabis Products, [but] does not include cooking or infusing”²³).²⁴

Approaches vary on the extent to which they limit sales of marijuana, marijuana products, and non-marijuana products and services. Several approaches limit the sale of marijuana purchased specifically for onsite consumption to individual servings.²⁵ All approaches agree that marijuana-consumption establishments should not be permitted to serve alcohol—with one exception. Under the first version of Massachusetts’s draft regulations, social-consumption establishments would have been permitted to serve and allow the consumption of either alcohol or marijuana, but not both, at any given time.²⁶ Approaches vary widely on whether and to what extent non-marijuana food may be produced and/or served in a consumption establishment. While most approaches do not impose restrictions on sales of non-marijuana-infused foods,²⁷ at least one approach would limit sales of food produced onsite to “light snacks.”²⁸

Proposed solutions to the social-consumption problem also include a variety of approaches to several other more-specific issues, including licensing,²⁹ indoor air quality,³⁰ preventing marijuana-related DUIs,³¹ and zoning restrictions.³² Additionally, local governments have imposed (or are considering

²³ *Id.*

²⁴ See S.F. HEALTH CODE § 8A.3; see also Cannabis Control Comm’n, *935 CMR 500.000: Adult Use of Marijuana*, at 83, ST. OF MASS. (Dec. 21, 2017), <https://www.mass.gov/files/documents/2017/12/22/DraftRegulations122117.pdf> [<https://perma.cc/X43C-4T8V>] (proposed 935 CMR 500.145(C)).

²⁵ See, e.g., Alaska Marijuana Control Bd., *Proposed Regulations*, *supra* note 20 (proposed 3 ALASKA ADMIN. CODE 306.370(A)(2)(A)); Mass. Cannabis Control Comm’n, *935 CMR 500.000*, *supra* note 24, at 83 (proposed 935 CMR 500.145(A)(2)).

²⁶ Mass. Cannabis Control Comm’n, *935 CMR 500.000*, *supra* note 24, at 83 (proposed 935 CMR 500.145(D)).

²⁷ See, e.g., City and Cty. of Denver, Colo., Neighborhood Approved Cannabis Consumption Pilot Program Initiative, Ordinance 300-16 (July 5, 2016), <https://www.denvergov.org/content/dam/denvergov/Portals/723/documents/Social%20Consumption%20Ordinance.pdf> [<https://perma.cc/Z2L7-VAQF>] (codified at DENVER, COLO., MUN. CODE §§ 6-300 to -319 (2017)).

²⁸ S.B. 17-063 § 3 (Colo.) (proposed COLO REV. STAT. § 12-43.4-408(2)(b) (unenacted)).

²⁹ See generally, e.g., *Cannabis Consumption Licenses*, DENVER, COLO: BUS. LICENSING CENT., <https://www.denvergov.org/content/denvergov/en/denver-business-licensing-center/marijuana-licenses/social-consumption-advisory-committee.html> [<https://perma.cc/K9L3-JVJ7>] (last visited Apr. 19, 2018).

³⁰ See, e.g., DENVER, COLO., MUN. CODE § 6-310(c) (2017) (requiring that all cannabis smoking in designated areas for consumption comply with Colorado’s Clean Air Act). See generally, e.g., Penelope Overton, *Maine’s Marijuana Social Clubs Likely to be No-Smoking Venues*, PRESS HAROLD (Oct. 10, 2017) <https://www.pressherald.com/2017/09/25/maines-marijuana-social-clubs-likely-to-be-no-smoking-venues/> [<https://perma.cc/T2LS-2JCC>].

³¹ See, e.g., Mass. Cannabis Control Comm’n, *935 CMR 500.000*, *supra* note 24, at 83 (proposed 935 CMR 500.145(E)(3), which would require consumption establishments to have reasonable plans and policies for providing ride-share and taxi services to patrons).

³² See, e.g., *L.V. Draft Marijuana Consumption Lounge Regulation*, *supra* note 19, at 6–8. See generally, e.g., Thomas Mitchell, *Denver Businesses Can Now Apply for Social Consumption Permits*, WESTWORD, (Aug. 24, 2017), <http://www.westword.com/marijuana/den>

imposing) even more specific restrictions and regulations, such as set hours of operation,³³ parking requirements,³⁴ and signage requirements.³⁵ Across the board, however, consumption businesses must provide protocols for ensuring that persons under the age of twenty-one cannot enter the establishment.³⁶ Other requirements include restricting advertisement or visibility of the actual marijuana consumption from passers-by.³⁷ Denver's ordinances go so far as to require an applicant to submit "[a] health and sanitation plan that demonstrates how rental cannabis [paraphernalia] will be cleaned and sanitized prior to each rental[.]"³⁸

This White Paper will survey both proposed and enacted laws, regulations, and ordinances from seven states that are blazing a path through this new area of law: Alaska, California, Colorado, Maine, Massachusetts, Nevada, and Oregon. The aim of this Paper is to compare the various approaches employed in these laws, regulations, and ordinances with respect to the several key issues explored briefly above and others. Drawing from those comparisons, this Paper will attempt to synthesize recommendations to help Nevada's lawmakers reach a workable and sensible solution to provide Nevada's tourists and residents alike with safe places to lawfully consume marijuana.

Nevada's Regulation and Taxation of Marijuana Act³⁹ presents two primary constraints on lawmakers in implementing a social-consumption industry. First, with one possible critical exception, lawmakers will not be able to add to or amend the Act's statutory provisions during the 80th session (to be held in 2019). Any such change is not permitted under the Nevada Constitution until January 1, 2020,⁴⁰ an off year for the legislature.⁴¹ Thus, the most straightforward and comprehensive mechanism for amending current marijuana law to accommodate a social-consumption industry is and will remain off the table until the 81st regular session, which will not begin until 2021.

Second, the Act prohibits "smok[ing] or otherwise consum[ing] marijuana

ver-businesses-can-start-applying-for-social-consumption-spaces-9407330
[<https://perma.cc/8HKZ-W5BQ>].

³³ See, e.g., DENVER MUN. CODE § 6-305.

³⁴ See, e.g., Las Vegas City Council, *Draft Marijuana Consumption Lounge Regulation*, *supra* note 19, at 8.

³⁵ See, e.g., S.F. POLICE CODE § 1620(c); see also, e.g., OAKLAND, CAL., MUN. CODE § 5.80.025(C) (2016) (conditioning consumption permits on compliance with site specific plans for such things as parking, ventilation, anti-drugged driving, and set hours).

³⁶ See, e.g., DENVER MUN. CODE § 6-309(c).

³⁷ S.F., CAL., POLICE CODE § 1620(b)(3).

³⁸ DENVER MUN. CODE § 6-308(a)(8).

³⁹ NEV. REV. STAT. § 453D.010-.600 (2017).

⁴⁰ The Nevada Legislature is not authorized to amend or repeal any initiative measure approved by voters until after three years from the effective date of the measure. NEV. CONST. art. 19, § 2, ¶ 3. The effective date of the Regulation and Taxation of Marijuana Act was January 1, 2017.

⁴¹ Nevada's regular legislative sessions are held biennially. NEV. CONST. art. 17, § 12.

in a public place, in a retail marijuana store, or in a moving vehicle.”⁴² The Act defines “public place” as “an area to which the public is invited or in which the public is permitted regardless of age.”⁴³ The Act specifically excludes “retail marijuana stores”⁴⁴ from that statutory definition.⁴⁵ An ambiguity exists in the phrasing of this definition, and two alternate interpretations are possible in light of what, precisely, the modifier “regardless of age” applies to. Under the first possible interpretation, a place is a “public place” if it is “an area to which the public is invited [*regardless of age*] or in which the public is permitted [*regardless of age*].” This interpretation would suggest that an age restriction on entry would be sufficient to disqualify a place from the definition. Alternatively, under the second interpretation, a place is a “public place” if it is “an area to which the public [*regardless of age*] is invited or in which the public [*regardless of age*] is permitted” This latter interpretation would suggest that age restrictions are *not* alone sufficient to disqualify a place from the definition.

Nevada’s Legislative Counsel Bureau (LCB) has opined that the Act does not prohibit consumption of marijuana in “a private lounge or other facility, which is closed to the public and only allows entry to persons who are 21 years of age or older, so long as the possession or consumption of marijuana at such a location is not exposed to public view.”⁴⁶ However, it is unclear to what extent an age restriction is sufficient to disqualify a lounge as a public place. If age-restricted lounges are indeed public places within the meaning of the Act, then two solutions proposed by Nevada’s lawmakers—Senate Bill 236 and a draft ordinance by the City of Las Vegas—may be in derogation of Nevada law.

As explored in this Section, this Paper suggests that the Act does indeed prohibit consumption of marijuana in private lounges such as those contemplated under S.B. 236 and Las Vegas’s draft ordinance. Because the definition of public place expressly excludes retail marijuana stores—which, like private lounges, are age-restricted private businesses—the LCB’s interpretation would seem to render the exclusion of retail marijuana stores redundant. Thus, the LCB’s opinion may be contrary to a canon of statutory interpretation: an ambiguous provision in a statute is to be construed to give meaning to all of its components such that no component is rendered meaningless.⁴⁷ Thus, Nevada’s legislators may have to amend several provisions of Act directly before a so-

⁴² NEV. REV. STAT. § 453D.400(2).

⁴³ NEV. REV. STAT. § 453D.030(17).

⁴⁴ Also defined in the Act, a “retail marijuana store” is “an entity licensed to purchase marijuana from marijuana cultivation facilities, to purchase marijuana and marijuana products from marijuana product manufacturing facilities and retail marijuana store, and to sell marijuana and marijuana products to consumers.” *Id.* § 453D.030(17).

⁴⁵ *Id.*

⁴⁶ Letter from Brenda J. Erdoes & Asher A. Killian, Legislative Counsel & Principal Deputy Legislative Counsel, State of Nev. Legislative Counsel Bureau, to Richard “Tick” Segerblom, Senator, State of Nev. (Sept. 10, 2017), <https://www.scribd.com/document/358620398/Legal-Opinion-Nevada-Marijuana-Lounges> [<https://perma.cc/7WNG-3XNH>].

⁴⁷ *See, e.g., Harris Assocs. v. Clark Cty. Sch. Dist.*, 81 P.3d 532, 534 (Nev. 2003).

cial-consumption industry will even be possible in Nevada.

In general, that will have to wait until 2021. However, one provision of the Act may prove to offer the possibility of at least a limited solution in 2019. This provision states that “[n]otwithstanding the provisions of this chapter, after January 1, 2017, the Legislature may amend provisions of this act to provide for the conditions in which a locality may permit consumption of marijuana in a retail marijuana store.”⁴⁸ Whether this provision actually grants to Nevada’s legislators the power that it purports to is a difficult constitutional question.

The Nevada Constitution quite plainly states that “[a]n initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within 3 years from the date it takes effect.”⁴⁹ However, that language should arguably be read in light of the broader purpose of the Nevada Constitution’s voter-initiative mechanism: presumably, to grant to voters a more direct set of checks and balances over the legislature and legislative process than indirect representation. Thus, the constitutional issue would turn on whether, through a provision in a law that is enacted as a voter initiative, the people of Nevada may expressly delegate limited amendment powers to the legislature notwithstanding the seemingly plain language of Article 19.

This Paper generally assumes that the provision grants the power it purports to. The people of Nevada voted on and approved of the entire Act, including, specifically, its provision that, “after January 1, 2017, the Legislature *may amend provisions of this act* to provide for the conditions in which a locality may permit consumption of marijuana in a retail marijuana store.”⁵⁰ While the Legislature could not grant this amendment power to itself with lawful effect, there does not immediately appear to be an issue with the people lawfully granting the Legislature that power. This Paper does not address this issue at length; it merely points out its existence, should lawmakers decide to take legislative action in 2019.

In light of constitutional and statutory constraints unique to Nevada’s Regulation and Taxation of Marijuana Act, this Paper proposes a two-step approach to implementing and regulating a social-consumption industry in Nevada. First, in 2019, this Paper suggests that legislators should make limited amendments to the Act to open the legal space necessary for local governments to permit consumption in what has been described as “[c]annabis consumption areas that are ancillary to . . . retail premises.”⁵¹ Alaska’s proposed regulation on “onsite consumption endorsements”⁵² will provide the basic model for the legal framework of this approach. Much of its language can be adapted for use in a statutory amendment, a suggested form of which is included in Appendix A. These limited changes should be used as a pilot program for social consumption in Neva-

⁴⁸ NEV. REV. STAT. § 453D.400(8).

⁴⁹ NEV. CONST. art. 19, § 2, ¶ 3.

⁵⁰ NEV. REV. STAT. § 453D.400(8).

⁵¹ W. HOLLYWOOD, CAL., MUN. CODE § 5.70.041(13)(d) (2017).

⁵² See generally Alaska Marijuana Control Bd., *Proposed Regulations*, *supra* note 20.

da, laying the foundation for more comprehensive changes in 2021. The Department of Taxation and local governments can also look to the Alaska regulation as a model for regulations and ordinances to govern this pilot-program industry.

This Paper proposes that legislative changes in 2021 focus on creating a legal framework for a second, more general category of standalone social-consumption establishments. While 2019 changes would allow for consumption in limited consumption areas ancillary to general retail stores, 2021 changes would provide for limited retail sales of marijuana in general consumption establishments. These changes would include a new statutory marijuana license for limited retail sales of marijuana. This new suggested license would permit a general consumption establishment to sell, directly to consumers on the premises, single servings of marijuana for onsite consumption. Given this license limitation, these establishments should be granted much more flexibility in terms of providing, in addition to a place where patrons may consume marijuana, a wide category of non-marijuana services, including food service and entertainment. The 2021 framework can also include a permitting scheme for consumption in designated indoor areas at special events (concerts, etc.). This two-stage, two-category approach is flexible enough to accommodate a diverse consumption industry and pragmatic enough to address the “elephant in Nevada’s hotel rooms.” A suggested form of this second-stage bill is also included in Appendix A.

This Paper will *not* address, however, another (but no less important) “elephant in the room”: whether it is prudent (either as a matter of social policy or in light of federal law on marijuana) for Nevada’s lawmakers to implement a social consumption industry in Nevada at all. This Paper merely points out that *there is a problem in the law*: hundreds of millions of dollars of marijuana will, inevitably, be consumed unlawfully by Nevada’s tourists in the coming years. This Paper sets out to offer a workable solution to that problem in light of the laws that created the problem in the first place, the options available to solve it, and the constraints on making the changes necessary to address it.

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INTRODUCTION

Part I of this White Paper briefly highlights the laws, regulations, and ordinances that provide the subject matter for this Paper’s analysis. Part II compares the approaches in those laws, regulations, and ordinances in context of the several key issues that are posed by licensing and regulating social-consumption establishments. Finally, Part III synthesizes the options and proposes specific solutions for Nevada’s lawmakers. First, however, this Introduction will first attempt to place the social-consumption discussion in a broader context of state and federal law.

A. A Brief History of Marijuana Law in Nevada

Marijuana regulation in Nevada has evolved over time. Cannabis was first banned in Nevada in 1923 following a nationwide trend of states responding to the “compounded” demand for marijuana after the prohibition of alcohol.⁵³ Nevada decriminalized marijuana for exclusively medicinal use in 2000, after vot-

⁵³ RICHARD DAVENPORT-HINES, *THE PURSUIT OF OBLIVION: A SOCIAL HISTORY OF DRUGS* 126 (2002).

ers approved ballot question 9 during the general election.⁵⁴ Voters had previously approved the use of medical marijuana, in 1998, but the initiative required approval in two consecutive elections because it was a citizen-initiated constitutional amendment.⁵⁵ Question 9 came into legal effect in October, 2001, and was codified in Chapter 453A of Nevada Revised Statutes (NRS).⁵⁶

The constitutional amendment only allowed authorized patients to use and possess medical marijuana,⁵⁷ and removed all state-level criminal penalties on the use, possession and cultivation of marijuana.⁵⁸ The state then instituted the Nevada Medical Marijuana Program in response to the constitutional amendment, which is a state registry and licensing program. The program allowed attending physicians to recommend marijuana, not prescribe, to patients with qualifying medical conditions, after patients applied for registry identification cards to use medical marijuana for those qualifying conditions.⁵⁹ The Nevada Medical Marijuana Program further provided for authorization of qualified patients to designate a caregiver, and legal protection to qualified patients and primary caregivers growing twelve plants or less, depending on other limitations.⁶⁰

However, NRS Chapter 453A's general broad language (and in some critical areas, broad silence) caused delays and difficulties for qualified patients to lawfully purchase marijuana. The statute prevented the development of a state licensure program for commercial businesses; thus, Nevada did not have an established system to sell or distribute marijuana.⁶¹ The qualified patients could only obtain marijuana for their medical needs if they grew their own, or found another way, undermining the legislation's intent of decriminalization.⁶²

The Nevada Legislature passed medical marijuana amendments in subsequent legislative sessions.⁶³ In 2003, 2005, and 2009, amendments to NRS

⁵⁴ NEV. CONST. art. 4, § 38; *State of Nevada Ballot Questions 2000*, NEV. LEGISLATURE, <https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2000.pdf> [https://perma.cc/94LU-P4RR]; Brian Sandoval et al., *Nevada Medical Marijuana Program*, DEP'T OF HEALTH & HUMAN SERVS., http://dhhs.nv.gov/uploadedFiles/dhhsnv.gov/content/About/Budget/FY14-15/2013-02-22_MedicalMarijuanaPresentation.pdf [https://perma.cc/UU8S-G65V] (last visited Nov. 27, 2017).

⁵⁵ NEV. CONST. art. 19, § 2; NEV. CONST. art. 4, § 38; *State of Nevada Ballot Questions 1998*, NEV. LEGISLATURE, <https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1998.pdf> [https://perma.cc/V636-J5PS] (last visited Apr. 14, 2018).

⁵⁶ See generally A.B. 453, 2001 Nev. Stat. ch. 592 (codified as amended at NEV. REV. STAT §§ 453A.010–810 (2017)).

⁵⁷ Haley N. Lewis, Note, *Unlikely Consequences: How Medical Marijuana is Affecting Nevada's Gaming Industry*, 6 UNLV GAMING L.J. 299, 300–01 (2016).

⁵⁸ ALYSA M. KELLER, NEV. LEGISLATIVE COUNSEL BUREAU, NEVADA MEDICAL MARIJUANA PROGRAM 1–2 (2016).

⁵⁹ *Id.*

⁶⁰ Sandoval et al., *supra* note 54.

⁶¹ Scott Sonner & Michelle Rindels, *Historic Day in Nevada: First Medical Marijuana Sales After 15-year Wait*, CANNABIST (July 31, 2015, 8:00 PM), <http://www.thecannabist.co/2015/07/31/nevada-medical-marijuana/38822/> [https://perma.cc/6KUG-A2W3].

⁶² *Id.*

⁶³ Sandoval et al., *supra* note 54.

Chapter 453 added language which further clarified the decriminalization of marijuana.⁶⁴ In 2003, Senate Bill (S.B.) 394 revised certain provisions relating to crime, the possessions of controlled substances, and the decriminalization of marijuana.⁶⁵ In 2005, Assembly Bill (A.B.) 465 also added language decriminalizing marijuana, and A.B. 519 provided for conduct subject to revocation of a medical marijuana program registry card, and procedures cardholder's must follow in case of revocation.⁶⁶ In 2009, S.B. 431 transferred the medical marijuana registry from the State Department of Agriculture to the Health Division of Nevada's Department of Health and Human Services.⁶⁷

Despite Nevada voters' ambition, Nevada medical marijuana laws did not actually go into effect until 2014. During the 2013 Legislative session, S.B. 374 was signed into law and codified as NRS Chapter 453A.⁶⁸ The Bill intended to "establish a framework to make medical marijuana available to patients."⁶⁹ It allowed the licensing of medical marijuana dispensaries and required the Division of Public and Behavioral Health (DPBH) to adopt regulations covering medical marijuana establishments, which took effect in April, 2014.⁷⁰ The Bill directed the DPBH to authorize the "creation of licensed and registered establishments to produce, test and dispense medical marijuana and marijuana-infused products."⁷¹

NRS Chapter 453A finally provided for a means to legally to sell, grow and tax medical marijuana, but it was not without flaws. The law dictated the location of medical marijuana establishments, and the number of certificates for medical marijuana establishments issued in each county, depending on population.⁷² It further restricted the transfer of ownership of a medical marijuana establishment to another person, even if that person met the stringent licensing requirements.⁷³ Nevada still needed to make significant changes to remove the limitations imposed on medical marijuana establishments. For instance, S.B.

⁶⁴ See NEV. LEGISLATURE, LEGISLATIVE COUNSEL BUREAU, 2003 SUMMARY OF LEGISLATION 68, 71 (2003), <https://www.leg.state.nv.us/Division/Research/Publications/SoL/2003SoL.pdf> [<https://perma.cc/97N4-DAYH>] [hereinafter NEV. 2003 LEG. SUMMARY]; NEV. LEGISLATURE, LEGISLATIVE COUNSEL BUREAU, 2005 SUMMARY OF LEGISLATION 70, 119 (2005), <https://www.leg.state.nv.us/Division/Research/Publications/SoL/2005SoL.pdf> [<https://perma.cc/PC2Q-2W7V>] [hereinafter NEV. 2005 LEG. SUMMARY]; NEV. LEGISLATURE, LEGISLATIVE COUNSEL BUREAU, 2009 SUMMARY OF LEGISLATION 12, 105, 278 (2009), <https://www.leg.state.nv.us/Division/Research/Publications/SoL/2009SoL.pdf> [<https://perma.cc/VFS8-A3AP>] [hereinafter NEV. 2009 LEG. SUMMARY].

⁶⁵ NEV. 2003 LEG. SUMMARY, *supra* note 64, at 68, 71.

⁶⁶ NEV. 2005 LEG. SUMMARY, *supra* note 64, at 70, 119.

⁶⁷ NEV. 2009 LEG. SUMMARY, *supra* note 64, at 12, 105, 278.

⁶⁸ S.B. 374, 77th Leg., Reg. Sess. (Nev. 2013) (codified as amended in scattered Chapters of Nevada Revised Statutes, including Chapter 453A); Lewis, *supra* note 57, at 300–01.

⁶⁹ Lewis, *supra* note 57, at 300–01.

⁷⁰ *Id.*; KELLER, *supra* note 58, at 1–2.

⁷¹ KELLER, *supra* note 58, at 1–2.

⁷² See S.B. 276, 78th Leg., Reg. Sess. (Nev. 2015) (codified as amended in scattered sections of Chapter 453A of the Nevada Revised Statutes).

⁷³ See generally *id.*; KELLER, *supra* note 58, at 1–2.

276, which was enacted in 2015, amended NRS 453A and provided medical-marijuana-dispensary applicants with a smoother application process and more flexibility in complying with licensing requirements.⁷⁴

In 2002, Question 9 sought to legalize and regulate recreational marijuana,⁷⁵ but did not receive enough votes.⁷⁶ And in 2006, the Nevada Regulation of Marijuana Initiative went before voters to decide whether the Nevada Revised Statutes should be amended to legalize and regulate recreational marijuana.⁷⁷ That Initiative also failed when it only received 44 percent of votes.⁷⁸ In 2016, Question 2, also known as the Initiative to Regulate and Tax Marijuana, appeared on the November 8, 2016 ballot.⁷⁹

The Initiative again sought to legalize, regulate, and tax recreational marijuana.⁸⁰ More specifically, the Initiative would amend the Nevada Revised Statutes to allow adults over twenty-one years of age to “purchase, cultivate, possess, or consume” recreational marijuana products, “manufacture, possess, use transport, purchase, distribute, or sell” marijuana paraphernalia, tax the sale of recreational marijuana at 15 percent, require regulations and licenses for “marijuana cultivators, testing facilities, distributors, suppliers, and retailers,” and provide certain criminal penalties.⁸¹ Question 2 passed with 54 percent of the vote.⁸²

Adults over twenty-one in Nevada could then begin legally possessing and using marijuana on January 1, 2017.⁸³ For marijuana retailers, Nevada ap-

⁷⁴ See S.B. 276. See generally Sandra Chereb, *Bill Massaging Medical Pot Law Headed for Assembly Floor*, L.V. REV.-J. (May 28, 2015, 7:55 PM), <https://www.reviewjournal.com/news/politics-and-government/nevada/bill-massaging-medical-pot-law-headed-for-assembly-floor/> [https://perma.cc/6NNU-DUC4]. The original provisions of NRS 453A imposed overly difficult, rigorous, and burdensome requirements for marijuana-business applicants, the result of which left many qualified patients unable to lawfully purchase medical marijuana. See generally *id.* S.B. 276 “aim[ed] to smooth the path” by allowing unused certificates to be used in other counties, by allowing establishments to relocate within the jurisdiction of their local government, and by allowing the transfer of ownership when the new owner meets certain requirements. *Id.*; see also KELLER, *supra* note 58, at 1–2.

⁷⁵ *State of Nevada Ballot Questions 2002*, NEV. LEGISLATURE, <https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2002.pdf> [https://perma.cc/VD38-KGEA] (last visited Apr. 19, 2018).

⁷⁶ See generally *History of Marijuana in Nevada*, CONNOR & CONNOR PLLC (June 26, 2017), <http://www.connorpllc.com/history-marijuana-nevada> [https://perma.cc/8U9L-5S8K].

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *State of Nevada Ballot Questions 2016*, NEV. SECRETARY OF ST., <https://nvsos.gov/sos/home/showdocument?id=4434> [https://perma.cc/WSM2-VLQN].

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Ben Gilbert, *4 States Just Voted to Make Marijuana Completely Legal — Here’s What We Know*, BUS. INSIDER (Nov. 9, 2016, 8:52 AM), <http://www.businessinsider.com/marijuana-states-legalized-weed-2016-11/#2-california-2> [https://perma.cc/3CS5-DHPZ].

⁸³ Colton Lochhead, *What You Should Know About Nevada’s New Marijuana Law*, L.V. REV.-J. (Nov. 9, 2016, 8:13 PM), <https://www.reviewjournal.com/news/politics-and->

proved the Early Start Program, which allowed only medical marijuana facilities to apply for recreational marijuana licenses.⁸⁴ On July 1, 2017, Nevada dispensaries began selling marijuana for recreational use.⁸⁵

B. Federal Marijuana Enforcement and State Reform

In early 2018, the U.S. Department of Justice, at the direction of Attorney General Jeff Sessions, rescinded the second Cole Memo⁸⁶—an Obama-era guidance that relaxed federal marijuana law enforcement in states with legalized marijuana.⁸⁷ In his memorandum, Sessions stated that “previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.”⁸⁸ He reiterated that Congress had determined that marijuana is a dangerous drug, and so federal prosecutors “should follow the well-established principles that govern all federal prosecutions.”⁸⁹ By rescinding the Cole Memo, the Justice Department has left states that have decriminalized marijuana dazed and confused. Questions abound: Will the federal government continue to take a “hands off” approach to state marijuana programs? Will the federal government prosecute recreational marijuana business? Can the federal government force states to recriminalize marijuana? At the crux of those answers lie the fundamental principles inherent in state sovereignty and of vertical separation of powers.

1. Background on Federal Marijuana Enforcement

This is not the first time that states with legalized recreational marijuana are at odds with federal law. In 2009, Deputy Attorney General David Ogden released a memo (Ogden Memo, 2009 Memo) stating that U.S. Attorneys should not prosecute marijuana-related crimes in states that legalized medical marijuana unless the activity clearly “indicate[d] illegal drug trafficking activi-

government/nevada/what-you-should-know-about-nevadas-new-marijuana-law [https://perma.cc/3F3M-TH3Y].

⁸⁴ *History of Marijuana in Nevada*, *supra* note 76.

⁸⁵ Melia Robinson, *You Can Now Buy Legal Marijuana in Nevada*, BUS. INSIDER (Jul. 1, 2017, 10:39 AM), <http://www.businessinsider.com/recreational-marijuana-sales-nevada-2017-6> [https://perma.cc/W46A-UGFD].

⁸⁶ Memorandum from James M. Cole, Deputy Attorney General, to all United States Attorneys re: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [https://perma.cc/Z26W-8RRS] [hereinafter Cole Memo II].

⁸⁷ See Memorandum from Jefferson B. Sessions, Attorney Gen., U.S. Dep’t. of Justice, to All U.S. Attorneys re: Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [https://perma.cc/J8ZF-874N] [hereinafter Sessions Memo]. See generally Associated Press, *Jeff Sessions Ends Policy that Let Legal Pot Flourish*, CBS NEWS (Jan. 4, 2018, 11:53 AM), <https://www.cbsnews.com/news/jeff-sessions-marijuana-policy-announcement> [https://perma.cc/U34E-9QSA].

⁸⁸ *Id.*

⁸⁹ *Id.*

ty.”⁹⁰ Thus, the “the Department’s investigative and prosecutorial resources should be directed” towards “[t]he prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks,” and not medical marijuana use that was in compliance with state law.⁹¹ States liberally construed the 2009 Ogden Memo as a *de jure* moratorium on federal enforcement of the Controlled Substances Act⁹² (CSA), sparking rapid growth in marijuana “commercial cultivation, sale, distribution and use of marijuana for purported medical purposes.”⁹³

In 2011, citing a plethora of million-dollar state-sanctioned marijuana cultivation operations across the country, Deputy Attorney General James Cole clarified that the Ogden Memo “was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.”⁹⁴ Because “state laws or local ordinances are not a defense to civil or federal law with respect to such conduct,” U.S. Attorneys could exercise their discretion in investigating and prosecuting those businesses. Thus, the Justice Department scaled back the Ogden Memo and reminded states that the CSA remained in effect such that state-legalization would not bar prosecutions in those states. Colorado and Washington legalized marijuana in 2012.⁹⁵

Just two years after the first Cole Memo, Deputy Attorney General Cole issued a second guidance regarding marijuana enforcement under the CSA in states with legalized medical and recreational marijuana use.⁹⁶ The subsequent guidance restricted states’ ability to implement adult use regulations. The second Cole Memo detailed a relaxed marijuana law federal enforcement policy.⁹⁷ It advises federal prosecutors to focus its efforts on preventing (1) distributing marijuana to minors; (2) marijuana revenue contributing to criminal activity; (3) diversion of marijuana to states where it is not legal; (4) legal mari-

⁹⁰ Memorandum from David W. Ogden, Deputy Att’y Gen., to Selected United States Attorneys re: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> [<https://perma.cc/P9KL-X6SQ>] [hereinafter Ogden Memo].

⁹¹ *Id.*

⁹² 21 U.S.C. §§ 801–904 (2012).

⁹³ Memorandum from James M. Cole, Deputy Attorney Gen., to United States Attorney re: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), https://www.drugpolicy.org/sites/default/files/DOJ_Guidance_on_Medicinal_Marijuana_1.pdf [<https://perma.cc/HD6G-54GL>] [hereinafter Cole Memo I].

⁹⁴ *Id.*

⁹⁵ See generally Sarah Trumble, *Timeline of State Marijuana Legalization Laws*, THIRD WAY (May 2, 2016), <http://www.thirdway.org/infographic/timeline-of-state-marijuana-legalization-laws> [<https://perma.cc/NV5X-V7CX>]; Aaron Smith, *Marijuana Legalization Passes in Colorado, Washington*, CNN: MONEY (Nov. 6, 2012, 11:46 AM), <http://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/index.html> [<https://perma.cc/Y556-ZJDT>].

⁹⁶ See Cole Memo II, *supra* note 86.

⁹⁷ *Id.*

juana activity being used as a cover for illegal activity; (5) violence in cultivating and distributing marijuana; (6) driving under the influence of marijuana and other health risks; (7) growing marijuana on public land; and (8) marijuana use and possession on federal property.⁹⁸ Outside of these priorities, the DOJ would rely on its “traditional joint federal-state approach to narcotics enforcement,” leaving the job primarily to state and local authorities.⁹⁹ Following this guidance, the federal government averred that it would not interfere in states’ regulation of the recreational marijuana market. Thus, states could continue regulating adult marijuana use “as long as they did not interfere with federal law enforcement priorities.”¹⁰⁰

2. *Up in Smoke: Recreational Marijuana After the Sessions Memo*

The Cole Memo provided the necessary “green light” for more states to decriminalize marijuana.¹⁰¹ In the few years following, nine more states legalized medical marijuana and seven states legalized recreational marijuana.¹⁰² City governments, Las Vegas included, even moved to pass necessary regulations to allow for semi-public consumption of marijuana in so-called “consumption lounges.”¹⁰³ As discussed in Section II.B, many states have legalized marijuana for adult use but have restricted consumption to private residences and other non-public places.¹⁰⁴ Private-use restrictions in a metropolitan city with a large tourist population,¹⁰⁵ creates quite the conundrum for visitors who can buy marijuana legally but have nowhere to smoke it. The City of Las Vegas posted its proposed regulations in December 2017, planning for a March 2018 vote.¹⁰⁶

The Sessions’ Memo,¹⁰⁷ however, halted the City’s consumption lounge conversation, amid uncertainty. Just five days after Sessions released his memo, officials for the city of Las Vegas and Clark County said they were no longer “immediately proceeding with previously discussed ideas to implement

⁹⁸ *Id.* at 1–2.

⁹⁹ *Id.* at 2.

¹⁰⁰ Associated Press, *supra* note 87.

¹⁰¹ Before the Cole Memo, nineteen states had legalized medical marijuana, and in 2012, Colorado and Washington legalized recreational marijuana. Trumble, *supra* note 95.

¹⁰² *Id.*

¹⁰³ See generally Colton Lochhead, *Las Vegas Could Have Nation’s First Government-Regulated Pot Lounges*, L.V. REV.-J. (Dec. 13, 2017, 7:07 PM), <https://www.reviewjournal.com/news/pot-news/las-vegas-could-have-nations-first-government-regulated-pot-lounges> [https://perma.cc/27ZL-M6AK].

¹⁰⁴ See NEV. REV. STAT. § 453D.400(2) (2017). Adult use is only legal when consumed on private property, see *id.* § 453D.030(17) (defining “public place” broadly), with the property owner’s permission, see *id.* § 453D.100(2)(c). See generally discussion *infra* Section II.B.

¹⁰⁵ Las Vegas welcomed 42.9 million tourists in 2016. See Thomas Moore, *Las Vegas Sees Record Tourism, Visitor Spending in 2016*, L.V. SUN (Mar. 14, 2017, 1:29 PM), <https://lasvegassun.com/news/2017/mar/14/las-vegas-sees-record-tourism-visitor-spending-in> [https://perma.cc/757R-223R].

¹⁰⁶ Lochhead, *supra* note 103.

¹⁰⁷ Sessions Memo, *supra* note 87.

the [marijuana consumption] lounges.”¹⁰⁸ So, the City of Las Vegas no longer plans to vote in March 2018. Further, Clark County’s board of commissioners had planned to discuss allowing consumption lounges in January 2018, but now the conversation would be tabled indefinitely until Clark County counsel Mary Anne Miller releases an opinion of the Sessions memo.¹⁰⁹

The Sessions Memo threatens significant losses to the Nevada marijuana market. Since Nevada legalized recreational marijuana, there have been an estimated \$126 million in sales and \$19 million in marijuana excise and wholesale taxes independent of sales tax and state and local licensing fees for marijuana dispensaries.¹¹⁰ With nearly 300 licensed businesses, the Nevada Dispensary Association estimates that the marijuana industry employs 8,700 people and invested \$280 million in real estate.¹¹¹ Further, the state awaits the funds from the 15 percent excise tax on marijuana sales, approximately \$40 million, that it has earmarked for public education over the next biennium.¹¹² Nevada, like other states, awaits the recreational marijuana industry’s harvest.

Sessions’ memo, while unexpected, did not change the status quo. A trio of state governors pledged that they would move forward with legal marijuana. In Colorado, the first state to legalize recreational marijuana and another area considering consumption lounges,¹¹³ Governor John Hickenlooper pledged to continue supporting Colorado voters’ decision to legalize recreational marijuana. Specifically, he stated Session’s decision “does not alter the strength of our resolve in [legal marijuana regulation and enforcement], nor does it change my constitutional responsibilities.”¹¹⁴ In Washington, state officials including Governor Jay Inslee, “won’t back down on legal pot” and “promised to defend the

¹⁰⁸ Chris Kudialis, *Las Vegas Plan to Develop, Open Marijuana Lounges on Hold After Sessions’ Move*, L.V. SUN (Jan. 9, 2018, 2:00 AM), <https://lasvegassun.com/news/2018/jan/09/las-vegas-plan-develop-open-marijuana-lounges-hold> [<https://perma.cc/Y3VK-R25V>].

¹⁰⁹ *Id.*

¹¹⁰ Michelle Rindels, *Feds Rescind Obama-era Marijuana Enforcement Policy, Putting Nevada Pot Industry’s Future in Doubt*, NEV. INDEP. (Jan. 4, 2018, 7:37 AM), <https://thenevadaindependent.com/article/feds-expected-to-rescind-obama-era-marijuana-enforcement-policy-putting-nevada-pot-industry-on-edge> [<https://perma.cc/M7FV-VDC8>].

¹¹¹ *Id.*; Colton Lochhead, *Federal Marijuana Policy Change Could Alter Nevada Economy*, L.V. REV.-J. (Jan. 4, 2018, 9:53 AM), <https://www.reviewjournal.com/news/pot-news/federal-marijuana-policy-change-could-alter-nevada-economy> [<https://perma.cc/M2UU-JKHJ>].

¹¹² Lochhead, *supra* note 111.

¹¹³ Thomas Mitchell, *Colorado Politicians, Cannabis Leaders React to Cole Memo Repeal*, WESTWORD (Jan. 4, 2018, 2:30 PM), <http://www.westword.com/marijuana/colorado-politicians-business-owners-react-to-cole-memo-repeal-by-jeff-sessions-9852683> [<https://perma.cc/HKG6-9J98>]; Thomas Mitchell, *Social Consumption Rules Finalized; Denver Will Review Applications in August*, WESTWORD (June 30, 2017, 2:17 PM), <http://www.westword.com/marijuana/denver-social-pot-consumption-rules-finalized-9214676> [<https://perma.cc/QV9H-6GJK>].

¹¹⁴ Mitchell, *Colorado Politicians, Cannabis Leaders React*, *supra* note 113.

state's marijuana laws."¹¹⁵ Even though Las Vegas is uncertain about consumption lounges, Nevada is following other states's examples in defending legal marijuana. Governor Brian Sandoval stated that he hoped that U.S. Attorney Dayle Elieson, an out-of-stater who was appointed days before the Session Memo issued, would follow Colorado's lead.¹¹⁶ Additionally, Governor Sandoval would not direct Nevada's Attorney General Adam Laxalt to change his approach to prosecuting crimes involving recreational marijuana.¹¹⁷

U.S. Attorneys have also signaled that they will maintain the status quo—continuing to “work with federal, state, local, and tribal law enforcement partners to pursue shared public safety objectives, with an emphasis on stemming the overproduction of marijuana and the diversion of marijuana out of state, dismantling criminal organizations and thwarting violent crime in our communities.”¹¹⁸ This stance was echoed by Colorado's U.S. Attorney, who stated that there would be no immediate changes to federal enforcement because the office “has already been guided by these principles in marijuana prosecutions – focusing in particular on identifying and prosecuting those who create the greatest safety threats to our communities around the state.”¹¹⁹ These efforts are not contrary to the Cole Memo and also not a promise to step up enforcement. In the three months since the Sessions Memo, U.S. Attorney Dayle Elieson has not indicated whether he intends to pursue marijuana prosecutions in Nevada, prompting gaming regulators to take a conservative approach in finalizing Nevada's gaming regulations regarding gaming licenses and marijuana businesses.¹²⁰ Thus, Sessions' Memo, while symbolic of the current administration's stance on marijuana law enforcement, has not yet directly interfered with Ne-

¹¹⁵ Evan Bush & Mike Carter, *'An Attack on Seattle': Washington State Officials Say They Won't Back Down on Legal Pot as Sessions Rescinds Obama-era Policy*, SEATTLE TIMES (Jan. 4, 2018, 9:31 AM), <https://www.seattletimes.com/seattle-news/seattle-state-officials-say-they-wont-back-down-on-legal-pot-as-feds-plan-change> [https://perma.cc/6V9L-WAUV].

¹¹⁶ Art Marroquin, *Sandoval Wants Nevada to Follow Colorado Plan on Marijuana*, L.V. REV.-J. (Jan. 8, 2018, 12:57 PM), <https://www.reviewjournal.com/news/pot-news/sandoval-wants-nevada-to-follow-colorado-plan-on-marijuana> [https://perma.cc/BA2C-Q49Y].

¹¹⁷ *Id.*

¹¹⁸ *See Oregon's US Attorney Suggests He Won't Step Up Marijuana Enforcement*, PORTLAND MERCURY <https://www.portlandmercury.com/blogtown/2018/01/04/19588776/oregons-us-attorney-suggests-he-wont-step-up-marijuana-enforcement> [https://perma.cc/NY9Y-KMLH].

¹¹⁹ *See* Max Greenwood, *Colorado: No Immediate Change in Marijuana Prosecutions*, THE HILL (Jan. 4, 2018, 2:03 PM), <http://thehill.com/homenews/state-watch/367454-us-attorney-in-colorado-says-there-will-not-be-immediate-change-in> [https://perma.cc/28H2-CW4F].

¹²⁰ Wes Rand, *Nevada Panel Keeps Barrier Between Gaming, Marijuana*, LV REV.-J. (March 5, 2018, 8:09 AM), <https://www.reviewjournal.com/business/casinos-gaming/nevada-panel-keeps-barrier-between-gaming-marijuana> [https://perma.cc/7DXW-EU3X]; *see* Nev. Gaming Policy Comm., Proposed Resolution Regarding Marijuana and the Gaming Industry (March 5, 2018), <http://gaming.nv.gov/modules/showdocument.aspx?documentid=12941> [https://perma.cc/8KMX-52UG]. The Nevada Gaming Policy Committee the regulation, which will Nevada's marijuana and gaming industries separate as long as marijuana remains illegal under federal law. *See* Rand, *supra*.

vada's marijuana program. After all, U.S. Attorneys retain their discretion in "identifying and prosecuting [which cases] create the greatest safety threats."¹²¹

3. *The Legal Basis and Implications of Federal Enforcement*

Irrespective of Justice Department guidance memoranda, the fact that marijuana remains a Schedule I drug under the Controlled Substances Act¹²² continues to create significant obstacles for states, businesses, and consumers. Those who are involved in marijuana business risk considerable consequences if federally prosecuted. Marijuana growers and distributors could be charged with production, distribution, and possession.¹²³ Those who assist marijuana business by leasing space, contractors, accountants, lawyers, or banks could conceivably be charged with conspiring or aiding and abetting marijuana businesses to violate federal law.¹²⁴

It appears such entities are stuck in ambiguity at the whim of their U.S. Attorney's discretion. Marijuana reform advocates have been unsuccessful in court. Courts have struck down challenges to Congress's power to regulate marijuana production and sales, and its decision to retain its Schedule I classification.¹²⁵ For example, a medical marijuana cooperative failed in arguing that the CSA implicitly provided a medical-necessity exception, despite its Schedule I status, such that states with medical marijuana laws could distribute the product to sick patients.¹²⁶ In *U.S. v. Oakland Cannabis Buyers' Cooperative*, the United States Supreme Court held that it was inconsequential that California law decriminalized use of marijuana for medical use: *federal* law considered it "possession with intent to distribute" for the Cooperative to distribute medical marijuana to its patients.¹²⁷ The Court precluded the Cooperative making a necessity-defense argument to the jury because the CSA made clear that marijuana had no medical value. As such, under the Supremacy Clause, federal statutes define federal crimes, meaning that federal prosecutors can enforce the CSA in states that have decriminalized marijuana.¹²⁸

In the medical context, the Court has somewhat limited the CSA regarding the regulation of medical professionals—traditionally, a power reserved to the states. In *Gonzalez v. Oregon*, the Court struck down the then-U.S. Attorney

¹²¹ Greenwood, *supra* note 119.

¹²² 21 U.S.C. § 812(c)(17) (2012).

¹²³ See 21 U.S.C. § 801. See generally Sam Kamin, *Legal Cannabis in the US: Not Whether But How?*, 50 U.C. DAVIS L. REV. 617 (2016).

¹²⁴ 21 U.S.C. § 846.

¹²⁵ See Kamin, *supra* note 123, at 621 (discussing *Gonzales v. Raich*, 545 U.S. 1 (2005)) (production and sales); *Ams. for Safe Access v. Drug Enf't Admin.*, 706 F.3d 438 (D.C. Cir. 2013) (classification); *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483 (2001) (distribution for medical marijuana patients); and *Craker v. Drug Enf't Admin.*, 714 F.3d 17 (1st Cir. 2013) (cultivation for research).

¹²⁶ See, e.g., *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483 (2001).

¹²⁷ See generally *id.*

¹²⁸ *Id.* at 491; see also Kamin, *supra* note 123, at 621.

General's interpretative rule that imposed criminal liability under the CSA to Oregon doctors prescribing lethal drugs under the Oregon Death with Dignity Act.¹²⁹ The Court stated that the CSA's purpose is primarily to combat recreational drug abuse, and because the statute was silent on the regulation of the medical profession, the Attorney General had exceeded his power. Moreover, such silence was "understandable given the structure and limitations of federalism, which allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" ¹³⁰ But when federal regulations interpreting the CSA "effect a radical shift of authority from the States to the Federal Government,"¹³¹ those directives will be struck down because "[t]he text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it."¹³²

However, while the CSA may be silent about the regulation of the medical profession, it is explicit about marijuana itself. Medical marijuana challenges failed "because [marijuana laws] authorized as medicine something the federal government has concluded has no medical properties."¹³³ Thus, it was clear that state laws purporting to decriminalize the sale and use of marijuana were nothing less than "a thumb in the eye of the federal marijuana prohibition."¹³⁴ Recreational laws short-circuit the entire rubric of the CSA framework, treating marijuana not as a controlled substance at all, but as something more akin to alcohol or tobacco. These decisions indicated that clear that recreational marijuana reform advocates would need a paradigm shift to "short-circuit" the CSA entirely.¹³⁵ Recreational marijuana law advocates adopted a paradigm shift in their ballot initiatives likening marijuana, "not as a controlled substance, but as something more akin to alcohol or tobacco."¹³⁶

Neither Supreme Court or the Department of Justice has interpreted the CSA reflects congressional intent to preempt state laws on marijuana reforms.¹³⁷ The CSA only preempts state law to the extent that state and federal provisions create a "positive conflict" such that "the two provisions cannot be read consistently together."¹³⁸ Such a positive conflict is missing in states that have decriminalized recreational marijuana: "it is only if the state were to *require* that which the federal government forbids that compliance with both state

¹²⁹ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

¹³⁰ *Id.* at 270 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)).

¹³¹ *Id.* at 275.

¹³² *Id.*

¹³³ Kamin, *supra* note 123, at 623.

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ *Id.* at 624.

¹³⁷ Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 7 (2013), <http://digitalcommons.law.umaryland.edu/jhclp/vol16/iss1/2> [<https://perma.cc/KS5Y-V5AZ>]; *see also* Kamin, *supra* note 123, at 624.

¹³⁸ 21 U.S.C.A. § 903 (2016).

and federal law would become impossible.”¹³⁹ For that reason, states are limited in regulating the private cannabis industry and cannot adopt a public distribution model because public employees could not physically comply with both state and federal laws.¹⁴⁰

Nonetheless, some courts have taken a broader reading of Section 903 of the CSA, which takes the approach that state laws that create an obstacle to federal enforcement of the CSA would be impliedly preempted.¹⁴¹ Yet, state sanctioned marijuana regulation would arguably facilitate enforcement of the CSA by providing public records of marijuana producers, distributors, and adult-use facilities.¹⁴² Moreover, the Supreme Court, in a 6-2 decision, declined to answer this question when Oklahoma and Nebraska challenged Colorado’s marijuana law in 2016.¹⁴³

Federal preemption suits would likely be dismissed for want of standing, specifically redressability. The CSA lacks a citizen-suit provision, and constitutional safeguards ensure vertical separation of powers and sovereign immunity so courts could not enjoin states to prohibit marijuana or even to comply with federal marijuana law enforcement.¹⁴⁴ Given that nearly all marijuana enforcement has occurred at the state level, the federal government would have to request state cooperation to continue enforcing federal marijuana laws.¹⁴⁵ Yet, such a request is prohibited by the anti-commandeering principle’s check on the Supremacy Clause.¹⁴⁶ The federal government cannot commandeer a state to enforce federal laws within its state.¹⁴⁷ Nor can it require that states recriminalize marijuana law.¹⁴⁸ Therefore, under the current state-federal marijuana law clash, states may proceed with state-marijuana reforms until U.S. Attorneys elect to prioritize federal prosecutions.

4. *The Collateral Consequences of Federal Prohibition*

This ambiguous state enhances legal risk for consumers. Before Sessions rescinded the Cole Memo, courts struggled to reconcile the competing bodies of law. Courts have penalized consumers under the CSA for conduct clearly allowed under state law. For example: medical-marijuana users are not exempt

¹³⁹ Kamin, *supra* note 123, at 625.

¹⁴⁰ *See id.* at 625 n.25.

¹⁴¹ Mikos, *supra* note 137 n.61 (collecting cases).

¹⁴² *See* Kamin, *supra* note 123, at 625–26.

¹⁴³ *See* Nebraska v. Colorado, 136 S. Ct. 1034 (2016); *see also* Kamin, *supra* note 123, at 626–27.

¹⁴⁴ *See* Kamin, *supra* note 123, at 627–28 n.28.

¹⁴⁵ In 2011, states were responsible for more than 1.6 million drug arrests, compared with the federal government’s 31,000 drug arrests in 2009. Mikos, *supra* note 137, at 12.

¹⁴⁶ Kamin, *supra* note 123, at 626.

¹⁴⁷ *Id.* (citing *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992)).

¹⁴⁸ *Id.* at 626–27.

from an employer's zero-tolerance policy;¹⁴⁹ a state-marijuana-card holder could not purchase a gun because "possession or receipt of a firearm by [an] unlawful drug user or a person addicted to a controlled substance" was proscribed under the federal Gun Control Act;¹⁵⁰ attorneys cannot represent marijuana users or businesses because they cannot assist clients in furthering conduct that remains illegal;¹⁵¹ marijuana for personal use may be contraband such that a dog-sniff of a legitimately parked vehicle is probable cause for a search;¹⁵² an insurance company is not required to pay a marijuana business's claim;¹⁵³ and it remains unclear whether marijuana use will affect probationers' and parolees' rights in supervised release programs, parents' rights in custody hearings, tenants' rights in housing disputes, or the denial of federal benefits.¹⁵⁴

C. *The Need for State Lawmakers to Proceed Cautiously and Thoughtfully*

As explored in the last section, possession and consumption of marijuana remain federal offenses. Government and industry leaders could urge Congress to reclassify marijuana or to decriminalize it completely, but such an endeavor seems unlikely, as evidenced by Attorney General Sessions's Memo and the current political climate in Congress. Anything less than statutory change will expose business to the risk of substantial criminal and civil liability under federal law.¹⁵⁵ Having perhaps the most to lose, Nevada's gaming industry has reservations about public consumption—and for good reason: a resort that openly permits guests to consume marijuana will lose its gaming license.¹⁵⁶ For an in-

¹⁴⁹ See *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. Ct. App. 2013) (finding that employee was not wrongfully terminated because his off-duty medical marijuana use was proscribed by federal law).

¹⁵⁰ *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016), *cert. denied sub nom. Wilson v. Sessions*, 137 S. Ct. 1396 (2017).

¹⁵¹ See MODEL RULES OF PROF'L RESPONSIBILITY 1.2(d) (AM. BAR ASS'N 2002). *But see, e.g.*, Comment 14 to COLO. RULE OF PROF'L CONDUCT 1.2(d) (2014) (allowing attorneys to represent marijuana users and business so long as they advise their clients that such conduct remains illegal at the federal level); James C. Coyle, *Lawyers Get the Green Light on Counseling and Assisting Marijuana Industry Clients*, COLO. S. CT.: OFF. ATT'Y REG. COUNS., <http://www.coloradosupremecourt.com/newsletters/spring2014/Lawyers%20Get%20the%20Green%20Light%20on%20Counseling%20and%20Assisting.htm> [https://perma.cc/6459-YRQW] (last visited Apr. 19, 2018).

¹⁵² See, e.g., *People v. McKnight*, 2017 COA 93 (Colo. Ct. App. Jul. 13, 2017), *cert. granted*, No. 17SC584, 2018 WL 447341 (Colo. Jan. 16, 2018).

¹⁵³ See, e.g., *Tracy v. USAA Cas. Ins. Co.*, No. 11-00487, 2012 WL 928186 (D. Haw. Mar. 16, 2012). *But see, e.g.*, NEV. REV. STAT. § 453D.140 (2017) (contracts related to marijuana are enforceable); *Green Earth Wellness v. Atain*, 163 F. Supp. 3d 821 (D. Colo. 2016).

¹⁵⁴ See generally Kamin, *supra* note 123 (discussing the legal consequences of marijuana remaining illegal at the federal level); see also, generally Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 97–100 (2015) (discussing consequences individuals and businesses face while marijuana remains federally illegal).

¹⁵⁵ See Chemerinsky, *supra* note 154, at 113–20 (discussing permissive federalism, cooperative federalism, and statutory amendments to alternatives to the prohibition on marijuana).

¹⁵⁶ See Nev. Gaming Policy Comm., *supra* note 120.

dustry as highly scrutinized by the federal government as the gaming industry, the Hobson's choice is clear: "Never the two shall meet."¹⁵⁷ On the other hand, however, the gaming industry arguably stands to benefit from sensible public consumption regulation—so long as public consumption is not permitted on or near the Las Vegas strip or any off-strip gaming premises—because visitors may be inclined to unlawfully consume marijuana, whether openly on Las Vegas Boulevard or clandestinely in their hotel rooms.¹⁵⁸

With these considerations in mind, this Paper aims to aid not only Nevada and Las Vegas but also those cities, counties, and states that want to provide safe, regulated establishments for the semi-public, social consumption of marijuana. Accommodating a social-consumption industry in any jurisdiction will require likely significant changes to existing laws and regulations that already presently constitute a new—and, for the most part, untested—area and body of law. To ensure that social-consumption establishments are adequately regulated and safely operated, changes to the law must be thorough, thoughtful, and carefully considered before they take effect. Lawmakers should follow closely the developments in those few jurisdictions that have recently enacted ordinances allowing for social consumption, and they should proceed critically and carefully in deciding whether to enact similar laws, regulations, and/or ordinances.

D. Potent Potables: A Brief Overview of Relevant Marijuana Terminology

"Pot" remains marijuana's perhaps most well and widely known alias. However, the story does not end there. Since marijuana emerged from the counterculture and black markets, it has entered the mainstream in a seemingly endlessly growing variety of types and forms. At present (what might well be considered the marijuana industry's "high noon"), the diversity of "strains," products, and new methods of consumption has taken what was once simply known as "pot" to new heights, and this linguistic plethora of "budding" terminology has become a language of its own.¹⁵⁹ Without at least a general understanding of some basic relevant terminology, lawmakers may struggle in drafting the laws that will regulate the continually evolving industry. Thus, before proceeding, this Paper will briefly discuss a few relevant instances of marijuana terminology and the general categories of products and types of consumption that are addressed later.

¹⁵⁷ April Corbin, *Advisory Panel Asks County to Look at Legality of Pot Consumption Lounges*, L.V. SUN (Aug. 11, 2017, 7:42 PM), <https://lasvegassun.com/news/2017/aug/11/marijuana-advisory-panel-asks-county-to-look-at-le/> [https://perma.cc/L7GS-KQW8] (statement of Tony Alamo, M.D., Chairman of the Nevada Gaming Control Commission).

¹⁵⁸ See Colton Lochhead, *Clark County Social Lounges Dominate Marijuana Discussion*, L.V. REV.-J. (May 2, 2017, 3:41 PM), <https://www.reviewjournal.com/news/pot-news/clark-county-social-lounges-dominate-marijuana-discussion/> [https://perma.cc/46BU-XPSS].

¹⁵⁹ See generally *Marijuana Glossary*, POTGUIDE.COM, <https://www.coloradopotguide.com/marijuana-glossary/> [https://perma.cc/X5A6-6WBB] (last visited Apr. 10, 2018).

1. *Medical vs. Recreational Marijuana*

The distinction between so-called “medical” or “medicinal” marijuana and “recreational” marijuana is well known, and the terms are fairly standard. However, non-medical marijuana is now frequently referred to as “adult-use” marijuana (a perhaps more precise, and more politically correct, phrasing than “recreational”). California adopted this “adult-use” phrasing in its Control, Regulate and Tax Adult Use of Marijuana Act (Adult Use of Marijuana Act),¹⁶⁰ a 2016 voter initiative that took practical effect on January 1, 2018, when California adults could begin (lawfully) purchasing marijuana without a medical marijuana card.¹⁶¹ Although “adult-use” is perhaps preferable to “recreational,” the word “use” carries a connotation of “consumption”—a connotation that would likely prove confusing in the context of this Paper’s focus, social consumption. Thus, this Paper will generally refer to state “adult-use” marijuana programs by using the term “recreational.”

2. *Types of Marijuana, Marijuana Products, and Consumption*

Marijuana can be consumed in a variety of methods based on the desired effect. The plant bud/flower can be smoked in joints, pipes, and blunts.¹⁶² Smoking effects begin seconds to minutes after use and can last up to six hours.¹⁶³ Other methods use THC extract. THC extract can also be consumed through marijuana-infused edibles or drinks, and ingesting THC can take up to ninety minutes to take an effect that can last up to eight hours.¹⁶⁴ THC extract can also be added to lotions, oils, balms, and salves for topical use but it topical use does not result in intoxication.¹⁶⁵ Vaping and “dabbing” techniques require rapidly heating THC extract or concentrate to aerosolize the active ingredients, after which the vapor is immediately inhaled; Both vaping and dabbing have quick results—seconds to minutes—and high levels of THC.¹⁶⁶

¹⁶⁰ See generally Comm’n on Peace Officer Standards and Training, *The Control, Regulate and Tax Adult Use of Marijuana Act: Proposition 64*, CAL.: POST, <https://post.ca.gov/proposition-64-the-control-regulate-and-tax-adult-use-of-marijuana-act> [<https://perma.cc/R3MQ-T5HL>] (last visited Apr. 19, 2018).

¹⁶¹ See Brooke Staggs, *Here Are the Rules for Legal Marijuana in California Once Law Goes Into Effect Jan. 1*, ORANGE COUNTY REG. (Nov. 17, 2017 9:47 AM), <https://www.ocregister.com/2017/11/16/here-are-the-rules-for-legal-marijuana-in-california-once-law-goes-into-effect-jan-1> [<https://perma.cc/B226-PRWP>]. See generally *Laws & Regulations*, CA. CANNABIS PORTAL, <https://cannabis.ca.gov/laws-regulations> [<https://perma.cc/S4QQ-JHDC>] (last visited March 30, 2018).

¹⁶² COLO. DEP’T OF PUB. HEALTH AND ENV’T, RETAIL MARIJUANA: METHODS OF USE (June 2017), https://www.colorado.gov/pacific/sites/default/files/MJ_RMEP_Factsheet-Methods-of-Use.pdf [<https://perma.cc/UQ5M-RKAP>].

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

“Dabbing,” for example, can have 60–80 percent THC.¹⁶⁷ As used in this Paper (and across state laws governing this industry), “marijuana” generally refers to the flower, including any concentrated products produced from just the natural plant,¹⁶⁸ while “marijuana products” generally refers to everything else in which non-marijuana products are added or infused with marijuana, including popular edible marijuana products and even marijuana-infused lotions.¹⁶⁹

3. “Social” Consumption

This Paper will focus on a concept that has been called by as many names as there are approaches to the issue. The laws, regulations, and ordinances that this Paper will discuss provide a tapestry of terms with overlapping meanings, for instance: “consumption lounge”;¹⁷⁰ “cannabis lounge”;¹⁷¹ “consumption club”;¹⁷² “social club”;¹⁷³ “cannabis consumption area”;¹⁷⁴ “designated consumption area”;¹⁷⁵ and “social consumption establishment.”¹⁷⁶ Each of these phrasings are getting at what this Paper calls “social consumption,” which will be used to generally refer to the consumption of marijuana and/or marijuana

¹⁶⁷ *Id.*

¹⁶⁸ *See, e.g.*, NEV. REV. STAT. § 453D.030(8) (2017) (defining marijuana, generally, as “all parts of any plant of the genus *Cannabis* . . .”).

¹⁶⁹ *See, e.g., id.* § 453D.030(13) (“‘Marijuana products’ means products comprised of marijuana or concentrated marijuana and other ingredients that are intended for use or consumption, such as, but not limited to, edible products, ointments, and tinctures.”).

¹⁷⁰ Las Vegas City Council, *Draft Marijuana Consumption Lounge Regulation*, CITY OF L.V., NEV. (Dec. 2017), <https://www.lasvegasnevada.gov/cs/groups/public/documents/document/chjk/mdcz/~edisp/prd073346.pdf> [<https://perma.cc/X6QF-45LM>] (unenacted).

¹⁷¹ S.B. 307, 2017 Leg., 79th Sess. (Or. 2017) (unenacted). The word “lounge” is typically used to describe a business that is not authorized to sell retail marijuana but allows onsite consumption marijuana that patrons purchase offsite. *See generally, e.g., id.*

¹⁷² S.B. 17-063, 71st Gen. Assemb., Reg. Sess. (Colo. 2017), https://leg.colorado.gov/sites/default/files/documents/2017A/bills/2017a_063_01.pdf [<https://perma.cc/Y6-VM-4S8M>]. The word “club” connotes a business that is (at least ostensibly) limited to members only. *See generally* Staff, *Members-Only Marijuana Clubs Open in Colorado*, DENV. POST (Dec. 31, 2012, 10:15 AM), <https://www.denverpost.com/2012/12/31/members-only-marijuana-clubs-open-in-colorado/> [<https://perma.cc/JY68-DK6K>].

¹⁷³ *Marijuana Legalization Act*, ST. OF MAINE: CITIZENS INITIATIVES & PEOPLE’S VETO, <https://maine.gov/sos/cec/elec/citizens/marijuanaleg.doc> [<https://perma.cc/KPR5-LHQS>].

¹⁷⁴ W. Hollywood, Cal., Ordinance 17-1016 (Nov. 20, 2017), <https://www.weho.org/home/showdocument?id=35309> [<https://perma.cc/6M9N-NNWJ>] (codified at W. HOLLYWOOD, CAL., MUN. CODE tit. 5, art. 2, §§ 5.16–.120 (2018)).

¹⁷⁵ Denver Ordinance. The word “area” is used in approaches that distinguish between a place of business in its entirety and that portion of the business’s premises in which patrons may consume marijuana; *see also, e.g.*, Marijuana Control Bd., *Proposed Regulations—Marijuana Retail Store Onsite Consumption Endorsement*, ST. OF ALASKA: ONLINE PUBLIC NOTICES (Aug. 21, 2017), <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=109020> [<https://perma.cc/J6JD-DZR3>] (unenacted).

¹⁷⁶ Cannabis Control Comm’n, *935 CMR 500.000: Adult Use of Marijuana*, STATE OF MASS. (Dec. 21, 2017), <https://www.mass.gov/files/documents/2017/12/22/DraftRegulations122117.pdf> [<https://perma.cc/X43C-4T8V>].

products in a private business establishment that is publicly or quasi-publicly accessible—analogous to the consumption of alcohol in a tavern. “Social-consumption establishments” will refer to businesses that permit social consumption on the entirety or any part of the premises.

I. THE SOLUTIONS TO DATE: A BRIEF OVERVIEW

As of March 2018, nine states have legalized recreational marijuana consumption, with the West and Pacific Northwest leading the charge: Washington, Oregon, California, Nevada, Alaska, and Colorado. On the East Coast, Maine, Massachusetts, the District of Columbia, and, most recently, Vermont have also decriminalized recreational marijuana use. The social-consumption is a dilemma that each of these states share. Solutions have been proposed at all levels of government, but the only enacted laws directly addressing social consumption, at least at present, take the form of city ordinances.

A. *State Legislation*

Of the nine states that have decriminalized marijuana for recreational use, four have considered legislation to regulate social consumption: Colorado, Nevada, Oregon, and Maine. None of these states, however, has yet enacted legislation directly providing for the licensing and regulation of social-consumption establishments.

1. *Colorado—S.B. 17-063 (2017)*¹⁷⁷

Colorado’s SB 17-063 would have “created a Marijuana Consumption Club License to allow marijuana consumption clubs to operate in local jurisdictions that obtained voter approval.”¹⁷⁸ The bill was introduced January 13, 2017, and moved to the Senate Committee on Business, Labor, & Technology.¹⁷⁹ On March 1, 2017, the Senate Committee passed two amendments and failed to pass one amendment.¹⁸⁰ The Senate Committee then failed to pass a motion to refer SB 17-063 to the Committee on Finance as amended.¹⁸¹ This bill was then postponed indefinitely.¹⁸²

¹⁷⁷ S.B. 17-063, 71st Gen. Assemb., Reg. Sess. (Colo. 2017), https://leg.colorado.gov/sites/default/files/documents/2017A/bills/2017a_063_01.pdf [<https://perma.cc/Y6VM-4S8M>].

¹⁷⁸ Luisa Altmann, Legislative Council Staff, *Summary of Legislation: Marijuana (2017)*, COLO. GEN. ASSEMB., <https://leg.colorado.gov/sites/default/files/marijuana.pdf> [<https://perma.cc/GL6Y-LZRV>] (last visited Apr. 19, 2018).

¹⁷⁹ S.B. 17-063.

¹⁸⁰ *SB17-063 Committee Actions*, COLO. GEN. ASSEMB., <http://leg.colorado.gov/bills/sb17-063> [<https://perma.cc/U55H-35UB>] (last visited Apr. 19, 2018).

¹⁸¹ *Id.*

¹⁸² *Id.*

2. *Nevada—S.B. 236 (2017)*¹⁸³

Nevada's S.B. 236 was introduced to the Nevada Senate on March 6, 2017.¹⁸⁴ The bill required businesses to obtain a license to allow marijuana consumption within the business or at special events.¹⁸⁵ Under the original version of the bill, business owners of licensed social-consumption lounges and their patrons would be broadly exempt from prosecution for various crimes relating to marijuana and paraphernalia production and distribution.¹⁸⁶ This "exemption" was controversial,¹⁸⁷ and the Committee on Judiciary introduced an Amendment 270, which deleted S.B.236's "exemption" approach in its entirety.¹⁸⁸ The Senate passed the amendment on April 25, 2017 (12 Yes, 9 No).¹⁸⁹

The amendment also added definitions for "[s]pecial event at which the use of marijuana is allowed" and "[u]nreasonably impracticable" (concerning the locally-imposed conditions that businesses must meet to be granted a license).¹⁹⁰ The bill moved to the State Assembly and was then referred to the Committee on Government Affairs, which recommended to pass the bill on May 17, 2017.¹⁹¹ Nothing further was done on this bill before the legislative session's end on May 27th,¹⁹² and it never reach the desk of Nevada's Governor, who opposed the measure specifically and marijuana-consumption lounges generally.¹⁹³

¹⁸³ S.B. 236, 2017 Leg., 79th Sess. (Nev. 2017) (as amended, first reprint version), https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB236_R1.pdf [<https://perma.cc/CJ97-844A>] (unenacted); *id.* (as introduced, original version), <https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB236.pdf> [<https://perma.cc/PRY2-VM33>].

¹⁸⁴ SB 236, NEV. LEG., <https://www.leg.state.nv.us/Session/79th2017/Reports/history.cfm?ID=550> [<https://perma.cc/83XK-5MUX>] (last visited Apr. 19, 2018).

¹⁸⁵ *See id.*

¹⁸⁶ S.B. 236 § 3 (as introduced).

¹⁸⁷ *See, e.g., Hearing on S.B. 236 Before the S. Comm. on Judiciary*, 2017 Leg., 79th Leg. Sess. (Nev. Mar. 9, 2017) (statements of Chuck Callaway, L.V. Metro. Police Dep't).

¹⁸⁸ Amendment No. 270 to S.B. 236, https://www.leg.state.nv.us/Session/79th2017/Bills/Amendments/A_SB236_270.pdf [<https://perma.cc/2F45-QMPR>]; Proposed Amendment 3730 to S.B. 236, <https://www.leg.state.nv.us/Session/79th2017/Exhibits/Senate/JUD/SJUD795C.pdf> [<https://perma.cc/5ALJ-ZUX8>].

¹⁸⁹ *See SB 236, supra* note 184.

¹⁹⁰ Amendment 270 to S.B. 236; *see also* S.B. 236 (as amended).

¹⁹¹ SB 236, NEV. LEG., *supra* note 184.

¹⁹² *Id.*; *see also* Chris Kudialis, *Recreational Pot Advocates Pleased with Nevada Legislature's Strides*, L.V. SUN (June 7, 2017, 2:00 AM), <https://lasvegassun.com/news/2017/jun/07/recreational-pot-advocates-praise-legislatures-str/> [<https://perma.cc/JRU2-VMPN>].

¹⁹³ *See generally* Ben Botkin, *Sandoval Against Nevada Marijuana Lounges*, L.V. REV.-J. (Sept. 12, 2017, 12:57 PM), <https://www.reviewjournal.com/news/pot-news/sandoval-against-nevada-marijuana-lounges/> [<https://perma.cc/F926-9W2L>].

3. Oregon—S.B. 307 (2017)¹⁹⁴

Oregon's S.B. 307 was introduced in the Oregon Senate on January 9, 2017.¹⁹⁵ The bill intended to allow the Oregon Liquor Control Commission to regulate the consumption and sale of marijuana through licensure of temporary events.¹⁹⁶ There were three public hearings held on February 14, May 16, and May 30, 2017.¹⁹⁷ At the second hearing, Amendment SB 307 -1 was introduced to allow social marijuana consumption at venues in public view if licensing requirements were met.¹⁹⁸ The Amendment also prohibited licensing a venue within a city or county that did not specifically allow marijuana consumption at licensed venues.¹⁹⁹ At the third hearing, Amendment SB 307 -3 was introduced to only allow marijuana inhalants and to prohibit the consumption of alcohol and tobacco products at licensed marijuana venues.²⁰⁰ This bill was not passed, and was still in the Senate Committee when the legislative session adjourned on July 7, 2017.²⁰¹

4. Maine—Marijuana Legalization Act²⁰²

Maine voters approved Question 1 on November 8, 2016, to legalize recreational use, retail sale, and taxation of marijuana.²⁰³ Governor Paul LePage approved the law with a signed proclamation on December 31, 2016.²⁰⁴ After thirty days, the law “An Act to Legalize Marijuana” came into effect on January 30, 2017.²⁰⁵ The law allows municipalities to regulate marijuana social clubs: locations where adults over twenty-one may consume marijuana.²⁰⁶ But on Jan-

¹⁹⁴ S.B. 307, 2017 Leg., 79th Sess. (Or. 2017), <https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/SB307/Introduced> [<https://perma.cc/5TPG-9DM8>].

¹⁹⁵ SB 307, OR. LEGISLATURE: OR. LEG. INFO., <https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/SB307> [<https://perma.cc/3M2L-EV6E>] (last visited Apr. 19, 2018).

¹⁹⁶ S.B. 307.

¹⁹⁷ SB 307, *supra* note 195.

¹⁹⁸ J. COMM. ON MARIJUANA REGULATION, SB 307-1 STAFF MEASURE SUMMARY, S. 2017, 79th Sess. (Or. 2017).

¹⁹⁹ *Id.*

²⁰⁰ J. COMM. ON MARIJUANA REGULATION, SB 307-3 STAFF MEASURE SUMMARY, S. 2017, 79th Sess. (Or. 2017).

²⁰¹ SB 307, *supra* note 195.

²⁰² *Marijuana Legalization Act*, ST. OF MAINE: CITIZENS INITIATIVES & PEOPLE'S VETO, <https://maine.gov/sos/cec/elec/citizens/marijuanaleg.doc> [<https://perma.cc/KPR5-LHQS>]; *see also* ME. STAT. tit. 7, §§ 2442–2455 (2017); 36 ME. CODE R. § 1817 (2017); *Recreational Marijuana in Maine*, ME. ST. LEGISLATURE (Apr. 17, 2018), https://legislature.maine.gov/lawlibrary/recreational_marijuana_in_maine/9419 [<https://perma.cc/MHH9-Y25J>].

²⁰³ *Id.*

²⁰⁴ Kate Abbey-Lambertz, *Maine's Recreational Marijuana Law Takes Effect This Month*, HUFFPOST: POL. (Jan. 3, 2017, 12:37 PM), https://www.huffingtonpost.com/entry/maine-recreational-marijuana-law_us_586bac85e4b0d9a5945c5a0c [<https://perma.cc/ME9B-9FB8>].

²⁰⁵ L.D. 1701, 127th Leg., 2d Reg. Sess. (Me. 2016); Abbey-Lambertz, *supra* note 204.

²⁰⁶ ME. STAT. tit. 7, § 2449(1); § 2442(39).

uary 27, 2017, the Legislature approved a moratorium on implementing certain parts of the law until February 2018.²⁰⁷ The moratorium's purpose was to give the legislature time to implement a system to regulate and administer the new marijuana law.²⁰⁸

The Special Committee on Marijuana Implementation worked for nine months to create a bill to implement Question 1.²⁰⁹ In October 2017, the implementation bill passed 22-9 in the Senate and 81-50 in the House during special session votes.²¹⁰ Then, Governor Paul LePage vetoed the bill on November 3, 2017, citing conflict with federal law as his primary reason for the veto.²¹¹ Maine's House of Representatives did not achieve the two-thirds majority required to overturn the Governor's veto, so the Special Committee on Marijuana Implementation went back to the drawing board.²¹² Since then, legislators have voted to ban marijuana social clubs until 2023, and then to remove marijuana social clubs from the voter-passed law completely.²¹³ As of April 3, 2018, a new implementation bill will be ready to put to a vote "fairly soon," but it will not contain a provision for marijuana social clubs.²¹⁴

B. State Regulations

An alternative to legislative action at the state level is administration action under the relevant agency's general rulemaking authority granted by a state marijuana act. Administrative agencies in Alaska and Massachusetts have proposed draft regulations providing for social consumption.

²⁰⁷ See L.D. 88, 128th Leg., 1st Reg. Sess. (Me. 2017).

²⁰⁸ *Id.*

²⁰⁹ Scott Thistle, *Maine House Upholds LePage's Veto of Recreational Marijuana Regulations*, CENT. ME. (Nov. 6, 2017), <https://www.centralmaine.com/2017/11/06/legislature-set-to-take-up-lepage-veto-of-recreational-marijuana/> [https://perma.cc/P69R-YVXG].

²¹⁰ Penelope Overton, *LePage Just Says No to Bill that Would Launch Maine's Marijuana Market*, PORTLAND PRESS HERALD (Nov. 3, 2017), <https://www.pressherald.com/2017/11/03/lepage-vetoes-marijuana-bill/?rel=related> [https://perma.cc/M75R-X9JY].

²¹¹ *Id.*

²¹² Thistle, *supra* note 209.

²¹³ Penelope Overton, *Panel's Marijuana Regulation Bill Omits Licensing of Social Clubs*, PORTLAND PRESS HERALD (Feb. 21, 2018), <https://www.pressherald.com/2018/02/21/committees-marijuana-regulation-bill-omits-licensing-of-social-clubs-in-maine/> [https://perma.cc/PS3N-BYQ4].

²¹⁴ Penelope Overton, *First Pot-Business Licenses Would Go to Maine Residents of at Least 4 Years*, PORTLAND PRESS HERALD (Apr. 3, 2018), <https://www.pressherald.com/2018/04/03/first-pot-business-licenses-would-go-to-maine-residents-of-at-least-4-years/> [https://perma.cc/GG3E-UBSZ].

1. *Alaska*²¹⁵

Alaska's Marijuana Control Board proposed a regulation that would allow onsite marijuana consumption at retail marijuana establishments.²¹⁶ The proposed additions were posted on the State of Alaska's website as a public notice on August 21, 2017, and the proposed additions were open for public comment until October 27, 2017.²¹⁷ After the public comment period ended, the Marijuana Control Board would have either adopted the changes without further notice, or would have decided to take no action.²¹⁸ Alaska's Marijuana Control Board has not yet adopted the proposed changes.

2. *Massachusetts*²¹⁹

The Massachusetts Cannabis Control Commission approved a draft of regulations on adult marijuana use on December 21, 2017.²²⁰ The draft regulations initially provided for Social Consumption Operations, entities licensed to sell marijuana for consumption or use on the premises.²²¹ The Cannabis Control Commission adopted adult marijuana use regulations on March 6, 2018,²²² but ultimately "backed away from controversial draft regulations that would have allowed 'social-use' establishments."²²³ Those provisions drew concern from the governor, the Executive Office of Public Safety and Security, the Depart-

²¹⁵ Marijuana Control Bd., *Proposed Regulations—Marijuana Retail Store Onsite Consumption Endorsement*, ST. OF ALASKA: ONLINE PUBLIC NOTICES (Aug. 21, 2017), <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=109020> [<https://perma.cc/J6JD-DZR3>] [hereinafter *Alaska Draft Regulation*]. See generally ALASKA ADMIN. CODE tit. 3, §§ 306.005–990 (2018), <https://www.commerce.alaska.gov/web/Portals/9/pub/MCB/StatutesandRegulations/MarijuanaRegulations.pdf> [<https://perma.cc/WF7L-QHSU>].

²¹⁶ See generally *Alaska Proposed Regulation*, *supra* note 215 (would add one new section, § 306.370, and two new provisions to an existing section, § 306.990, to ALASKA ADMIN. CODE tit. 3, § 306.005–990).

²¹⁷ See *id.* *Proposed Regulations—Marijuana Retail Store Onsite Consumption Endorsement*, ST. OF ALASKA: ONLINE PUBLIC NOTICES (Aug. 21, 2017), <https://aws.state.ak.us/OnlinePublicNotices/Notices/View.aspx?id=186831> [<https://perma.cc/26QT-HAFG>].

²¹⁸ See *id.*

²¹⁹ Cannabis Control Comm'n, *935 CMR 500.000: Adult Use of Marijuana*, STATE OF MASS. (Dec. 21, 2017), <https://www.mass.gov/files/documents/2017/12/22/DraftRegulations122117.pdf> [<https://perma.cc/X43C-4T8V>] [hereinafter *Mass. Draft Regulation*].

²²⁰ Press Release from Steven J. Hoffman, Chairman, Mass. Cannabis Control Comm'n (Dec. 21, 2017); see also David Lakeman & John Ouellette, *Cannabis Control Commission Finalizes Marijuana regulations*, MASS. MUN. ASSOC'N (Mar. 7, 2018), <https://www.mma.org/cannabis-control-commission-finalizes-marijuana-regulations> [<https://perma.cc/A9UM-D2AL>].

²²¹ See *Mass. Draft Regulation*, *supra* note, § 500.145.

²²² See generally 935 MASS. CODE REGS. 500.000–900 (2018); see also, generally, *Cannabis Control Comm'n*, MASS. MUN. ASSOC'N (Mar. 23, 2018), https://www.mma.org/sites/default/files/resources/adult_use_of_marijuana_regs_final_mar232018.pdf [<https://perma.cc/E97P-N23B>].

²²³ Lakeman & Ouellette, *supra* note 220.

ment of Public Health, the Executive Office for Administration and Finance, and the Massachusetts Municipal Association.²²⁴ These entities urged the Cannabis Control Commission to wait on passing consumption laws until the marijuana industry was more established in Massachusetts.²²⁵

C. Local Ordinances

In the absence of an express legislative sanction, several local city governments have opted to take the initiative by enacting (or at least considering) ordinances establishing regulatory and licensing requirements for social consumption. Among these cities (at present) are Denver, Colorado; Las Vegas, Nevada; and, in California, Oakland, San Francisco, and West Los Angeles.

1. Denver²²⁶

On July 6, 2016, the Denver City Council and the Denver City Attorney's Office held a public review and comment meeting about the proposed cannabis consumption pilot program.²²⁷ In November 2016, Denver voters approved Initiative 300, which granted businesses the ability to apply for adult social-use licenses for marijuana in designated areas.²²⁸ Denver held six meetings in 2017 (January 18, February 8, February 22, March 10, March 24, and April 6) to determine the actual rules and regulations for adult social marijuana consumption.²²⁹ Those rules and regulations became effective on July 1, 2017.²³⁰

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ City and Cty. of Denver, Colo., Neighborhood Approved Cannabis Consumption Pilot Program Initiative, Ordinance 300-16 (July 5, 2016), <https://www.denvergov.org/content/dam/denvergov/Portals/723/documents/Social%20Consumption%20Ordinance.pdf> [<https://perma.cc/Z2L7-VAQF>] [hereinafter Denver Ordinance] (codified at DENVER, COLO., MUN. CODE §§ 6-300 to -319 (2017)); Dep't of Excise and Licenses, City and Cty. of Denver, Colo., Rules Governing Marijuana Designated Consumption Areas (2017), <https://www.denvergov.org/content/dam/denvergov/Portals/723/documents/Social%20Consumption%20Rules%20FINAL%206-30-17.pdf> [<https://perma.cc/9AUP-JD8P>] [hereinafter Denver Ordinance Regulations].

²²⁷ See Denver Ordinance, *supra* note 226.

²²⁸ See *id.*

²²⁹ *Cannabis Consumption Licenses*, DENVER, COLO: BUS. LICENSING CENT., <https://www.denvergov.org/content/denvergov/en/denver-business-licensing-center/marijuana-licenses/social-consumption-advisory-committee.html> [<https://perma.cc/K9L3-JVJ7>] (last visited Apr. 19, 2018). See generally Andrew Ward, *Denver Social Cannabis Consumption Update*, POTGUIDE.COM (Oct. 2, 2017), <https://www.coloradopotguide.com/colorado-marijuana-blog/article/denver-social-cannabis-consumption-update/> [<https://perma.cc/X2J9-EJLQ>]; PotGuide.com Staff, *Initiative 300 Update: How Social Consumption in Colorado is Progressing*, POTGUIDE.COM (Mar. 13, 2017), <https://potguide.com/pot-guide-marijuana-news/article/initiative-300-update-how-social-consumption-in-colorado-is-progressing/> [<https://perma.cc/V6RV-GA7U>].

²³⁰ Denver Ordinance Regulations, *supra* note 226.

2. *Las Vegas*²³¹

After Nevada's 2017 legislative session closed without the enactment of S.B. 236, lawmakers were unsure of whether and to what extent Nevada law allowed local governments to license and regulate social-consumption establishments in the absence of any state-wide direction from Nevada's legislature. In the wake of this confusion emerged an opinion letter by Nevada's Legislative Counsel Bureau on September 10, 2017, concluding that state law did not prevent cities and counties from authorizing marijuana consumption lounges.²³² In light of this opinion, the City of Las Vegas began drafting an ordinance that would provide for the licensing and regulation of social-consumption lounges. In December 2017, the City published its final draft ordinance, which would regulate marijuana consumption lounges, on the city website.²³³ However, Las Vegas officials recently stated that consumption lounges are on hold until 2019 due to the Sessions memo and in order to observe Denver's new social use licenses.²³⁴

3. *California*

On November 8, 2016, California voters passed Proposition 64 to legalize recreational marijuana.²³⁵ Also known as the Adult-Use of Marijuana Act, the law allows local jurisdictions to adopt and enforce local ordinances to regulate marijuana business allowed under state law.²³⁶ State law also allows onsite marijuana consumption in state-approved marijuana businesses, but leaves it to each local jurisdiction to decide whether it will allow adults over twenty-one to

²³¹ Las Vegas City Council, *Draft Marijuana Consumption Lounge Regulation*, CITY OF L.V., NEV. (Dec. 2017), <https://www.lasvegasnevada.gov/cs/groups/public/documents/document/chjk/mdcz/~edisp/prd073346.pdf> [<https://perma.cc/X6QF-45LM>] [hereinafter *L.V. Draft Ordinance*].

²³² Letter from Brenda J. Erdoes & Asher A. Killian, Legislative Counsel & Principal Deputy Legislative Counsel, State of Nev. Legislative Counsel Bureau, to Richard "Tick" Segerblom, Senator, State of Nev. (Sept. 10, 2017), <https://www.scribd.com/document/358620398/Legal-Opinion-Nevada-Marijuana-Lounges> [<https://perma.cc/7WNG-3XNH>] [hereinafter LCB Opinion Letter].

²³³ *L.V. Draft Ordinance*, *supra* note 231.

²³⁴ Chris Kudialis, *Las Vegas: No Marijuana Lounges Until 2019, Monitoring Denver Social Use Licenses*, CANNABIST (Mar. 6, 2018, 1:07 PM), <https://www.thecannabist.co/2018/03/06/las-vegas-no-marijuana-lounges-until-2019/100606/> [<https://perma.cc/9JHU-AB29>].

²³⁵ See generally *California Proposition 64*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_64_Marijuana_Legalization_\(2016\)](https://ballotpedia.org/California_Proposition_64_Marijuana_Legalization_(2016)) [<https://perma.cc/GP6U-3KBC>] (last visited Apr. 8, 2018).

²³⁶ CAL. BUS. & PROF. CODE § 26200(a)(1) (2017); *California Prop. 64*, *supra* note 235.

consume marijuana in a state-licensed marijuana retailers or microbusinesses.²³⁷ Two cities in California, Oakland and San Francisco, allow these marijuana use lounges, and one, West Hollywood, is still in the approval process.²³⁸

*a. Oakland*²³⁹

California enacted the Medicinal and Adult-Use Cannabis and Regulation and Safety Act on June 27, 2017 to consolidate the Medical Cannabis Regulation and Safety Act and Proposition 64.²⁴⁰ Then, Oakland's City Administrator proposed to amend the City's regulatory system for medical marijuana to better reflect new state law on October 11, 2017.²⁴¹ These amendments included a provision for permits for onsite cannabis consumption.²⁴² The Oakland City Council's Cannabis Regulatory Commission and Public Safety Committee worked on the proposed amendments until the Public Safety Committee approved the final amendments, including the provision for onsite cannabis consumption, to Oakland ordinances 5.80 and 5.81 on November 28, 2017.²⁴³

The cannabis consumption permit ordinance requires the City Administrator to create "conditions of approval" for each permit.²⁴⁴ The current cannabis permit application on the City Administrator's website does not include an onsite cannabis consumption permit.²⁴⁵ And as of the Cannabis Regulatory Commission's March 15, 2018, meeting, onsite marijuana consumption is still con-

²³⁷ CAL. BUS. & PROF. CODE § 26200(g).

²³⁸ See generally Brad Branan, *San Francisco Allows Pot-Smoking Lounges. Is Sacramento Next?*, SACRAMENTO BEE (Feb. 12, 2018, 3:55 AM), <http://www.sacbee.com/news/local/article199586359.html> [<https://perma.cc/E22P-Z968>]; Mona Holmes, *Weed-Friendly Lounges Could Be Coming to West Hollywood This Year*, L.A. EATER (Feb. 2, 2018, 2:55 PM), <https://la.eater.com/2018/2/2/16965694/west-hollywood-cannabis-consumption-lounges> [<https://perma.cc/P22L-P84L>].

²³⁹ Oakland City Council, Ordinance 13464 (Nov. 17, 2017), <https://www.cacities.org/Resources-Documents/Policy-Advocacy-Section/Hot-Issues/Adult-Use-of-Marijuana-Act/Oakland-2017-Cannabis-Ordinance> [<https://perma.cc/24LP-SS9R>]. [hereinafter *Oakland Ordinance*]; see also OAKLAND, CAL., CODE OF ORDINANCES tit. 5, §§ 5.80.010–.100 (2016).

²⁴⁰ Agenda Report from Greg Minor, Assistant to the City Administrator, to Sabrina B. Landreth, City Administrator, Oakland, Cal., at 1 (Oct. 11, 2017).

²⁴¹ *Id.*

²⁴² See *id.* at 7 (proposed ordinance 5.80.025).

²⁴³ PUBLIC SAFETY COMMITTEE, OAKLAND CITY COUNCIL, MEETING MINUTES – FINAL, 5 (Oct. 24, 2017); Cannabis Regulatory Commission, *Regular Meeting Minutes*, OAKLAND CITY COUNCIL (Oct. 19, 2017), <http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/agenda/oak067772.pdf> [<https://perma.cc/5Z3Z-ED5N>]; *Oakland City Council Approves Cannabis Regulation Measure*, CBS (Nov. 29, 2017, 9:26 AM), <http://sanfrancisco.cbslocal.com/2017/11/29/oakland-city-council-cannabis-regulation/> [<https://perma.cc/BA6Y-Y85L>].

²⁴⁴ OAKLAND CODE § 5.80.025.

²⁴⁵ *Cannabis Permit Application*, OAKLAND CITY ADMIN., <http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/form/oak070119.pdf> [<https://perma.cc/MYW2-DNRZ>] (last visited Apr. 19, 2018).

sidered a pending item to be decided at a later meeting.²⁴⁶ However, there is a private membership club that allows members to “dab” marijuana onsite named “Fancy Dabz” in Oakland.²⁴⁷

*b. San Francisco*²⁴⁸

On November 9, 2016, Edwin M. Lee, the Mayor of San Francisco, issued Executive Directive 16-05 to implement Proposition 64.²⁴⁹ The Board of Supervisors’ Rules Committee was assigned the proposed ordinance amendment, authored by Mayor Lee and Jeff Sheehy from the Board of Supervisors, to incorporate Proposition 64 on September 26, 2017.²⁵⁰ The amendment included language that required retail cannabis businesses and cannabis microbusinesses to obtain a permit from the Department of Public Health in order to allow onsite cannabis consumption.²⁵¹

The proposed amendment was then amended in committee on November 1, 2017, to include material unrelated to onsite marijuana consumption.²⁵² The proposed amendment was again amended on November 7, 2017, to expand cannabis consumption permits to include both smoking and non-smoking consumption of cannabis.²⁵³ On the same day, the Rules Committee recommended the proposed ordinance as amended.²⁵⁴ The ordinance was passed by the Board

²⁴⁶ Cannabis Regulatory Commission, *Regular Meeting Agenda*, OAKLAND CITY COUNCIL (Mar. 15, 2018), <http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/agenda/oak069727.pdf> [https://perma.cc/FQ6Q-TAUS].

²⁴⁷ *Fancy Dabz*, BUDPUBS, <https://www.budpubs.com/places/fancy-dabz/> [https://perma.cc/PS7D-E5C6] (last visited Apr. 8, 2018); *Recreational Marijuana in California Begins at Fancy Dabz*, DABCONNECTION.COM (Nov. 8, 2017), <https://dabconnection.com/news/recreational-marijuana-california/> [https://perma.cc/HC4F-KHRN]. Dabs are concentrated doses of marijuana, and consuming dabs by heating them and inhaling the smoke is called dabbing. *See generally Dabbing 101: What are Dabs and How Are They Made?*, LEAFLY, <https://www.leafly.com/news/cannabis-101/is-dabbing-good-or-bad-or-both> [https://perma.cc/VP7G-ZWDZ] (last visited Apr. 19, 2018).

²⁴⁸ S.F., Cal., Dep’t Pub. Health, *Regulation of Cannabis Businesses Ordinance 230-17* (Dec. 5, 2017), <https://www.sfdph.org/dph/files/csl/RegulationofCannabisBusinessesOrdinance230-17.pdf> [https://perma.cc/A2FC-YLLL] [hereinafter S.F. Ordinance] (codified at S.F., CAL., HEALTH CODE art. 8A, §§ 8A.1–8A.8 (2018); S.F., CAL., POLICE CODE art. 16, §§ 1600–1639 (2018)).

²⁴⁹ SAN FRANCISCO OFFICE OF THE MAYOR, EXECUTIVE DIRECTIVE 16-05, IMPLEMENTING PROP 64: ADULT USE OF MARIJUANA ACT (Nov. 9, 2016).

²⁵⁰ Rules Committee, *Meeting Minutes*, CITY & CTY. OF S.F., at 2 (Nov. 13, 2017), http://sfbos.org/sites/default/files/rls111317_minutes.pdf [https://perma.cc/47HR-QTN9].

²⁵¹ *Id.*

²⁵² *Id.* at 2–3.

²⁵³ *Id.* at 3.

²⁵⁴ *Id.* at 4.

of Supervisors of the City and County of San Francisco on December 5, 2017.²⁵⁵ As of February 2018, there are eight marijuana lounges in San Francisco allowing onsite consumption.²⁵⁶

*c. West Hollywood*²⁵⁷

After California voters passed Proposition 64 in 2016, West Hollywood spent most of 2017 discussing how to implement the state's new adult-use marijuana law.²⁵⁸ On November 21, 2017, the City of West Hollywood approved Ordinance 17-1016.²⁵⁹ The updated ordinance allows the City to license cannabis consumption areas²⁶⁰ where adults over twenty-one years of age may consume "cannabis by smoking, vaping, and ingesting edible products."²⁶¹ The City of West Hollywood released a draft Cannabis Business License Screening Application on April 4, 2018.²⁶² The draft application only allows the City to issue eight consumption area licenses.²⁶³ The City plans to release the final screening application the week of April 16, 2018, and will hold an application submittal period from May 2-31, 2018.²⁶⁴

II. REGULATING SOCIAL CONSUMPTION: ISSUES AND APPROACHES

What level of government should implement the regulations that will ultimately govern social-consumption establishments? Should social-consumption establishments be permitted to produce and/or sell marijuana and marijuana products directly to patrons for onsite consumption? If yes, then what restrictions should be specifically placed on such establishments' production and/or sale of marijuana? Should social-consumption establishments be permitted to operate as restaurants or entertainment venues? Should they be permitted to sell alcohol? How should they be regulated for indoor air quality? Should they be treated the same as taverns in terms of statutorily imposed or limited liability for the torts of their patrons? How should nuisance complaints (e.g.,

²⁵⁵ Board of Supervisors, *Ordinance No. 229-17*, CITY & CTY. OF S.F., 105 (Nov. 28, 2017), <http://sfbos.org/sites/default/files/o0229-17.pdf> [<https://perma.cc/YN5Q-HMV5>].

²⁵⁶ Branan, *supra* note 238.

²⁵⁷ City Council of W. Hollywood, Cal., Ordinance 17-1016 (Nov. 20, 2017), <https://www.weho.org/home/showdocument?id=35309> [<https://perma.cc/6M9N-NNWJ>] [hereinafter W. Hollywood Ordinance] (codified at WEST HOLLYWOOD, CAL., MUN. CODE tit. 5, art. 2, §§ 5.16-.120 (2018)).

²⁵⁸ *Cannabis*, CITY OF W. HOLLYWOOD, <https://www.weho.org/business/cannabis> [<https://perma.cc/QA2N-GSZ4>] (last visited Apr. 19, 2018).

²⁵⁹ W. Hollywood Ordinance, *supra* note 257, at 23.

²⁶⁰ *Id.* at 9 (5.70.041).

²⁶¹ *Id.* at 20 (Definitions, "C.", "Cannabis Consumption with On-Site Adult-Use Retail).

²⁶² Dep't of Pub. Works, *Draft Cannabis Business License Screening Application*, CITY OF W. HOLLYWOOD, CAL., <https://www.weho.org/home/showdocument?id=35993> [<https://perma.cc/XK4U-DEMA>] (last visited Apr. 19, 2018).

²⁶³ *Id.*

²⁶⁴ *Cannabis*, *supra* note 258.

for odor or noise) by neighbors of a social-consumption establishment be addressed? Where should social-consumption establishments be zoned?—This Part II compares various approaches to each of these questions.

A. *What Level of Government Should License and Regulate the Industry?*

The first key question is whether social-consumption lounges should be licensed and regulated at the state or local level. In general, state-run marijuana programs are primarily implemented at the state level by such agencies as state departments of health, tax and revenue departments, liquor control boards, and even newly-forged marijuana control boards.²⁶⁵ Nevada is among the majority of jurisdictions that already licenses and regulates marijuana establishments primarily at the state level through a single administrative agency, the Nevada Department of Taxation.²⁶⁶ Nonetheless, proposed state-level approaches to social-consumption lounges vary regarding where governments place authority. Several states have considered retaining primary authority over social consumption by granting licensing and rulemaking authority to one or more state agencies. Other states have considered simply decriminalizing certain narrowly defined types of social/public consumption while granting broad licensing and regulatory authority to local governments.²⁶⁷

1. *Nevada's S.B. 236*

At one end of the spectrum, Nevada's S.B. 236 would have granted licensing and regulatory authority almost exclusively to local governments.²⁶⁸ It grants broad authority to both county and city governments.²⁶⁹ Thus, under S.B. 236, a city could implement an ordinance providing for the licensing and regulation of social lounges, even if the county in which the city is located has not implemented such an ordinance. S.B. 236 would not require local governments to allow social consumption,²⁷⁰ but it does place a few substantive restrictions on the autonomy of local governments that do elect to allow social consumption. For instance, under the amended version of the bill, a local government's board would not be allowed to impose "unreasonably impracticable"²⁷¹ limita-

²⁶⁵ See generally, e.g., CAL. BUREAU OF CANNABIS CONTROL, <https://www.bcc.ca.gov/> [<https://perma.cc/8MM8-M6VF>] (last visited Apr. 19, 2018).

²⁶⁶ Regulation and Taxation of Marijuana Act, NEV. REV. STAT. §§ 453D.010–.600 (2017).

²⁶⁷ See, e.g., S.B. 17-063, 71st Gen. Assemb., Reg. Sess. (Colo. 2017).

²⁶⁸ See S.B. 236 §§ 1, 2, 2017 Leg., 79th Sess. (Nev. 2017).

²⁶⁹ See, e.g., *id.* § 1(1).

²⁷⁰ See, e.g., *id.* § 1(1) ("The board of county commissions of each county may, by ordinance, [set requirements for social consumption licenses.]; see also *Hearing on S.B. 236 Before the S. Comm. on Judiciary*, 2017 Leg., 79th Leg. Sess. (Nev. Mar. 9, 2017) (statement of Sen. Aaron D. Ford, Member, S. Comm. on Judiciary) ("[S.B. 236] does not open the door to a mandate[requiring local governments to allow public use of marijuana.]").

²⁷¹ S.B. 236 §§ 1(5)(f), 2(5)(f) (" 'Unreasonably impracticable' means that the measures necessary to comply with the conditions, limitations or restrictions require such a high in-

tions or conditions on social-consumption permits and licenses.²⁷² As introduced, the original bill prohibited local governments from “arbitrarily or unreasonably limit[ing] the number of licenses or permits [to be] issued”²⁷³ However, an amendment removed this latter restriction.²⁷⁴

2. Other Approaches

At the other extreme, Oregon’s S.B. 307 would grant licensing and regulatory authority exclusively to a single state agency, Oregon’s Liquor Control Commission.²⁷⁵ In recognition of local concerns, however, S.B. 307 grants local governments the autonomy to prohibit social consumption. Additionally, Section 6 of S.B. 307 prevents the Oregon Liquor Control Commission from issuing licenses for cannabis lounges and temporary events “if the temporary event [or cannabis lounge] will be located . . . [w]ithin a city [or county] that has not adopted an ordinance allowing [social] consumption”²⁷⁶

In between the two extremes, Colorado’s S.B. 17-063 takes a more flexible split-authority approach. It would have granted primary licensing and regulatory authority to local governments while maintaining some limited authority under state control. At a minimum, a “marijuana consumption club” would require a state-issued license and be subject to certain minimum requirements and regulations imposed at the state level.²⁷⁷ Additionally, S.B. 17-063 would have granted to local governments the option to impose additional “approval requirements” or even require consumption clubs to be independently licensed at the local level.²⁷⁸ Under S.B. 17-063, local governments would have been allowed to impose more stringent requirements and regulations than those imposed at the state level.²⁷⁹

Similar to Colorado’s S.B. 17-063, Maine’s legislation (governing “retail marijuana social clubs”²⁸⁰) would have granted primary regulatory and licensing authority to a single state agency.²⁸¹ Additionally, under Maine’s proposed

vestment of risk, money, time or any other resource or asset that the operation of a business [or special event] in which the use of marijuana is allowed . . . is not worthy of being carried out in practice by a reasonably prudent businessperson.”).

²⁷² S.B. 236 §§ 1(4)(c), 2(4)(c).

²⁷³ S.B. 236 §§ 1(5), 2(5) (as introduced).

²⁷⁴ See generally Amendment No. 270 to S.B. 236, *supra* note 188.

²⁷⁵ S.B. 307 § 2(1), 2017 Leg., 79th Sess. (Or. 2017); *id.* § 2(1) (regulatory authority for special events); 2(2) (licensing authority for special events); *id.* § 3(1) (regulatory authority for cannabis lounges); *id.* § 3(2) (licensing authority for special events).

²⁷⁶ *Id.* at § 6.

²⁷⁷ S.B. 17-063 § 1, 71st Gen. Assemb., Reg. Sess. (Colo. 2017).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ ME. STAT. tit. 7, § 2442(39) (defining “retail marijuana social club” as “an entity licensed to sell retail marijuana and retail marijuana products to consumers for consumption on the licensed premises”) (2017).

²⁸¹ *Id.* § 2448(1)(E) (licensing authority); *id.* at § 2444(2) (rulemaking authority).

laws, local governments would have been free to regulate social clubs and even require them to be independently licensed at the local level.²⁸² Maine's approach also includes local approval of any social club that is fully compliant with state-level requirements.²⁸³

3. *A Third Option: Do Nothing*

Rather than expressly providing for social-consumption lounges and granting regulatory authority over them to either a state agency or local governments, lawmakers might decide to simply do nothing at the state level. Under this approach, local governments could independently provide for the licensing and regulation of social-consumption lounges pursuant to their broad authority to license and regulate businesses in general.²⁸⁴ For this approach to ultimately prove lawful, state law providing for specifically and narrowly defined categories of marijuana establishments would have to be interpreted as not precluding all other possible types of marijuana establishments.²⁸⁵ Las Vegas's draft ordinance is an example of a local government considering independent action in the absence of express legislation.

B. *Statutory Prohibition on Public Consumption*

The first substantive impediment to implementing and regulating social-consumption establishments, whether in Nevada or any other state, is the general statutory prohibition on public consumption. Virtually all states that have decriminalized marijuana use have similar statutory provisions that provide a broad, general prohibition on public consumption followed by a list of specific, carve outs.²⁸⁶

1. *Nevada's S.B. 236 and Las Vegas's Draft Ordinance*

S.B. 236 would have expressly forbidden "the consumption of marijuana at any place which is viewable from a public place."²⁸⁷ S.B. 236 also would have provided that no establishment may "allow any person who is less than 21 years of age to enter the business of special event."²⁸⁸ Taken together, these two

²⁸² *Id.* § 2449.

²⁸³ *Id.* § 2449(2).

²⁸⁴ *See, e.g.*, LCB Opinion Letter, *supra* note 232, at 4 ("Since . . . counties, cities and towns [have] the power to generally license and tax businesses . . . , these local governments clearly have the power[] to regulate social-consumption-lounge businesses.[]").

²⁸⁵ *See id.* ("[B]ecause we have established that the laws of this State generally authorize the possession and consumption of marijuana by certain persons and prohibit the possession and consumption of marijuana only in certain enumerated circumstances or locations, it is the opinion of this office that a business may establish and operate a lounge or other facility or special event at which patrons of the business are allowed to use marijuana.").

²⁸⁶ *See, e.g.*, COLO. REV. STAT. § 18-18-406(5)(b) (2018).

²⁸⁷ S.B. 236 § 1(3)(b), 2017 Leg., 79th Sess. (Nev. 2017); *see also id.* § 2(3)(b).

²⁸⁸ *E.g., id.* § 1(3)(c).

restrictions are an attempt to limit social-consumption lounges to non-public places. S.B. 236 would not have, however, directly changed Nevada law on the general prohibition on public consumption.²⁸⁹ Las Vegas's draft ordinance would place nearly identical restrictions on licensed social-consumption lounges.²⁹⁰

2. *Other Approaches*

For reasons discussed below in Section III.A.1, Nevada is unique in that Nevada lawmakers cannot amend the statutory definition of public place to simply exclude social-consumption lounges. Other states, however, are not so constrained and therefore approach the public-consumption issue directly by amending the definition of public place to exclude from the general prohibition on public consumption certain statutorily defined establishments, including social-consumption lounges. Both S.B. 17-063 and Oregon's S.B. 307 would have amended existing statutes to exempt marijuana use in social-consumption establishments from the general prohibition on public consumption.²⁹¹ Additionally, Washington law allows for a specific exception to the general public-consumption prohibition for visitors staying in hotels that permit guests to consume marijuana in their rooms.²⁹²

C. *Points of Production, Sale, and Consumption*

Social-consumption establishments could potentially encompass almost an endless variety of businesses. However, answers to several important considerations may limit the seemingly endless possibilities for this industry.

1. *Point of Sale vs. Point of Consumption*

Should a social-consumption establishment be permitted to sell marijuana and marijuana-products directly to patrons for consumption on site? Or should laws require patrons to bring their own marijuana that was lawfully purchased elsewhere? Jurisdictions have answered these questions differently.

a. *Nevada's S.B. 236 and Las Vegas's Draft Ordinance*

S.B. 236 was entirely silent on the issue of how consumption lounges would operate in terms of point of sale. Under Nevada's Regulation and Taxation of Marijuana Act, only licensed marijuana retailers can lawfully sell mari-

²⁸⁹ See generally discussion *infra* Section III.B.

²⁹⁰ *L.V. Draft Ordinance*, *supra* note 231, § 1 (6.96.070(A)–(B)).

²⁹¹ S.B. 17-063 § 10, 71st Gen. Assemb., Reg. Sess. (Colo. 2017); S.B. 307 § 4, 2017 Leg., 79th Sess. (Or. 2017).

²⁹² See *Marijuana Use in Washington State an Adult Consumer's Guide – Revised*, WASH. ST. LIQUOR AND CANNABIS BOARD, <https://lcb.wa.gov/mj-education/for-adult-consumers> [https://perma.cc/5NJ4-AZQK] (last visited April 19, 2018).

juana in Nevada.²⁹³ Onsite consumption on the premises of a licensed retailer is expressly forbidden.²⁹⁴ Thus, with or without S.B. 236, current Nevada law would limit a consumption-lounge industry to a “bring your own marijuana” (BYOM) approach to social-consumption establishments. In accord with Nevada law, Las Vegas’s draft ordinance would expressly make it unlawful for a licensed consumption lounge to “[s]ell, provide or distribute marijuana, marijuana products within or on the premises of a marijuana consumption lounge.”²⁹⁵ However, unlike the state-level BYOM model under S.B. 236, Las Vegas’s draft ordinance would allow deliveries to a social consumption establishment provided that deliveries are performed in compliance with state regulations.²⁹⁶

b. Other Approaches

Other approaches can be roughly split up into two general categories. The first category prohibits a social-consumption establishment from holding any other marijuana license (retail, cultivation, production etc.).²⁹⁷ Under this approach, a new category of marijuana business is established, and onsite consumption is permissible only on the premises of such a business or in a specially designated area of that business (i.e., no consumption is allowed in retail businesses). An example of this approach is Oregon’s S.B. 307—which, like Nevada’s S.B. 236, goes so far as to even prohibit the sale of marijuana on the premises of a social-consumption establishment.²⁹⁸ S.B. 307 does, however, provide a more practical approach than S.B. 236’s BYOM model. Under S.B. 307, retail establishments are expressly allowed to “deliver marijuana items . . . to or on [the] premises [of a consumption establishment.]”²⁹⁹

A more flexible variation to the first approach allows a single consumption establishment to hold one or more “overlapping” marijuana licenses in addition

²⁹³ NEV. REV. STAT. § 453D.120(1) (2017).

²⁹⁴ *Id.* at § 453D.400(2).

²⁹⁵ *L.V. Draft Ordinance*, *supra* note 231, § 1 (6.96.070(C)).

²⁹⁶ *Id.* (6.96.070(F)).

²⁹⁷ Some cities have elected to prohibit retail-consumption hybrid businesses, even if hybrid businesses are not expressly prohibited under state law. Los Angeles is one such example. City of Los Angeles, Ordinance 185,344 (Dec. 19, 2017); *see also* Hilary Bricken, *ICYMI: Los Angeles (Finally) Passes Cannabis Business Regulations*, ABOVE THE LAW (Dec. 11, 2017, 4:20 PM), <https://abovethelaw.com/2017/12/icymi-los-angeles-finally-passes-cannabis-business-regulations/> [<https://perma.cc/5EY5-RSG6>]. Los Angeles does not currently allow for on-site consumption in a marijuana retailer and is in the process of drafting regulations for consumption lounges. Additional information about L.A.’s regulation of recreational marijuana can be found here: *City of Los Angeles: Regulations for Marijuana Related Commercial Activity*, CANNABUSINESS L. (Jan. 1, 2018), <http://cannabusinesslaw.com/california-cannabis-laws-by-county/los-angeles-county/city-of-los-angeles/> [<https://perma.cc/TF3Y-VMBJ>].

²⁹⁸ *See* S.B. 307 § 3(3)(d), 2017 Leg., 79th Sess. (Or. 2017) (“The commission shall adopt rules that: . . . [p]rohibit the production, propagation, processing and sale of marijuana items on [the] premises [of a consumption establishment.]”).

²⁹⁹ *Id.* § 7.

to a consumption license, usually on the condition that consumption on the premises is limited to a specially designated and confined area. Colorado's S.B. 17-063,³⁰⁰ for instance, goes one step further. Under S.B. 17-063, a business cannot obtain a consumption permit without also holding a retail-sales permit.³⁰¹ Many instances of this flexible approach, including S.B. 17-063, prohibit patrons from removing from the premises any unconsumed marijuana or marijuana products that were purchased for onsite consumption.³⁰²

The second general category of approaches focuses on allowing existing categories of marijuana establishments to add on consumption areas. Under this second approach, generally a retail business can apply for an additional license to designate a specific area of the premises for social consumption and/or "sampling." Oakland, San Francisco, and West Hollywood, for example, each allow on site sampling consumption at a licensed dispensary, provided that the dispensary obtains a secondary on-site consumption permit and complies with additional requirements.³⁰³

Alaska's draft regulations are a state-level example of this approach.³⁰⁴ Unlike Colorado's S.B. 17-063, Alaska's draft regulations allow patrons to remove from the premises unconsumed marijuana and marijuana products, provided that the unconsumed marijuana is securely repackaged in full compliance with all for packing and labeling requirements for marijuana and marijuana products sold at retail for offsite consumption.³⁰⁵

An interesting, more restrictive variation on this second approach is employed, at the local level, as shown by the Denver ordinance. Unlike Las Vegas's draft ordinance, Denver's ordinance allows a single business/establishment to delineate its premises into consumption and non-consumption areas.³⁰⁶ Thus, under the Denver ordinance, a business owner

³⁰⁰ S.B. 17-063 § 3, 71st Gen. Assemb., Reg. Sess. (Colo. 2017) (12-43.4-408(1)(d)) (providing that a consumption establishment may hold other classes of marijuana licenses).

³⁰¹ *See id.* (12-43.4-408(1)(a)) ("A marijuana consumption club license may only be issued to a person operating an establishment that allows persons to purchase and consume retail or medical marijuana on site.").

³⁰² *Id.* (12-43.4-408(1)(c)).

³⁰³ *See generally* OAKLAND, CAL., CODE OF ORDINANCES tit. 5, § 5.80.025 (2017); S.F., CAL., POLICE CODE art 16., § 1620; W. HOLLYWOOD, CAL., MUN. CODE tit. 5, art. 2, § 5.70.041. As an example of such additional requirements, under West Hollywood's ordinance, retail establishments may allow onsite consumption in a designated "cannabis consumption area," subject to two requirements: (i) "[t]he space devoted to cannabis consumption [does] not exceed fifty percent of the total floor area of the . . . retail space, [and] in no case more than one thousand five square feet[]"; and (ii) "[the c]annabis consumption area [is a] well-ventilated private area[] that [is] portioned off from access to all other areas of the retail establishment and [is] designed to prevent the flow of smoke to any other area of the establishment." W. HOLLYWOOD, CAL., MUN. CODE tit. 5, art. 2, § 5.70.041(13)(d).

³⁰⁴ *See Alaska Draft Regulation, supra* note 215. Alaska is considering adopting similar language state-wide but proposed different permits for a single establishment to have a designated "consumption area" at a "retail marijuana store premise." *Id.* § 306.990(b).

³⁰⁵ *Id.* § 306.370(a)(3).

³⁰⁶ *See* DENVER, COLO., MUN. CODE § 6-307.

would seek a “cannabis consumption permit” that would authorize marijuana consumption in a “designated consumption area,” rather than in an entire lounge.³⁰⁷ Similar to the Las Vegas ordinance, Denver’s ordinance expressly prohibits a social-consumption establishment from selling or otherwise distributing marijuana or marijuana products “within *or around* a designated consumption area.”³⁰⁸ This provision may effectively limit a single establishment from both selling and allowing customers to consume marijuana on the premises. However, anticipating future changes to state law, Denver’s ordinance also includes a simple caveat to the general prohibition: “It shall be unlawful for a [social-consumption establishment] to . . . sell . . . cannabis within or around a designated consumption area, *unless otherwise permitted by state law.*”³⁰⁹

2. Point of Production vs. Point of Consumption

The onsite production of marijuana and/or marijuana products on the premises of a consumption establishment is another thorny issue for state or local lawmakers considering regulations for a social-consumption industry. Should a social-consumption establishment be permitted to produce any marijuana, marijuana-products, or marijuana-infused products on site? Or should laws/regulations require social-consumption establishments to purchase products from licensed retailers or producers for resale on site?

Many proposed approaches have simply avoided the issue by prohibiting all onsite production.³¹⁰ However, the general trend is to allow for limited production and/or cultivation of marijuana and marijuana products for consumption onsite. For instance, Colorado’s S.B. 17-063 would expressly allow a social-consumption establishment to hold multiple marijuana licenses, including cultivation and production licenses, in addition to a consumption license.³¹¹ West Hollywood’s ordinance similarly allows for “[l]imited ancillary cultivation of cannabis” and “[l]imited ancillary manufacture of cannabis derivatives and products,”³¹² subject to various additional requirements.³¹³

San Francisco’s ordinance, rather uniquely, offers three distinct types of cannabis consumption permits. The first permit allows consumption of “Pre-

³⁰⁷ *Id.* § 6-302.

³⁰⁸ *Id.* § 6-309(a). *See generally Cannabis Consumption Licenses*, CITY & CTY. OF DENVER, COLO., <https://www.denvergov.org/content/denvergov/en/denver-business-licensing-center/marijuana-licenses/social-consumption-advisory-committee.html> [https://perma.cc/TM3L-ZKLP] (last visited Apr. 17, 2018); *see also, generally, Social Consumption Advisory Committee: Meeting 1*, CITY & CTY. OF DENVER, COLO. (Jan. 18, 2017), <https://www.denvergov.org/content/dam/denvergov/Portals/723/documents/Meeting%201%20Agenda%20&%20Topics.pdf> [https://perma.cc/HU5J-WFRF].

³⁰⁹ DENVER, COLO., MUN. CODE § 6-309(a).

³¹⁰ *See, e.g., Alaska Draft Regulation, supra* note 215, § 306.370(a)(2)(C).

³¹¹ S.B. 17-063 § 3, 71st Gen. Assemb., Reg. Sess. (Colo. 2017).

³¹² W. HOLLYWOOD, CAL., MUN. CODE tit. 5, art. 2, § 5.70.040(8)(a), (14)(a).

³¹³ *See, e.g., id.* § 5.70.040(8)(a), (14)(a)–(b)); *id.* § 5.70.041(13)(d)(i)–(ii); *id.* § 19.36.030 (general requirements for ancillary business uses and activities).

packaged Cannabis Products” (defined in the ordinance as a product “served to a customer in its original [general retail] packaging”³¹⁴), but it prohibits any onsite production of marijuana products and any onsite smoking of marijuana.³¹⁵ The second permit allows limited onsite “preparation” (defined as “heating, reheating, or serving of Cannabis Products, [but] does not include cooking or infusing”³¹⁶).³¹⁷ The third permit allows for smoking and, subject to approval, limited onsite preparation.³¹⁸

Perhaps the most permissive approach to onsite production is taken by Massachusetts’s draft regulations, which would allow for hybrid restaurant-consumption establishments. Under the regulations, as the only exception to the general rule that “[a]ll Marijuana Products must remain in the original packaging and may not be further processed,” a social-consumption establishment that is also licensed as a restaurant is permitted to produce and process marijuana products onsite.³¹⁹ By contrast, Colorado’s S.B. 17-063 expressly disallows a restaurant-consumption hybrid.³²⁰

D. Limits on the Sale of Marijuana and Related Restrictions

Under an approach allowing social-consumption establishments to sell marijuana and marijuana products directly to patrons for consumption on the premises, an important question is whether specific limitations should be placed on such things as the amount and type of products that can be sold and consumed. Jurisdictions have approached this question in different ways.

³¹⁴ S.F., CAL., HEALTH CODE art. 8A, § 8A.1(b).

³¹⁵ *Id.* § 8A.3(a).

³¹⁶ *Id.* § 8A.3(b).

³¹⁷ *Id.*

³¹⁸ *Id.* § 8A.3(c).

³¹⁹ *Mass. Draft Regulation, supra* note 219, § 500.145(C).

³²⁰ S.B. 17-063 § 3, 71st Gen. Assemb., Reg. Sess. (Colo. 2017) (12-43.4-408(2)(b) (“A marijuana consumption club may not sell . . . [f]ood prepared on site, excluding light snacks, medical marijuana-infused products, *or* [sic] retail marijuana products, for consumption on the premises.” (emphasis added)). There is some ambiguity in this language, but the “or” emphasized in the above quote appears to be drafting error. The “or” seems to suggest that a consumption establishment may not sell: (1) food prepared onsite (excluding light snacks); (2) medical marijuana-infused products; *or* (3) retail marijuana products. However, this interpretation appears to be at odds with language in the same section: that “[a] marijuana consumption club shall purchase the retail or medical marijuana, . . . medical marijuana-product, or retail marijuana product that it sells on site from a [licensed marijuana cultivator or manufacturer]”). In light of that contradiction, it appears that the above-referenced “or” should be replaced with an “and,” such that: *A consumption establishment may not sell any food prepared onsite; provided, however, that it may produce and sell for consumption on-site light snacks, medical marijuana-infused products, and retail marijuana products.*

1. *Amount and Potency Limits*

States that have decriminalized marijuana use, whether for medicinal or recreational purposes or both, generally limit the amount of marijuana a single user can purchase in a single retail transaction to one ounce (or, for marijuana products, an amount of THC roughly equivalent to the THC in one ounce of marijuana).³²¹ Should this limitation be the same for the purchase of marijuana in a social-consumption establishment?

Colorado's S.B. 17-063 took a more permissive approach: it would have placed the same quantity limitations on sales for onsite consumption as the general limitations for all retail sales.³²² At the opposite end of the spectrum are Alaska's and Massachusetts's proposed regulations. Under Alaska's proposed regulations, in any given single transaction, marijuana sold for consumption onsite cannot exceed one gram, and purchases of edible marijuana products for onsite consumption are limited to 10 mg of THC.³²³ The Massachusetts regulations take a similar approach but phrase the limitation in general terms: "[Marijuana] Products consumed on the premises of marijuana social consumption establishments shall be provided only in individual servings."³²⁴

2. *Product Type Restrictions*

Marijuana-product restrictions are another species of regulatory control. For instance, under Alaska's proposed regulations, social-retail hybrid establishments are specifically not allowed to sell high-potency marijuana concentrates for consumption on the premises.³²⁵ Another approach is to limit the sale of certain marijuana-products purchased for consumption on the premises of specific types of businesses. In San Francisco, for example, a social-consumption business is restricted to one of three types of consumption permits,³²⁶ each related to the type of product to be consumed onsite.³²⁷ Thus, un-

³²¹ See, e.g., NEV. REV. STAT. § 453D.110(1) (2017).

³²² S.B. 17-063 § 3, 71st Gen. Assemb., Reg. Sess. (Colo. 2017) (12-43.4-408(1)(b)); see *id.* § 10 (allowing the "public display, consumption or use of up to one ounce of marijuana" in a social-consumption establishment); see also, e.g., DENVER, COLO., MUN. CODE § 6-309(e) (2019) ("It shall be unlawful for any person to possess more than one (1) ounce of cannabis at any time within a designated consumption area, unless a greater amount is permitted by state law."). Another approach that would have the same effect would be to remain silent on the question, thereby making the general limitation under state law (e.g., one ounce) the default limitation for purchases in social-consumption establishments.

³²³ *Alaska Draft Regulation*, *supra* note 215, § 306.370(a)(2)(A)–(B).

³²⁴ *Mass. Draft Regulation*, *supra* note 219, § 500.145(A)(2). "Marijuana Products" are defined as "products that have been manufactured and contain marijuana or an extract from marijuana, including concentrated forms of marijuana and products composed of marijuana and other ingredients that are intended for use or consumption, including edible products, beverages, topical products, ointments, oils and tinctures." *Id.* § 500.002.

³²⁵ *Alaska Draft Regulation*, *supra* note 215, § 306.370(b)(1).

³²⁶ See generally *supra* discussion in Section II.C.2.

der San Francisco's approach, a patron could smoke marijuana and/or eat marijuana products in an establishment that has a "cannabis smoking" permit.³²⁸ However, that same patron would not be allowed to smoke marijuana in an establishment with a permit for only the consumption of edibles.³²⁹

3. Paraphernalia

Additionally, some approaches limit the types of consumption paraphernalia and/or equipment that can be used in social-consumption establishments. Many approaches expressly allow the general provision, sale, and use of marijuana paraphernalia in a social-consumption establishment. Las Vegas's draft ordinance is one such example.³³⁰ Most approaches also impose a general fire-safety limitation on permissible types and uses of paraphernalia. For instance, Las Vegas's draft ordinance prohibits the use of paraphernalia that does not comply with the establishment's required fire-safety plan, as approved by the local fire department.³³¹ Going even one step further, Colorado's S.B. 17-063 would have specifically prohibited the use of butane torches on the premises of a social-consumption establishment.³³²

E. Miscellaneous Restrictions: Food, Alcohol, Tobacco, and Entertainment

Approaches vary regarding miscellaneous restrictions on the sale or provision of non-marijuana-related products, including food, alcohol, and tobacco, on the premises of a social-consumption establishment. Additionally, approaches vary regarding what types of entertainment may be allowed on such premises.

1. Nevada's S.B. 236 and Las Vegas's Draft Ordinance

S.B. 236 is silent on the issue of whether a social-consumption lounge may serve or permit the consumption of food, alcohol and tobacco, or provide entertainment,³³³ leaving it up to local governments to provide for such allowances or restrictions. The Las Vegas draft ordinance leaves open the sale, onsite pro-

³²⁷ S.F., CAL., HEALTH CODE § 8A.3. The three types of permits are for the consumption of either: (1) pre-packaged cannabis products that are ready to consume; (2) limited preparation; or (3) cannabis smoking permits, meaning that the facility can host on-site smoking and sell either pre-packaged or prepare the products. *Id.* However, subject to approval, the smoking permit allows both smoking and eating (i.e., it includes each of the first two more-limited permits. *See id.*

³²⁸ *Id.* § 8A.3(a).

³²⁹ *Id.* § 8A.3.

³³⁰ *See L.V. Draft Ordinance, supra* note 231, § 1 (6.96.020(B) & 6.96.070(A)).

³³¹ *Id.* (6.96.070(B))

³³² S.B. 17-063 § 3, 71st Gen. Assemb., Reg. Sess. (Colo. 2017).

³³³ *See* S.B. 236, 2017 Leg., 79th Sess. (Nev. 2017).

duction, and consumption of non-marijuana-infused food,³³⁴ but it expressly prohibits any sale or consumption of alcohol on the premises of a social-consumption establishment.³³⁵ A violation of the alcohol prohibition would result in the establishment's license being suspended for "a period not to exceed ten days" if any alcohol has been sold or even if it is merely found on the premises.³³⁶ The draft ordinance is silent on the issue of smoking tobacco in a consumption lounge,³³⁷ leaving it permissible, but otherwise subject to, Nevada's existing indoor air quality laws. Finally, the ordinance prohibits live entertainment in a social-consumption lounge "unless pursuant to a nightclub license issued for the premises."³³⁸

2. *Other Approaches*

a. *Food*

Most approaches either expressly allow a social-consumption establishment to sell and serve non-cannabis food or are silent, leaving the issue to be decided by local governments. For instance, Alaska's proposed regulations expressly allow for non-cannabis food and beverage sales.³³⁹ Some approaches, however, limit, or even prohibit, the sale of food produced on the premises of a social-consumption establishment. For instance, Colorado's S.B. 17-063 would have allowed for the sale of food produced off-site and "light snacks" produced onsite, it but would have generally prohibited the sale of food produced onsite.³⁴⁰ Additionally, S.B. 17-063 would have allowed patrons to bring in outside food for consumption in the establishment.³⁴¹ Social-consumption lounges that are permitted and elect to produce and/or serve non-marijuana food must comply with all general food and food-handling/safety codes and regulations.³⁴²

b. *Alcohol and Tobacco*

The sale and consumption of alcohol in social-consumption establishments, however, are summarily disallowed at both state and local levels,³⁴³ as are to-

³³⁴ See *L.V. Draft Ordinance*, *supra* note 231, § 1 (6.96.070(A)–(I)).

³³⁵ *Id.* § 6.96.070(H).

³³⁶ *Id.* § 6.96.090(A).

³³⁷ *Id.* § 6.96.070(A)–(I).

³³⁸ *Id.* § 6.96.070(G).

³³⁹ *Alaska Draft Regulation*, *supra* note 215, § 306.370(a)(2)(C); see also *Cannabis Café Rules Postponed to 2018*, MARIJUANA POL'Y PROJECT (Dec. 11, 2017), <https://www.mpp.org/states/alaska/> [<https://perma.cc/9XRH-LTBJ>].

³⁴⁰ S.B. 17-063 § 3, 71st Gen. Assemb., Reg. Sess. (Colo. 2017) (12-43.4-408(2)(b)).

³⁴¹ *Id.*

³⁴² See, e.g., S.F., CAL., HEALTH CODE § 8A.6(h)(i) (2018).

³⁴³ OAKLAND, CAL., CODE OF ORDINANCES § 5.80.025 (2017); *Mass. Draft Regulation*, *supra* note 219, § 500.145(D).

bacco sales.³⁴⁴ Massachusetts's draft regulations are the only outlier to the total prohibition on alcohol sales in a consumption establishment. Under those regulations, a social-consumption establishment is permitted to serve and allow the consumption of either alcohol or marijuana, but not both, at any given time.³⁴⁵

c. Entertainment and Related Restrictions

Most approaches do not limit or prohibit live or other entertainment on the premises of a social-consumption lounge. One unique exception to this general trend is Oregon's S.B. 307, which would prohibit "video lottery games,"³⁴⁶ "social games,"³⁴⁷ and betting in social-consumption establishments.³⁴⁸ Alaska's draft regulations would create another unique (and prudent) restriction. Under Alaska's approach, social-consumption establishments would be prohibited specifically from hosting or allowing on the premises promotional drawings, contests, and games that involve consuming, or awarding as prizes, marijuana or marijuana products.³⁴⁹ Many approaches, typically at the local level, impose general time restrictions on when a social-consumption can operate.³⁵⁰ Additionally, many local-level approaches place general noise restrictions on consumption establishments.³⁵¹

F. Indoor Air Quality and Odor Nuisance

Permitting patrons to smoke marijuana in social-consumption establishments raises an obvious concern for lawmakers regarding indoor air quality. The issue has been raised quite frequently in hearings on state bills that would permit marijuana smoking in social-consumption establishments.³⁵² Nearly all approaches include provisions for regulating indoor air quality in social-consumption establishments.

1. Nevada's S.B. 236 and Las Vegas's Draft Ordinance

An outlier on this issue, S.B. 236 is silent on indoor air quality, leaving the

³⁴⁴ S.F., CAL., POLICE CODE § 1620(b)(4) (2017).

³⁴⁵ *Mass. Draft Regulation*, *supra* note 219, § 500.145(4).

³⁴⁶ *See generally* OR. REV. STAT. § 461.217 (2016). Oregon's video lottery games, usually found in bars, are reminiscent of slot machines.

³⁴⁷ *See* OR. REV. STAT. § 167.117(21) (2016) (defining "social game," in part, as "a game, other than a lottery, between players in a private business, private club or place of public accommodation where no house player, house bank or house odds exist and there is no house income from the operation of the social game.>").

³⁴⁸ *See* S.B. 307 § 3(3)(f), 2017 Leg., 79th Sess. (Or. 2017).

³⁴⁹ *Alaska Draft Regulation*, *supra* note 215, § 306.370(b)(11).

³⁵⁰ *See, e.g.*, DENVER, COLO., MUN. CODE § 6-305 (2017).

³⁵¹ *See, e.g.*, S.F., CAL., POLICE CODE § 1618(u).

³⁵² *See, e.g.*, *Hearing on S.B. 236 Before the Assemb. Comm. on Gov't Aff*, 2017 Leg., 79th Leg. Sess. (Nev. May 12, 2017) (statements of Amber Joiner, Assemb.).

details to be decided by local governments.³⁵³ The Las Vegas draft ordinance addresses indoor air quality indirectly through a general provision providing that social-consumption establishments shall “[n]ot knowingly permit upon the premise any violation of applicable statutes, regulations, ordinances, license conditions, and the approved security and fire safety plans.”³⁵⁴ Las Vegas’s draft ordinance would subject social-consumption establishments to the same odor-control ordinances applicable to other marijuana establishments, such as production facilities and dispensaries.³⁵⁵

2. *Other Approaches*

Oregon’s S.B. 307 grants rulemaking authority to the Oregon Liquor Control Commission to adopt rules regarding indoor quality for consumption establishments.³⁵⁶ This rulemaking authority is directed specifically at “[r]equiring each portion of a premises . . . where marijuana items are smoked, aerosolized or vaporized to have a ventilation system” that expels smoke and vapor from the premises and that meets general building code standards.³⁵⁷ Additionally, under S.B. 307, the Oregon Liquor Control Commission would have been granted general authority to set additional requirements “to meet any public health and safety standards and industry best practices.”³⁵⁸

Colorado’s S.B. 17-063 would have created a general exception to Colorado’s statute banning smoking indoors for licensed, fully compliant, and “fully ventilated” social-consumption establishments, “limited to only the purpose of smoking marijuana.”³⁵⁹ In the absence of state-level direction by Colorado’s legislature, Denver’s ordinance imposed the requirement that “[a]ll cannabis consumption permitted within a designated consumption area must comply with the requirements of the Colorado Clean Indoor Air Act.”³⁶⁰

Alaska’s regulations would require a consumption area to be “separate[] from the remainder of the premises, either by being in a separate building or by a secure door and having a separate ventilation system[.]”³⁶¹ Additionally, it would require that all consumption areas “include a smoke-free area for employees monitoring the marijuana consumption area”³⁶² and that all consump-

³⁵³ See S.B. 236, 2017 Leg., 79th Sess. (Nev. 2017).

³⁵⁴ *L.V. Draft Ordinance*, *supra* note 231, § 1 (6.96.080(D)).

³⁵⁵ *Id.* (6.96.080(A)).

³⁵⁶ S.B. 307 § 3(3)(g), 2017 Leg., 79th Sess. (Or. 2017).

³⁵⁷ *Id.*

³⁵⁸ *Id.* § 3(3)(h).

³⁵⁹ S.B. 17-063 § 11, 71st Gen. Assemb., Reg. Sess. (Colo. 2017).

³⁶⁰ DENVER, COLO., MUN. CODE § 6-310(c) (2017).

³⁶¹ *Alaska Draft Regulation*, *supra* note 215, § 306.370(a)(1); see also *id.* § 306.370(c)(1)(C)(ii) (“The marijuana consumption area must . . . be entirely outdoors in a designated smoking area or separated from other retail areas by a wall with a secure door[.]”).

³⁶² *Id.* § 306.370(c)(1)(C)(i).

tion establishments “maintain a ventilation system that directs air from the marijuana consumption area to the outside of the building through a filtration system adequate to reduce odor.”³⁶³ Alaska’s regulations would require, as a component of the application for a consumption-area permit, a plan detailing how the consumption area would be isolated from the non-consumption portion of the premises, if any.³⁶⁴ The regulations would also require a ventilation plan, which, “[i]f consumption by inhalation is to be permitted, . . . must be (i) signed and approved by a licensed mechanical engineer; (ii) sufficient to remove visible smoke; and (iii) consistent with all applicable building codes and ordinances[.]”³⁶⁵

San Francisco’s ordinances require social-consumption establishments to “[p]ost clear and prominent ‘No Smoking’ signs” both outside the establishment and in areas of the establishment where cannabis smoking is not permitted.³⁶⁶ All violations of San Francisco’s marijuana ordinances, by any cannabis establishment, are considered nuisances.³⁶⁷ Under San Francisco’s ordinances, all cannabis businesses are subject to a general requirement that “[a]ppropriate odor control equipment shall be installed in conformance with the approved odor plan and maintained to prevent any significant noxious or offensive odors from escaping the Premises.”³⁶⁸ West Hollywood’s ordinances subject “[c]annabis consumption areas that allow smoking and vaping” to West Hollywood’s general ordinance on “[t]he smoking of tobacco, or any other weed or plant.”³⁶⁹

G. “Gram” Shop Liability

Statutorily imposing or limiting civil liability for marijuana establishments has been coyly named after the equivalent name for alcohol establishments. “Gram shop liability” statutes remain a relatively uncharted area of marijuana law (especially for social-consumption establishments), which has not yet been directly addressed at the state level. Nonetheless, a few proposed solutions do address issues of liability, whether directly or indirectly.

1. Nevada’s S.B. 236 and Las Vegas Ordinance

Although the original version of S.B. 236 did include a broad exemption for business owners and patrons of consumption lounges,³⁷⁰ neither version

³⁶³ *Id.* § 306.370(f)(2).

³⁶⁴ *Id.* § 306.370(c)(1)(C).

³⁶⁵ *Id.* § 306.370(c)(1)(B).

³⁶⁶ S.F., CAL., POLICE CODE § 1620(c) (2018).

³⁶⁷ *Id.* § 1635.

³⁶⁸ *Id.* § 1618(v).

³⁶⁹ W. HOLLYWOOD, CAL., MUN. CODE § 5.70.041(14) (2017); *id.* § 7.08.010. *See generally id.* §§ 7.08.010–.070 (providing for restrictions on smoking in public).

³⁷⁰ S.B. 236 § 3, 2017 Leg., 79th Sess. (Nev. 2017) (as introduced).

generally addressed civil liability. Las Vegas’s draft ordinance would have required consumption-establishment permit applicants to submit “[a] written statement acknowledging that the applicant understands all applicable [laws]” and “[a] written statement . . . that the applicant will hold harmless, indemnify, and defend the City against all claims and litigation arising from the issuance of a [consumption establishment] permit”³⁷¹

2. *Other Approaches*

Colorado’s S.B. 17-063 would have taken the—perhaps most direct and simple—approach to the issue of whether and to what extent a consumption establishment should be held liable for its patrons’ post-consumption torts. In accordance with the general philosophy of “regulating marijuana like alcohol,” S.B. 17-063 would have extended to social-consumption establishments “the same immunity to a lawsuit for an injury caused by a club patron that a bar enjoys.”³⁷²

H. *Driving Under the Influence of Marijuana*

A universal concern among both proponents and opponents of the social-consumption industry is preventing impaired driving either to or from a consumption establishment. Several states have considered and/or enacted legislation targeted specifically at preventing and policing persons from driving under the influence of marijuana. However, such legislation likely does not go far enough to prevent impaired driving to and from social-consumption establishments.

1. *Nevada’s S.B. 236 and Las Vegas’s Draft Ordinance*

As amended, S.B. 236 did not address DUI concerns related specifically to social consumption. Rather, it would have relied on local government regulations and other Nevada’s general DUI laws.³⁷³ Las Vegas’s draft ordinance is also silent on any requirements related specifically to consumption-establishment patrons driving under the influence.³⁷⁴ It does, however, impose two general requirements on licensed consumption lounges related more generally to law enforcement and security. First, Las Vegas’s draft ordinance would require social-consumption establishments to submit for approval a general security plan.³⁷⁵ Second, it would also impose numerous security and enforcement-specific requirements, including, most notably, that each social-

³⁷¹ *L.V. Draft Ordinance*, *supra* note 231, § 1 (6.96.030(A)–(B)).

³⁷² S.B. 17-063, *Bill Summary*, 71st Gen. Assemb., Reg. Sess. (Colo. 2017). *Compare id.* § 3, with COLO. REV. STAT. § 12-47-801(3) (2014).

³⁷³ *See generally*, e.g., A.B. 135, 2017 Leg., 79th Sess. (Nev. 2017) (enacted).

³⁷⁴ *See L.V. Draft Ordinance*, *supra* note 231.

³⁷⁵ *Id.* § 1 (6.96.040(A)).

consumption establishment must “[p]rovide a twenty-four-hour surveillance system to monitor the interior and exterior of the premises, a live feed of which must be accessible to authorized law enforcement at all times and in real-time.”³⁷⁶ These mechanisms would help law enforcement in preventing instances of driving under the influence of marijuana to or from consumption lounges.

2. *Other Approaches*

Like Nevada, many states that have decriminalized marijuana for recreational use have enacted legislation specifically addressing driving under the influence of marijuana. Additionally, many states have provided for certain educational campaigns such as the “Drive High, Get a DUI” campaigns in Colorado and California.³⁷⁷ Massachusetts’s regulations go further, requiring that every social-consumption establishment to maintain a written plan outline how that establishment will assist patrons in acquiring rideshare or taxi services.³⁷⁸

I. *Addressing the Concerns of Neighbors*

Particularly for lawmakers at the local level, integrating social-consumption establishments into existing neighborhoods and shopping malls will present a significant regulatory challenge. Can an approach amicably balance the interests of a consumption industry with the needs and concerns of that industry’s future neighbors—perhaps many of which may simply not want to be around marijuana smoke and intoxicated patrons? Most, if not all, approaches to regulating a social-consumption industry reflect a general awareness of this concern.

1. *Nevada’s S.B. 236 and Las Vegas’s Draft Ordinance*

Nevada’s proposed consumption-lounge laws do not directly address neighbor or community approval. S.B. 236, Nevada’s failed marijuana consumption lounge bill, did not mention requiring a neighbor’s, or the community’s, permission to acquire consumption lounge licensing.³⁷⁹ Additionally, Las Vegas’s draft consumption lounge ordinance does not address neighbor or community consent directly.³⁸⁰ However, it does require the licensee to not knowingly permit any law, safety plan, security plan, or nuisance ordinance violation that would endanger the health or safety of the community.³⁸¹ Las Ve-

³⁷⁶ *Id.* (6.96.080(E)).

³⁷⁷ See generally, e.g., Colorado “Drive High, Get a DUI” Drugged Driving Campaign, GHSA, <https://www.ghsa.org/resources/colorado-drive-high-get-dui> [https://perma.cc/28Q5-HFF9] (last visited Apr. 18, 2018).

³⁷⁸ *Mass. Draft Regulation*, *supra* note 219, § 500.145(5)(c).

³⁷⁹ S.B. 236, 2017 Leg., 79th Sess. (Nev. 2017).

³⁸⁰ *L.V. Draft Ordinance*, *supra* note 231.

³⁸¹ *Id.* § 1 (6.96.080(D)).

gas's draft ordinance also does not require neighbor or community approval to obtain a business license for a recreational marijuana dispensary,³⁸² so there is no indication that Las Vegas would require such approval of a marijuana consumption lounge.

2. *Other Approaches*

To date, Denver's Cannabis Consumption Pilot Program ordinance provides the most extensive and sophisticated approach to the concerns of neighbors. Under the ordinance, an applicant for a cannabis consumption permit must submit with the application "evidence of community support."³⁸³ To acquire evidence of community support, prospective consumption-business owners must first reach out to the members of the community in which the consumption business may ultimately exist, thereby giving notice to the members of that community and providing a mechanism for them to voice their support or opposition to the proposed business.

Under this approach, "eligible neighborhood organizations"³⁸⁴ may provide (or withhold) evidence of community support.³⁸⁵ Denver allows groups of residents and property owners to form and register as Registered Neighborhood Organizations (RNOs).³⁸⁶ These groups meet regularly, "receive notification of proposed zoning amendments, landmark designation applications, planning board and board of adjustment hearings, liquor and cabaret licenses, and other activities occurring in the neighborhood."³⁸⁷ To become an RNO, the group must: 1) be formed by residents and property owners within a certain area within the City and County of Denver; 2) hold meetings at least once a year with at least twelve members in attendance; 3) keep all meetings open to the public; 4) post notice of all meetings in advance; 5) open membership to any real property owner within the RNO's boundaries; and, 6) establish the RNO's boundaries.³⁸⁸ The group must also follow a registration process with the city as outlined in Denver's Code of Ordinances.³⁸⁹

³⁸² NEV. REV. STAT. § 453A.322 (2017); LAS VEGAS, NV., CODE OF ORDINANCES § 6.06.030 (2018); *id.* at 6.06.070(A); *id.* at 6.06.080(C) & (D); *id.* at 6.95.060(A)–(E), (G)–(M).

³⁸³ DENVER, COLO., MUN. CODE § 6-303 (2017). As defined in the ordinance, "evidence of community support" means documentation (of which there are four specific types) that is properly authorized by an eligible neighborhood organization. *Id.* § 6-301(7). It is essentially a signed letter or agreement evidencing the community's support of (or opposition to) a proposed consumption business. *See id.* § 6-301(7)(a)–(d).

³⁸⁴ *See id.* § 6-301(6) (defining eligible neighborhood organization).

³⁸⁵ DENVER, COLO., CODE OF ORDINANCES, ch. 6, art. 6, §6-304(a) (2018).

³⁸⁶ *Denver's Registered Neighborhood Organizations (RNOs)*, CITY OF DENVER, <https://www.denvergov.org/content/denvergov/en/community-planning-and-development/registered-neighborhoods.html> [<https://perma.cc/JW7M-83TH>] (last visited, Apr. 18, 2018).

³⁸⁷ *Id.*

³⁸⁸ *See* DENVER CODE § 12-93.

³⁸⁹ *Id.* § 12-94.

Eligible neighborhood organizations that can provide evidence of community support to cannabis consumption permit applicants are RNOs that have existed for more than two years, a business improvement district, or any other group of residents and property owners designated as eligible by the director of excise and licenses.³⁹⁰ These organizations must have a portion of, or all of, the designated consumption area within its boundaries.³⁹¹

“The evidence of community support may contain any additional operational requirements that the eligible neighborhood organization deems necessary to protect the health, safety, and welfare of the surrounding community,” including: 1) limitations on, or prohibition of, concurrent consumption of alcohol and marijuana; 2) requiring the permit applicant to address driving under the influence concerns; 3) requiring the permit holder to provide transportation to any person consuming marijuana within the designated consumption area; 4) requiring patrons consuming marijuana to be easily identifiable to address intoxication issues; 5) manager and employee training requirements; 6) restrictions for outdoor marijuana smoking; 7) ventilation and odor control requirements; 8) advertising restrictions; 9) restrictions on the visibility of patrons consuming marijuana; and, 10) limits on the operation’s hours.³⁹²

Denver’s State Department of Excise and Licenses created additional rules for obtaining community support.³⁹³ The Department also requires a public hearing within thirty days of the business permit application date with notice given to all RNOs in the designated area.³⁹⁴ Applicants for a special event permit only need to have a public hearing if the parties-in-interest request one.³⁹⁵

J. Zoning Social Consumption Establishments

Usually within the exclusive province of local governments, zoning restrictions are included in most marijuana legislation, including proposed bills for social-consumption establishments. Nonetheless, several trends exist in zoning restrictions on marijuana establishments across levels of government. While the numbers may differ slightly, the goal is usually the same: prevent the sale and use of marijuana near places that, for good reason, should not be a neighbor to a marijuana establishment.

1. Nevada’s S.B. 236 and Las Vegas’s Draft Ordinance

Borrowing the general zoning requirements for marijuana dispensaries,³⁹⁶ the amended version of S.B. 236 would have prohibited local governments

³⁹⁰ *Id.* § 6-301(5)–(6).

³⁹¹ *Id.* § 6-301(6).

³⁹² *Id.* § 6-304(a)(1)–(10).

³⁹³ The Department may make additional general rules. *Id.* § 6-316(b).

³⁹⁴ Rules Governing Marijuana Designated Consumption Areas, *supra* note 226.

³⁹⁵ *Id.*

³⁹⁶ *See generally infra* Section III(J).

from issuing a license to any social-consumption establishment or special event that “[w]ould be located on the property of a public airport, within 1,000 feet of a public or private school or within 300 feet of a community facility[.]”³⁹⁷ The original version was more restrictive, prohibiting social-consumption establishments or special events from “be[ing] located within 1,000 feet of a public or private school or community facility.”³⁹⁸ As defined in the bill, a “community facility” would have included day care centers, public parks, playgrounds, public swimming pools, youth recreation centers, places of religious worship, and drug/alcohol-abuse rehabilitation centers.³⁹⁹ The distance restriction from community facilities was lowered from 1,000 feet to 300 feet following concerns that it would be too easy for community activists to open businesses or establishments operating as community centers near consumption establishments to thereby thwart the consumption establishment from being annually relicensed.⁴⁰⁰ The lower 300 foot restriction was modeled after the Denver ordinance.⁴⁰¹

Las Vegas’s draft ordinance would also prohibit consumption establishments from being located “within 1,000 feet of any school, or within 300 feet of any” public park, place of religious worship, individual care center licensed for the care of children, public recreational center, or any other general recreation, amusement, or entertainment facility that primarily offers services and opportunities to specifically minors.⁴⁰² It would have limited social-consumption establishments to the city’s C-1, C-2, C-M, and M Zoning Districts.⁴⁰³

2. Other States and Cities

Similar restrictions are common across major cities that allow recreational marijuana dispensaries including Denver, Colorado; Los Angeles, California; and Seattle, Washington. Colorado marijuana law leaves zoning up to its cities.⁴⁰⁴ Denver prohibits retail marijuana⁴⁰⁵ stores (dispensaries) from being lo-

³⁹⁷ S.B. 236 § 1(3)(a) & 2(3)(a), 2017 Leg., 79th Sess. (Nev. 2017) (first reprint).

³⁹⁸ S.B. 236 § 1(3)(a) & 2(3)(a) (as introduced).

³⁹⁹ S.B. 236 § 1(5)(b) & 2(5)(b) (first reprint).

⁴⁰⁰ *Hearing on S.B. 236 Before the S. Comm. on Judiciary*, 2017 Leg., 79th Leg. Sess. (Nev. Mar. 9, 2017) (statement of Michael McAuliffe, Wellness Education Cannabis Advocates of Nevada) (“If Senator Segerblom wanted to open a hash bar but I did not like that, all I would have to do is move into a facility or rent a home within 1,000 feet of his bar and turn it into a religious retreat or something like that. When the bar came up for relicensing, it would be denied. Entrepreneurs could spend a lot of money and then be thwarted by community activists wanting to throw a wrench in marijuana use. Perhaps an ounce of prevention now will be worth a pound of cure later.”).

⁴⁰¹ *See id.*

⁴⁰² *L.V. Draft Ordinance*, *supra* note 231, § 5.

⁴⁰³ *Id.* § 4.

⁴⁰⁴ *See* COLO. REV. STAT. § 12-43.3 (2017); COLO. CODE REGS. § 212-2 (R400) (2017).

⁴⁰⁵ Retail marijuana is Colorado’s name for recreational marijuana. COLO. CODE REGS. § 212-2 (R103) (2017).

cated wherever retail sales are prohibited or within 1,000 feet of any: school, other retail marijuana store or medical marijuana center,⁴⁰⁶ childcare establishment,⁴⁰⁷ or alcohol or drug treatment facility.⁴⁰⁸ If an application to open a retail marijuana store is denied, an application for that location, or a location within 1,000 feet of the initial application, will not be considered for two years after the denial if the application was denied because the neighborhood was satisfied with its existing retail marijuana stores.⁴⁰⁹

Denver also has an ordinance for its Cannabis Consumption Pilot Program⁴¹⁰ that prohibits marijuana consumption areas within 1,000 feet of any school.⁴¹¹ Hosting a consumption area requires a permit, however, designated consumption areas will not require a specific zoning permit.⁴¹² Instead, the consumption area will be permitted in any zone lot where the underlying business or event is permitted.⁴¹³

California law is more permissive: it prohibits retail marijuana stores from being located within 600 feet of “sensitive locations.”⁴¹⁴ Los Angeles ordinances are slightly stricter than state law in that they prohibit retail marijuana businesses from being located within 700 feet of any school, park, library, drug treatment facility, or other marijuana shop.⁴¹⁵ In keeping with Washington state law, Seattle’s ordinance prohibits recreational marijuana facilities within: 1,000 feet of elementary schools, secondary schools, and playgrounds; 500 feet of child care centers, arcades allowing those under twenty-one years of age, libraries, public parks, public transit centers, and recreation facilities unless the facility is in a Downtown commercial zone where the rule is 250 feet; and only two marijuana facilities will be allowed within 1,000 feet.⁴¹⁶

⁴⁰⁶ Does not apply to any location for proposed retail marijuana store that is already licensed as a medical marijuana center. DENVER, COLO., MUN. CODE § 6-211(b)(3) (2018).

⁴⁰⁷ Does not apply to any location for proposed retail marijuana store that is already licensed as a medical marijuana center. *Id.* § 6-211(b)(4).

⁴⁰⁸ *Id.* § 6-211(b). Does not apply to any location for proposed retail marijuana store that is already licensed as a medical marijuana center. *Id.* § 6-211(b)(4).

⁴⁰⁹ *Id.* § 6-211(b)(6)(a).

⁴¹⁰ The ordinance allows a person to “obtain a cannabis consumption permit to operate a designated consumption area at any type of business or event provided they obtain the support of an eligible neighborhood association and meet the requirements of this article.” *Id.* § 6-300.

⁴¹¹ *Id.* § 6-311.

⁴¹² *Id.* § 6-311(b).

⁴¹³ *Id.*

⁴¹⁴ City News Service, *LA Planning Commission Approves Marijuana Zoning Regulation Ordinance*, NBC (Sept. 15, 2017, 1:44 AM), <https://www.nbclosangeles.com/news/local/LA-City-Council-Approves-Marijuana-Zoning-Regulation-Ordinance-444611243.html> [<https://perma.cc/R3B8-NSE7>].

⁴¹⁵ L.A., CAL., MUNICIPAL CODE, ch. 10, art. 5, § 105.02(a)(1)(B) (2017). *But see id.* § 105.02(a)(2) (exception for microbusinesses with sales limited to off-site delivery).

⁴¹⁶ WASH. REV. CODE § 69.50.331(8)(a) (2017); SEATTLE, WASH., MUNICIPAL CODE, § 23.42.058(C)(2) (2018); *id.* § 23.42.058(C)(3); *id.* § 23.42.058(C)(5). Washington law is more similar to Las Vegas because it requires 1,000 feet between recreational marijuana fa-

III. ANALYSES AND PROPOSED SOLUTIONS FOR NEVADA

As explored above, many approaches have been proposed or enacted at various levels of government in several states. Although no state has enacted a legislative solution to the social-consumption problem, several local governments have. Lawmakers should look to these early experiments for their successes and failures, and future solutions should incorporate the examples these early experiments will ultimately set. It will take some time before these early experiments begin to yield data with which to judge their success or failure with respect to the issues also discussed above. Nonetheless, as this Part III will explore, the approaches discussed above provide lawmakers today with, at a minimum, a variety of creative and thoughtful solutions to several issues. In the absence of data on the success or failure of the first experiments in social-consumption law, this Part III synthesizes the range of approaches taken in other jurisdictions and offers suggestions for Nevada's lawmakers in particular.

Part III's suggestions for Nevada's lawmakers will be organized roughly into short-term and long-term solutions. The primary focus will be on what can be done now, whether by Nevada's legislature, Department of Taxation, or local governments. As a secondary focus, this Part III will discuss the limitations of those short-term solutions and thereby arrive at suggestions for a long-term solution that ultimately must wait for Nevada's 2021 legislative session.

A. *What Level of Government Should License and Regulate the Industry?*

Nevada lawmakers face several obstacles in creating the legal and regulatory framework for a social-consumption industry. This Section first explores the legal limitations of implementing and regulating a social-consumption industry at each level of government. This Section then synthesizes from these considerations a general recommendation for how Nevada's lawmakers should go about implementing and regulating a social-consumption industry.

1. *Constitutional Constraints on Legislating a Solution in Nevada*

For most state lawmakers, a solution to the social-consumption problem will take the form of legislative amendments to existing marijuana laws. Nevada, however, faces a unique challenge: the Nevada Constitution includes two

cilities and any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, library, or game arcade not restricted to those over twenty-one years of age. WASH. REV. CODE § 69.50.331(8)(a). But those requirements "made it very challenging for many recreational marijuana proprietors to find suitable sites [for marijuana businesses] under state law." Stephen Fesler, *More Pot Shops in Seattle? It's All in the Zoning*, URBANIST (Jan. 27, 2016), <https://www.theurbanist.org/2016/01/27/more-pot-shops-in-seattle-its-all-in-the-zoning/> [<https://perma.cc/B68B-2MPF>]. So, Washington amended its law to provide that municipalities can permit recreational marijuana facilities within 1,000 feet, but not less than 100 feet, to everything listed above except elementary schools, secondary schools, and playgrounds. WASH. REV. CODE § 69.50.331(8)(b).

provisions that are working in tandem to constrain Nevada lawmakers in directly legislating a solution. First, the Nevada Legislature is not authorized to amend or repeal any initiative measure approved by voters until after three years from the effective date of the measure.⁴¹⁷ The Regulation and Taxation of Marijuana Act (Chapter 453D.010 of NRS) was an approved voter-initiative measure, and it took effect on January 1, 2017⁴¹⁸—the same year as Nevada’s most recent 79th legislative session. This is a significant impediment because, secondly, as the Nevada Constitution provides in Article 17, Section 12, regular legislative sessions are held biennially.

With one possibly critical exception,⁴¹⁹ Nevada lawmakers will not be able to add or amend the Regulation and Taxation of Marijuana Act’s statutory provisions during the 80th session (to be held in 2019). Any such change is not permitted under the Nevada Constitution until January 1, 2020, an off year for the legislature. Thus, the most straightforward and comprehensive mechanism for amending current marijuana law to accommodate a social-consumption industry is and will remain off the table until the 81st regular session, which will begin in 2021.

2. *Statutory Constraints on Local-Level Solutions*

Several questions remain after the Nevada Legislature failed to take any action on social-consumption establishments in the 2017, including whether such establishments are in fact under existing law and, if so, whether local governments would have the power to regulate such establishments in the absence of legislation like S.B. 236.⁴²⁰ There is significant disagreement about the answers to those questions.

Nevada’s Legislative Counsel Bureau published an opinion stating that “it is the opinion of this office that a business may establish and operate a lounge . . . at which patrons of the business are allowed to use marijuana.”⁴²¹ The opinion letter continued on and, citing the general authority of local governments to license and regulate businesses, concluded that:

[I]t is the opinion of this office that counties, cities and towns may require a business that wishes to operate a lounge or other facility or special event at which patrons of the business are allowed to use marijuana to secure a license or permit before commencing operation. It is further the opinion of this office

⁴¹⁷ NEV. CONST. art. 19, § 2, cl. 3.

⁴¹⁸ NEV. REV. STAT. § 453D.010 (2017).

⁴¹⁹ See *infra* Section III.A.4.a.

⁴²⁰ Letter from Deonne Contine, Dir., Nev. Dep’t of Taxation, to Adam P. Laxalt, Nev. Attorney Gen. (Sept. 25, 2017).

⁴²¹ LCB Opinion Letter, *supra* note 232, at 4.

that the county, city or town may impose restrictions and otherwise regulate such businesses so long as *the regulations or other restrictions do not violate state law*.⁴²²

The final part of that sentence is key. In the absence of a state-level solution, many lawmakers question whether local-level solutions are even legal under current Nevada law. As explained in a letter by Deonne Contine, Director of the Department of Taxation, to Adam Laxalt, Nevada's Attorney General, sent in the wake of confusion following the LCB opinion, there are two main concerns relevant to this Section's discussion.

First, the LCB opinion assumes that a social-consumption lounge could lawfully operate with a general business license under current Nevada law. However, NRS 453.316 makes it generally unlawful for any person to "open[] or maintain[] any place for the purpose of unlawfully selling, giving away or using any controlled substance . . ."⁴²³ Marijuana establishments such as retail businesses do not violate NRS 453.316 "because NRS 453A and NRS 453D are the specific statutes that provide for the [lawful] opening [and operation] of places for the purpose of lawfully [cultivating, producing, and] selling marijuana[.]"⁴²⁴ This raises the first question about the legality of a social-consumption industry under current Nevada law: "Are businesses that allow for use of marijuana unlawful under NRS 453.316 because there is no corresponding state law providing [explicitly] for the opening [and operation] of any place for the purpose of lawfully using marijuana?"⁴²⁵

Second, the general authority of local governments to license and regulate businesses is limited to businesses in general. It does not necessarily extend to certain businesses that are subject to stricter regulations. For instance, "[a]dditional regulatory authority of local governments for specific industries (like alcohol and gaming) is given by state law."⁴²⁶ Given that social-consumption establishments arguably fall into the more specific category of the tightly regulated marijuana industry than the category of businesses in general, "[s]hould the state be concerned that non-uniform regulation of the businesses by local governments that allow marijuana consumption lounges could subject the state to enhanced enforcement activities by the federal government?"⁴²⁷

There are no clear answers to either of these questions. In the absence of any state-level legislative (or perhaps regulatory) direction on the social-consumption issue, as one commentator has put it, "Nevada's tourists [and lawmakers at the local level] will remain trapped in a legal limbo."⁴²⁸

⁴²² *Id.* (emphasis added).

⁴²³ NEV. REV. STAT. § 453.316(1) (2017).

⁴²⁴ Contine Letter, *supra* note 420, at 2.

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 3.

⁴²⁷ *Id.*

⁴²⁸ Katherine L. Hoffman, *Nevada's Ban on Public Use of Marijuana Creates Problems for Visitors*, NEV. LAW., Feb. 2018, at 14, 16.

3. *Statutory Constraints on an Administrative Solution*

The Nevada's Regulation and Taxation of Marijuana Act grants general rulemaking authority to the Department of Taxation's statutory authority to "adopt all regulations necessary or convenient to carry out the provisions of [the Act]."⁴²⁹ Following this language is a non-exhaustive list of various subjects on which the Department of Taxation is required to issue regulations.⁴³⁰ The extent to which this rulemaking authority applies to social consumption is also somewhat unclear.

Director Contine's letter to the Attorney General was directed specifically to this issue. However, the Attorney General declined to answer several of the Director's questions regarding the regulatory authority of the Department of Taxation on the issue of social consumption. The Attorney General's reason for declining to answer the Director's "general" questions was that "the Department [of Taxation] does not regulate the time, place or manner of consumption of marijuana."⁴³¹ The letter offers little else than these conclusory terms, but the general conclusion is clear: The current Attorney General's position is that nothing in NRS 453D grants regulatory or rulemaking authority to the Department over the "time, place or manner of consumption of marijuana."

4. *The Scope of Nevada's Lawmakers Authority in 2019*

The first question then for this analysis is what, specifically, in light of the general constraints discussed above, can Nevada's lawmakers lawfully do to establish and regulate a social-consumption industry?

a. *Legislative Authority*

Even under the general constitutional constraint discussed above, Nevada's legislators have two potentially useful avenues during the 2019 legislative session to facilitate a first-stage social-consumption industry. A single provision of the Regulation and Taxation of Marijuana Act provides the first avenue: "Notwithstanding the provisions of this chapter, after January 1, 2017, the Legislature may amend provisions of this act to provide for the conditions in which a locality may permit consumption of marijuana in a retail marijuana store."⁴³² This peculiar provision—the only, but potentially a critical, exception to the general constitutional constraint on amending the Act—raises several ques-

⁴²⁹ NEV. REV. STAT. § 453D.200(1) (2017).

⁴³⁰ *Id.*

⁴³¹ Letter from Gregory L. Zunino, Bureau Chief, Nev. Office of the Attorney Gen., to Deonne Contine, Dir., Nev. Dep't of Taxation, at 1 (Oct. 12, 2017). Citing as the reason why the Attorney General "ha[d] no authority to issue an opinion," the letter later states that "it is unclear to us how these questions relate to the enforcement or regulatory authority of your office." *Id.* at 2.

⁴³² NEV. REV. STAT. § 453D.400(8) (2017).

tions, first and foremost of which is whether this language effectively grants the legislative authority that it purports to. The answer is not clear at present.⁴³³

Arguably, the provision should have been drafted to begin, “[n]otwithstanding the constitutional limitation on amendments to the provisions of this chapter before January 1, 2020,” It seems unclear whether the plain language of the provision, as it was drafted, is at odds with the relevant plain language of the Nevada Constitution, which would supersede the statute’s language in the event of any such conflict. Normally, to amend a statute that has become law by way of Article 19 of the Nevada Constitution, the amendments would need to become law in the same way.⁴³⁴ However, it is the general opinion of this Paper that the provision does in fact lawfully grant the power it purports to.

First, the “[n]otwithstanding” language does not impose any condition or limitation, so regardless of whether it was imprecisely worded, the people of Nevada voted and approved of the provision’s main two clauses: “[A]fter January 1, 2017, the Legislature *may amend provisions of this act* to provide for the conditions in which a locality may permit consumption of marijuana in a retail marijuana store.” While the Legislature could not grant this amendment power to itself with lawful effect, there does not immediately appear to be an issue with the people lawfully granting the legislature that power.

More in-depth analysis on this peculiar provision in Nevada’s Regulation and Taxation of Marijuana Act is beyond the scope of this Paper. However, given its potential critical importance in facilitating a social-consumption industry in Nevada in the 2019 legislative session, this Paper will assume that the provision lawfully grants the legislative authority to amend the Act as it purports to do. The first of this Paper’s general categories of recommendations for Nevada will rely on this authority, but lawmakers should nonetheless proceed cautiously until more thorough analysis is available.

The second potential avenue of legislative action would be to revisit the basic concept underlying S.B. 236, which would have added a new section to Chapter 244 of NRS (which includes, among other things, grants of specific authority to license, regulate, and tax certain types of businesses⁴³⁵) expressly granting local governments the authority to license and regulate social-consumption establishments.⁴³⁶ This approach would at least avoid the potential

⁴³³ See Contine Letter, *supra* note 420, at 3 (“[I]t *appears* that legislative action may only be permitted [before 2020] to allow consumption in a retail store based on the plain language of the initiative[.]” (emphasis added)); Zunino, *supra* note 431, at 1 (“With one *possible* exception, as suggested in [Director Contine’s] letter, the Department [of Taxation] does not regulate the time, place or manner of consumption of marijuana.” (emphasis added)).

⁴³⁴ NEV. CONST. art. 19, § 2, cl. 3 (“An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within 3 years from the date it takes effect.”).

⁴³⁵ See, e.g., NEV. REV. STAT. § 244.350–.352 (2016) (providing for the grant of, and limitations on, the authority of local governments to issue licenses and regulate the sale of liquor).

⁴³⁶ S.B. 17-063 § 1, 71st Gen. Assemb., Reg. Sess. (Colo. 2017).

constitutional issue of amending the Regulation and Taxation of Marijuana Act pursuant to NRS 453D.200. However, it will prove only as useful as the operation of social-consumption establishments proves legal under the present version of the Act. In particular, the Act's definition of "public place"—depending on how Nevada courts interpret it—may potentially prove fatal to this latter approach.⁴³⁷

b. Rulemaking Authority

Like the legislature, Nevada's Department of Taxation has potentially two avenues by which to facilitate at least a first-stage solution to the social-consumption problem. And like the legislature's first potential path, the Tax Department's first path is tied to NRS 453D.400(8), which, as discussed above, potentially grants to the legislature the authority to amend the provisions of the Regulation and Taxation of Marijuana Act, prior to 2020, solely for the purpose of "provid[ing] for the conditions in which a locality may permit consumption of marijuana in a retail marijuana store."⁴³⁸

To the extent that NRS 453D.400(8) does effectively grant the legislature authority to amend the Marijuana Act in 2019, and if the 2019 legislature ultimately enacts such amendments, the Department of Taxation should, as part of those amendments, be granted additional rulemaking and oversight authority to implement the amendments.⁴³⁹ Even though the provision does not expressly mention the Department (it only mentions localities), the Department does have general licensing and regulatory authority over retail marijuana stores.⁴⁴⁰ Therefore, the Department should have at least a minimum level of oversight authority over the consumption of marijuana on the premises of retail marijuana stores.⁴⁴¹

In absence of any extension of the Department's regulatory authority by way of legislative action (whether in 2019 or beyond), the Department may not have any authority over social-consumption establishments. As discussed above, this is the current Attorney General's position.⁴⁴² Nonetheless, Nevada's next Attorney General may perhaps be more open to persuasion to an argument

⁴³⁷ See discussion *infra* Section III.B.

⁴³⁸ NEV. REV. STAT. § 453D.400(8) (2017).

⁴³⁹ See, e.g., NEV. REV. STAT. § 453D.020(3)(c) ("The People of the State of Nevada proclaim that marijuana should be regulated in a manner similar to alcohol so that . . . [c]ultivating, manufacturing, testing, transporting and selling marijuana will be strictly controlled through state licensing and regulation[.]").

⁴⁴⁰ See NEV. REV. STAT. § 453D.200.

⁴⁴¹ See, e.g., NEV. REV. STAT. § 453D.020(3)(c); see also, generally, Zunino, *supra* note 431, at 1 ("The possible exception [to the Department's lack of authority over the time, place or manner of consumption of marijuana] relates to situations in which the owner and operator of a licensed retail . . . facility seeks to operate a [consumption] club or similar business where marijuana consumption is permitted in close proximity to the retail . . . facility.").

⁴⁴² Zunino, *supra* note 431, at 1 ("[T]he Department [of Taxation] does not [have the authority to] regulate the time, place or manner of consumption of marijuana.").

that the Department has at least some authority under Nevada's current law.

In light of the Act's provisions prohibiting public consumption of marijuana, the Department of Taxation should be able to argue that, to help enforce any unlawful public consumption, regulations are needed to provide tourists with "non-public" places to consume marijuana that they have lawfully purchased. This authority would seem to be supported, at least generally speaking, by language in the Act's findings and declarations: for instance, that "[t]he People of the State of Nevada find and declare that the *use* of marijuana should be legal for persons 21 years of age or older[.]"⁴⁴³ This argument is probably a stretch, except perhaps with respect to specific, limited additions and/or changes to the regulations governing Nevada's recreational marijuana industry in general.

c. Local Governments

A provision of Las Vegas's 2017 draft consumption-lounge ordinance included, perhaps somewhat redundantly, a succinct statement of the limitations of such a local-level solution in the absence of any changes to present state-level laws and regulations:

Nothing in this Chapter is intended to limit the application of State law and regulations governing marijuana [Consumption lounges] are subject to the compliance with State law and regulations in accordance with the terms thereof, notwithstanding any provisions of the Chapter that pertain specifically to and are an exercise of the City's licensing and regulatory powers and jurisdiction.⁴⁴⁴

As such, lawmakers at the local level should proceed cautiously (as they have⁴⁴⁵), and only to the extent they are comfortable that a limited social-consumption-lounge industry is lawful under the current Marijuana Act and its accompanying regulations.⁴⁴⁶ But regardless of whether Nevada courts would agree with the LCB's conclusion that local governments can lawfully implement and regulate a social-consumption industry in the absence of further state-level action, such an industry would, as a practical matter, be severely constrained by the limitations of Nevada's current laws—which were not drafted with an eye toward social-consumption establishments. As explored below in subsequent sections, these limitations are quite restrictive, and tourists may not be enticed to consume marijuana in such "bare bones" social-consumption establishments.

Local governments will ultimately play a significant role in licensing, regulating, and zoning any social-consumption industry in Nevada, as they al-

⁴⁴³ NEV. REV. STAT. § 453D.020(1) (emphasis added).

⁴⁴⁴ *L.V. Draft Ordinance*, *supra* note 231, § 1 (6.96.100).

⁴⁴⁵ See, e.g., Chris Kudialis, *Las Vegas Officials Say No Pot Lounges Until 2019, Despite Openings in Colorado, Massachusetts*, L.V. Sun (Mar. 5, 2018, 2:00 AM) <https://lasvegas.sun.com/news/2018/mar/05/las-vegas-officials-say-no-pot-lounges-until-2019/> [<https://perma.cc/5RNJ-GUBP>].

⁴⁴⁶ See generally Contine Letter, *supra* note 420.

ready do for other marijuana establishments.⁴⁴⁷ Especially if the Nevada Legislature takes action in 2019 pursuant to NRS 453D.400(8), subject to enacted conditions, it will fall on local governments to determine whether and how, specifically, to “permit consumption of marijuana in . . . retail marijuana store[s].”

5. *Suggested Approaches for Nevada*

On the one hand, Nevada’s local governments are better equipped to balance the needs and concerns of the industry with the needs and concerns of local residents. On the other hand, Nevada’s Department of Taxation is better equipped to license and regulate the industry uniformly across the state. Local governments are generally concerned that granting primary regulatory and licensing authority to a state agency may encroach on their ability to limit or prohibit altogether a social-consumption lounges.⁴⁴⁸ State lawmakers and regulators are generally concerned that granting primary authority to local governments may lead to a situation where licensing requirements, regulations, and penalties could be different across counties.⁴⁴⁹ An ideal approach to social consumption in Nevada should attempt to strike a balance between these competing interests.

This Paper proposes a state-level legislative solution that follows the general approach of Colorado’s S.B. 17-063. As discussed above, under S.B. 17-063, local governments would be primarily responsible for regulating consumption establishments, while the relevant state agency would have the general regulatory authority necessary to ensure uniform, state-wide compliance with certain minimum licensing and regulatory requirements. This approach is ideal because of its flexibility in striking a proper balance between the need for state-wide uniformity and the divergent local concerns represented by Nevada’s widely dissimilar rural and urban counties.

The basic approach taken in S.B. 17-063 also comports with the statutory language in NRS 453D.400(8), which suggests that local governments should have primary regulatory authority over the consumption of marijuana in a marijuana retail store. This means that the legislature should make only the mini-

⁴⁴⁷ See generally, e.g., *Marijuana Licenses*, CITY OF L.V., NEV., https://www.lasvegasnevada.gov/portal/faces/wcnav_externalId/bl-med-marijuana [<https://perma.cc/D9RB-CGHN>] (last visited Apr. 18, 2018).

⁴⁴⁸ See, e.g., *Hearing on S.B. 236 Before the S. Comm. on Judiciary*, 2017 Leg., 79th Leg. Sess. (Nev. Mar. 9, 2017) (statement of Denny Doston, Director of Tourism, City of Virginia City) (“Virginia City[, Nevada] is a local treasure and national landmark. We have worked hard over the last 150 years to create a family-oriented atmosphere where folks can step back in time. Rural Nevada means something to a lot of people, including overseas tourists. We present a lot of unique, fun family events. We need to protect against vendors and shops that could drastically change that environment.”).

⁴⁴⁹ See, e.g., *id.* (statement of Sen. Becky Harris, Member, S. Comm. on Judiciary) (“Are we looking at the possibility that penalty schemes could be different in every county, or would there be some statewide uniformity?”).

num changes to NRS 453D as are necessary to make consumption in a retail store lawful. Additionally, however, because retail marijuana stores will be involved, the Department of Taxation will have an implied authority to carry out the intent of the legislature in setting out the specific conditions that local governments must first meet. As such, the Department should have, under a newly added subsection to NRS 453D.200, general rulemaking and regulatory authority over marijuana consumption in retail stores. It is unclear, however, the extent to which the Department may have general licensing authority over on-site consumption under NRS 453D.400(8). This Paper therefore proposes the following procedure for the issuance of onsite consumption endorsements.

First, a local government should submit a proposed ordinance to the Department of Taxation for approval. The legislature should add a new subsection (7) to NRS 453D.210 setting out the minimum statutory conditions and requirements with which the ordinance must comply before the Department may approve it. Second, the local government must enact the ordinance. The legislature should add, as a subsection (8) to NRS 453D.210, a general “local control” provision that expressly precludes the Department from granting a consumption endorsement to any retail marijuana store located in a county that has not given lawful effect to an ordinance approved by the Department under subsection (7). Third, retail marijuana stores will apply to the local government for onsite-consumption permits, and the local government will issue permits pursuant to the ordinance. Finally, before it may lawfully begin allowing onsite consumption, a marijuana retail store with a local onsite consumption permit must apply to the Department for an onsite consumption endorsement. The application should contain all relevant information about that retail store’s compliance with all state and local requirements for onsite consumption. The primary purpose of the state-issued endorsement would be for the Department to maintain continually-updated records and to exercise a minimum level of control over onsite consumption in retail stores. The legislature should add a subsection (9) to NRS 453D.210 setting out the application requirements for obtaining an onsite-consumption endorsement. The legislature should also add a subsection (9) to NRS 453D.400 making it unlawful for a retail marijuana store to permit consumption of marijuana on the premises without a state-issued onsite consumption endorsement.

This structure will give the Department the minimum level of oversight necessary to ensure uniformity across the state while largely leaving discretion to local governments over whether and how consumption in retail stores in that should be permitted. Additional specific suggestions to implement this approach are explored in the following Sections in this Part III.

A more limited variation on the above approach would be to add a sunset provision⁴⁵⁰ to the suggested changes and treat the changes, at least in 2019, as creating a temporary pilot program. Denver’s ordinance provides an excellent

⁴⁵⁰ See, e.g., DENVER, COLO., MUN. CODE § 6-319 (2017).

pilot-program model for this variation.⁴⁵¹ If lawmakers adopt this approach, they should also look to the Denver ordinance's provisions on the task force created to collect data and evaluate the successes and failures of the program.⁴⁵²

The general alternative to S.B. 17-063 would be Oregon's S.B. 307, which places oversight authority almost exclusively at the state level. Although it grants local governments the option to preclude the state authority from licensing social-consumption establishments in that local jurisdiction, its approach would not provide the general flexibility that would be necessary to accommodate the diverse needs of both Nevada's urban and rural counties.⁴⁵³ Moreover, this approach would likely not be permissible under NRS 453D.400(8) and therefore could not be implemented until Nevada's 2021 legislation session.

Nevada's S.B. 236 is ultimately insufficient as a long-term solution because it would not grant any oversight authority whatsoever to the Department of Taxation. At a minimum, the Department of Taxation should have the authority to require local governments to regularly provide the Department with updated lists of licensed consumption establishments across the state. Without a new statutorily-defined, state-issued license specifically for social-consumption establishments, S.B. 236 would likely lead to not only widely disparate licensing and regulatory requirements, but also, potentially, wholly inadequate requirements. S.B. 236's local-government approach would likely lead to less uniformity and more uncertainty in an entirely new body of law that may come under heavy scrutiny by the federal government. And, of course, all of this assumes that S.B. 236's approach is even legal under the present version of Chapter 453D of NRS. As explored in the next Section, a social-consumption industry may be unlawful in the absence of legislative action.

As a practical matter, the Nevada Legislature may continue to take no further legislative action on the social-consumption issue, leaving a significant open-ended question regarding whether local governments can in fact lawfully authorize consumption of marijuana in the type of establishment contemplated under Las Vegas's draft ordinance. In that case, the Department of Taxation could, potentially, explore the possibility of implementing whatever new regulations it may lawfully issue pursuant to its general rulemaking authority under NRS 453D.200. Several suggestions are explored below in later Sections. Nonetheless, without legislative action, the Department's authority to regulate social consumption will likely prove quite limited, and local governments may be unable to lawfully act on their own.

⁴⁵¹ See generally *id.* §§ 6-300 to -319 (2017).

⁴⁵² *Id.* § 6-317.

⁴⁵³ For states with more uniformly populated and "like-minded" counties, Oregon's S.B. 307 does provide an excellent model, or at least a starting point, for how a "local control" provision might be drafted. Additionally, S.B. 307's local-control provision could prove useful for counties in which diverse and/or divergent social values co-exist and represented by different municipal governments.

B. Nevada's Statutory Prohibition on Public Consumption of Marijuana

Under Nevada's current Regulation and Taxation of Marijuana Act, persons are prohibited from "smok[ing] or otherwise consum[ing] marijuana in a public place, in a retail marijuana store, or in a moving vehicle."⁴⁵⁴ Any person who violates this prohibition "is guilty of a misdemeanor punished by a fine of not more than \$600."⁴⁵⁵ The Act elsewhere defines "public place" as "an area to which the public is invited or in which the public is permitted regardless of age."⁴⁵⁶ The Act specifically excludes "retail marijuana stores"⁴⁵⁷ from that statutory definition.⁴⁵⁸ As explored in this Section, Nevada's legislators may have to amend these provisions directly before a social-consumption industry will be possible in Nevada.

1. Legal Barriers in Nevada

If social-consumption establishments are within the meaning of the statutory definition of "public place," then those establishments may be unlawful absent legislative action. An ambiguity exists in the phrasing of this definition, and two alternate interpretations are possible in light of what, precisely, the modifier "regardless of age" applies to. Under the first possible interpretation, a place is a "public place" if it is "an area to which the public is *invited* [*regardless of age*] or in which the public is *permitted regardless of age*." This interpretation would suggest that an age restriction on entry would be sufficient to disqualify a place from the definition. Alternatively, under the second interpretation, a place is a "public place" if it is "an area to which *the public* [*regardless of age*] is invited or in which the *public* [*regardless of age*] is permitted . . ." This latter interpretation would suggest that an age restriction alone would not be sufficient to disqualify a place from the definition.

Nevada lawmakers have not reached a strong consensus on this critical question one way or the other, and it is not at all yet clear how broadly or narrowly the Nevada Judiciary might construe the statutory definition of public place. In its 2017 letter to Senator Segerblom (discussed in the last Section), Nevada's Legislative Counsel Bureau concluded that "it is the opinion of this office that a business may [lawfully] establish and operate a lounge . . . at which patrons of the business are allowed to use marijuana."⁴⁵⁹ In support of that conclusion, the LCB reasoned that:

⁴⁵⁴ NEV. REV. STAT. § 453D.400(2) (2017).

⁴⁵⁵ *Id.*

⁴⁵⁶ NEV. REV. STAT. § 453D.030.

⁴⁵⁷ Also defined in the Act, a "retail marijuana store" is "an entity licensed to purchase marijuana from marijuana cultivation facilities, to purchase marijuana and marijuana products from marijuana product manufacturing facilities and retail marijuana store, and to sell marijuana and marijuana products to consumers." *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ LCB Opinion Letter, *supra* note 232, at 4.

Th[e statute’s “public place”] language would not prohibit the possession or use of marijuana at a place to which the public is not invited or permitted, including a person’s home or a lounge or other facility with restricted access, such as a private lounge or other facility, which is closed to the public and only allows entry to persons who are 21 years of age or older, so long as the possession or consumption of marijuana at such a location is not exposed to public view.⁴⁶⁰

Implicit in the analysis here is a possible ambiguity in the statutory language: Is a general age restriction by itself sufficient to disqualify a social-consumption establishment from the statutory definition of public place? Or must the admittance to the establishment be limited to “members only”? Or would even a members-only restriction fail to disqualify an establishment from the definition? There does not appear to be a clear answer to these questions, and even the LCB opinion does not appear to be internally consistent regarding its answers.⁴⁶¹

In a hearing on S.B. 236, Senator Segerblom testified that, to his understanding of the prohibition on public consumption of marijuana, “[i]t is illegal [under current Nevada law] to use marijuana anyplace but your home. By definition, tourists do not have local homes and cannot use marijuana in their hotel rooms, casinos, walking on The Strip or even out in the desert.”⁴⁶² Senator Segerblom was not then, and is not now, alone in having that understanding of the law. For instance, Director Contine’s letter to Attorney General Laxalt notes that “[a] spokesperson for the initiative has mentioned that the language was intended to mean that even a business that is open only to people 21 or older would qualify as a “public place.”⁴⁶³ Significantly, Nevada’s current Governor, Brian Sandoval, agrees with that understanding of the law, and not

⁴⁶⁰ *Id.* at 2.

⁴⁶¹ Compare in-text quotation accompanying *supra* note 460, with *id.* (“[I]t is the opinion of this office that a business may [lawfully] establish and operate a lounge or other facility or special event at which patrons [aged 21 and over] of the business are allowed to use marijuana.”). Moreover, if correct, the LCB’s opinion would seem to suggest that, even in the absence of a local ordinance expressly permitting social consumption in certain business establishments, a proprietor could lawfully open and operate a social-consumption establishment under a general business license, provided only that the local jurisdiction has no ordinance expressly prohibiting such establishments. See LCB Opinion Letter, *supra* note 232 (“[I]t is the opinion of this office that a business *may* establish and operate a lounge . . . at which patrons of the business are allowed to use marijuana.” (emphasis added)); *id.* (“[I]t is the opinion of this office that counties, cities and towns *may* require a business that wishes to operate a [social-consumption] lounge . . . to secure a license or permit before commencing operation.” (emphasis added)). This conclusion seems questionable.

⁴⁶² *Hearing on S.B. 236 Before the S. Comm. on Judiciary*, 2017 Leg., 79th Leg. Sess. (Nev. Mar. 9, 2017) (statement of Sen. Richard “Tick” Segerblom, Chair, S. Comm. on Judiciary).

⁴⁶³ Contine Letter, *supra* note 420, at 3; see also, e.g., *id.* (“This [interpretation] is consistent with the argument in support of ballot initiative which says: ‘To enhance public safety, the initiative: . . . prohibits the use of marijuana in public.’” (emphasis added) (quoting STATE OF NEV., 2016 STATEWIDE BALLOT QUESTIONS, at 18 (2016))); 2016 STATEWIDE BALLOT QUESTIONS, *supra* at 15 (“Criminal offenses would include . . . public consumption of marijuana[.]” (emphasis added)).

the LCB's.⁴⁶⁴ But perhaps most significantly, the statutory language itself seems to support this latter interpretation—and *not* the LCB's.

Without context, the specific exemption for retail marijuana stores from the definition of public place might seem somewhat peculiar. However, the exemption begins to make sense when considered alongside another provision of the Act: NRS 453D.400(8), which as discussed in depth above, provides that “the Legislature may amend provisions of this act to provide for the conditions in which a locality may permit *consumption of marijuana in a retail marijuana store*.”⁴⁶⁵ Considered in light of NRS 453D.400(8), the specific exemption for retail marijuana stores seems to be anticipating the amendments that NRS 453D.400(8) purports to authorize: Given the original definition, the legislators who ultimately decide to amend the statutes pursuant to NRS 453D.400(8) need only strike out “a retail marijuana store” from the prohibition against consuming marijuana “in a public place, in a retail marijuana store, or in a moving vehicle.”

But even more fundamentally, like age-restricted consumption lounges under both S.B. 236 and Las Vegas's draft ordinance, retail marijuana stores also must restrict access to persons aged twenty-one or older.⁴⁶⁶ The LCB opinion acknowledges this: “[W]hile a retail marijuana store would fall into this category of businesses which impose restrictions for entry on the basis of age, consumption of marijuana within a retail marijuana store is specifically prohibited by NRS 453D.400.”⁴⁶⁷ But NRS 453D.400(2) is sufficient by itself to prohibit consumption in retail marijuana stores, and the LCB opinion does not substantively address *why* NRS 453D.030's *definition* of public place specifically excludes retail marijuana stores.⁴⁶⁸ If an age restriction alone were sufficient to disqualify marijuana retail stores from the definition of public place, then for what purpose did the original definition expressly exclude them? The LCB's interpretation—that an age restriction alone would make any establishment, including a retail marijuana store, a non-public place—seems to render the exclusion of marijuana retail stores from the definition of public place either meaningless or redundant. And this conclusion places the LCB's interpretation in violation of at least one principle of statutory interpretation endorsed by the Supreme Court of Nevada.⁴⁶⁹

⁴⁶⁴ See Hoffman, *supra* note 428, at 15.

⁴⁶⁵ NEV. REV. STAT. § 453D.400(8) (2017) (emphasis added).

⁴⁶⁶ *Id.* § 453D.020(1).

⁴⁶⁷ LCB Opinion Letter, *supra* note 232, at 3.

⁴⁶⁸ See *id.* at 2.

⁴⁶⁹ Nevada courts interpret statutes as follows:

When “the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended.” However, if a statute “is ambiguous, the plain meaning rule of statutory construction” is inapplicable, and the drafter's intent “becomes the controlling factor in statutory construction.” An ambiguous statutory provision should also be interpreted in accordance “with what reason and public policy would indicate the

There is, however, perhaps a valid argument that the LCB's interpretation is supported by the "the context and the spirit of the law or the causes which induced the Legislature to enact it."⁴⁷⁰ The Nevada Supreme Court does appear willing to give at least some deference to LCB opinion letters.⁴⁷¹ However, the fact that the statute being interpreted here was enacted directly by Nevada voters through an initiative might weigh against deference.⁴⁷² Moreover, the LCB does not directly address why, under its interpretation of the Act, the definition of public place expressly excludes a retail marijuana store.⁴⁷³ Further contradicting the LCB's opinion (perhaps persuasively), is the fact that legislation proposed in at least two other states would have added exemptions to their respective statutes prohibiting public consumption (which are fairly similar to Nevada's⁴⁷⁴) specifically for marijuana use in consumption establishments.⁴⁷⁵

It is the opinion of this Paper that, for the reasons above, social-consumption establishments—at least as contemplated under S.B. 236 and Las

legislature intended." Additionally, we "*construe statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.*" Further, *no part of a statute should be rendered meaningless* and its language "should not be read to produce absurd or unreasonable results."

Harris Assocs. v. Clark Cty. Sch. Dist., 81 P.3d 532, 534 (Nev. 2003) (emphasis added) (footnotes omitted) (quoting several cases).

⁴⁷⁰ Leven v. Frey, 168 P.3d 712, 716 (Nev. 2007) (quoting McKay v. Bd. Of Supervisors, 730 P.2d 438, 443 (Nev. 1986)); see Contine Letter, *supra* note 420, at 2 ("When read together, [NRS 453A.300, 453D.030, and NRS 453D.400] prohibit the possession or consumption of marijuana at a place where the public is invited or in which the public is permitted regardless of age or a place exposed to public view."). A potential weak point in the LCB's suggestion that provisions of NRS 453A and 453D be "read together" is in a provision of NRS 453D: "Nothing in the provisions of this chapter shall be construed as in any manner affecting the provisions of chapter NRS 453A of NRS relating to the medical use of marijuana." NEV. REV. STAT. § 453D.100(3) (2017).

⁴⁷¹ See Nevada Attorney for Injured Workers v. Nevada Self-Insurers Ass'n, 225 P.3d 1265, 1269–71 (Nev. 2010); Cable v. State ex rel. its Employers Ins. Co. of Nev., 127 P.3d 528, 532–33 (Nev. 2006).

⁴⁷² See L.V. Convention & Visitors Auth. v. Miller, 191 P.3d 1138, 1146–47 (Nev. 2008).

⁴⁷³ See LCB Opinion Letter, *supra* note 232, at 1–2.

⁴⁷⁴ See, e.g., COLO. REV. STAT § 18-18-406(5)(b)(I) (2016) (providing that it is unlawful to "openly and publicly display[], consume[], or use[]" marijuana); see also, e.g., OR. REV. STAT. § 475B.280(1) (2017) (similarly providing that "[i]t is unlawful . . . to engage in the use of marijuana items in a public place."); *id.* § 475B.015(32) (defining "public place" as a place to which the general public has access and includes, but is not limited to, hallways, lobbies and other parts of apartment houses and hotels not constituting rooms or apartments designed for actual residence, and highways, streets, schools, places of amusement, parks, playgrounds and areas used in connection with public passenger transportation").

⁴⁷⁵ See S.B. 17-063 § 10, 71st Gen. Assemb., Reg. Sess. (Colo. 2017) (proposing amendment to CRS 18-18-406(5)(b) to provide that "[p]ublic display, consumption or use of up to one ounce of marijuana in a business licensed [as a consumption club] is not a violation of this subsection (5)(b)"); S.B. 307 § 4, 2017 Leg., 79th Sess. (Or. 2017) (proposing addition of an exception to ORS 475B.280's prohibition on public consumption for "the use of marijuana items in designated areas of a [licensed consumption lounge]. . .").

Vegas's draft ordinance⁴⁷⁶—are “public places” as defined in NRS 453.030(17). Thus, because consuming marijuana in such an establishment would qualify as a misdemeanor under NRS 453D.400(2), such unlawful use of marijuana⁴⁷⁷ in such an establishment would render the opening and operation of that establishment unlawful (a felony) under NRS 453.316(1).⁴⁷⁸ Therefore, as proposed, S.B. 236 and Las Vegas's draft ordinance may not even clear the first major hurdle for implementing a social-consumption industry in Nevada.

In reliance on the Nevada LCB opinion, a local government might nonetheless forgo the wait for direct statutory change and issue an ordinance sanctioning and regulating social-consumption lounges.⁴⁷⁹ However, a plaintiff with standing might be able to bring a successful mandamus action against that local government for failing to enforce a strict construction of the public-consumption prohibition. If a Nevada court disagreed with the LCB's interpretation, then that plaintiff would have a good argument for compelling enforcement of NRS 453D.400(2), which unambiguously provides that a person who consumes marijuana publicly “is guilty of a misdemeanor *punished* [i.e., as opposed to “punishable”⁴⁸⁰] by a fine of not more than \$600.” This language suggests that the statute does not grant enforcement discretion to local governments.⁴⁸¹ A Nevada court might therefore agree with other concerned citizens

⁴⁷⁶ Whether additional “members-only” restrictions on entry to an establishment would render an establishment a non-public place under NRS 453D.030 is a question beyond the scope of this Paper. However, this Paper is skeptical of such a “solution,” primarily because, in practice, members-only restrictions tend to prove merely ostensible, and not actual, “restrictions.” See, e.g., Staff, *Members-Only Marijuana Clubs Open in Colorado*, DENVER POST (Dec. 31, 2012, 10:15 AM), <https://www.denverpost.com/2012/12/31/members-only-marijuana-clubs-open-in-colorado/> [<https://perma.cc/JY68-DK6K>] (noting that a “members-only group smoking” club was “not open to the public” because its “200 members over age 21 . . . paid \$29.99 for a one-time club event” and further reporting that “[n]early an hour after opening, no police were seen outside” the club). Is an indoor concert venue not a “public place” simply because it charges an entry fee? Do calling that entry fee a “membership” fee change that outcome?

⁴⁷⁷ NRS 453D.110 does provide that “[n]otwithstanding any other provision of Nevada law . . . it is [generally] lawful, in this State . . . to . . . consume . . . marijuana[.]” but it includes one important exception: “*except as otherwise provided in this chapter.*” NEV. REV. STAT. § 453D.110(1) (2017) (emphasis added).

⁴⁷⁸ NEV. REV. STAT. § 453.316 (providing that it is unlawful for any person to “open[] or maintain[] any place for the purpose of *unlawfully* . . . using any controlled substance . . .” (emphasis added)).

⁴⁷⁹ See generally, e.g., *L.V. Draft Ordinance*, *supra* note 231.

⁴⁸⁰ See, e.g., NEV. REV. STAT. § 388.1459 (2017).

⁴⁸¹ *C.f.* State v. Johnson, 346 P.2d 291, 292 (Nev. 1959) (“Where the penal statute gives no discretion to the trial court in fixing the punishment, it would be proper for this court without remand to modify the sentence to conform to the statute. . . . In this case, however, the applicable statute does give discretion, limited as it is to the amount of the fine.”).

who have voiced their opposition to what has been considered by some to be artful efforts that appear to circumvent the express statutory prohibition on public consumption.⁴⁸²

2. Proposed Solutions for Nevada

Local governments do not have the authority to change or interpret the statutory definition of “public place.” Amending the definition to exclude the premises of stand-alone consumption establishments will have to take place legislatively and will therefore have to wait until 2021. However, as discussed above, legislators could amend the Act in 2019 pursuant to NRS 453D.400(8), which plainly purports to allow pre-2020 amendments to the Act for the limited purpose of “provid[ing] for the conditions in which a locality may permit consumption of marijuana in a retail marijuana store.”

Amending the Act to render such consumption lawful seems implied, because without that authority the provision would appear meaningless (or at least superfluous). As such, legislators could directly address the public-consumption hurdle by making the following amendment to NRS 453D.400:

A person who smokes or otherwise consumes marijuana in a public place ~~[, in a retail marijuana store.]~~ or in a moving vehicle is guilty of a misdemeanor punished by a fine of not more than \$600.⁴⁸³

Because a retail marijuana store is exempt from the definition of public place, this amendment (in conjunction with several other related necessary legislative amendments explored in later Sections below) would allow for lawful consumption in a retail marijuana store.

Although not a required change, Nevada’s legislators might also consider amending the definition of public place to remove any ambiguity about what does and does not constitute a public place. Such an amendment would likely be lawful pursuant to NRS 453D.400(8) because it would “provide for the conditions in which a locality may [not] permit consumption.” An amendment to the presently somewhat ambiguous definition of public place could better clarify that, in light of NRS 453D.400(8), standalone consumption lounges like those under Las Vegas’s draft ordinance (i.e., that are not retail marijuana stores) are not legal under NRS 453D.400(2). Alternatively, legislators could simply delegate the authority to clarify the definition to the Department of Taxation. Either way, lawmakers may find several variations on statutory definitions of public places from marijuana law in other jurisdictions.

⁴⁸² E.g., *Hearing on S.B. 236 Before the S. Comm. on Judiciary*, 2017 Leg., 79th Leg. Sess. (Nev. Mar. 9, 2017) (statement of Grace Crosley, Nevadans for Informed Marijuana Regulation) (“Testifiers [today] have said they are confused by provisions in S.B. 236 that exempt from prosecution business owners who allow consumption of marijuana. That is the legal mechanism by which we are getting around the fact that the terms of Question No. 2 may not be altered for 3 years. It is legal trickery to circumvent what voters approved.”).

⁴⁸³ This Paper proposes a more nuanced change, as found in Appendix A to this Paper.

Although this Paper does not endorse the following alternative solution, the approach taken in Las Vegas's draft ordinance might find better support if the Department of Taxation takes limited action. Given the potential ambiguity in the statute's definition of public place, the Department might consider formally adopting the LCB's interpretation of the definition of public place by issuing a new regulation. For instance, such a regulation might qualify the statutory definition as follows:

*The premises of a business are not a public place within the meaning of NRS 454D.030 if the interior of the premises is not visible from the outside and if the business invites or permits only patrons aged twenty-one and older.*⁴⁸⁴

However, given the current Attorney General's position and this Paper's analysis of the statutory language, this approach is perhaps ill-advised, notwithstanding the LCB opinion.

This Paper's proposed solution for 2019 is limited to expanding the scope of retail marijuana stores to possibly include separately licensed designated consumption areas within the retail stores. This Paper does ultimately suggest that the retail-consumption hybrid approach, if thoughtfully planned and implemented, is best for Nevada (for various reasons, as explored below, including that it may lead to fewer instances of driving under the influence of marijuana). However, this Paper also acknowledges that there are valid reasons to maintain a strict separation between retail and consumption establishments. If lawmakers ultimately disagree with this Paper's suggested approach, they could amend Nevada law to accommodate lawful consumption in standalone consumption lounges in 2021. This approach would simply require lawmakers to add a carveout to the public-consumption prohibition for licensed consumption lounges.

This Paper suggests that the best approach would be to implement the limited changes that may prove permissible in 2019 and use the retail-store approach as a pilot program, laying the foundation for more comprehensive changes in 2021. As explored in the next Section, this Paper would suggest that lawmakers take a two-step approach: lawmakers could amend Nevada law in 2019 as this Paper suggests and then add new amendments in 2021 that would also provide for standalone consumption lounges.

⁴⁸⁴ Compare the language of this proposed clarification with an example of language providing for precisely the opposite regarding members-only clubs:

For purposes of this subsection, and notwithstanding any other provision of law, a private club, which includes any building, facility, or premises used or operated by an organization or association for a common avocational purpose, such as a fraternal, social, educational, or recreational purpose, is a place to which the public is invited; provided, that a private club does not include a private residence.

D.C. CODE § 48-911.01(a)(3) (2018).

C. *Points of Production, Sale, and Consumption*

Although Nevada's Regulation and Taxation of Marijuana Act does not currently allow marijuana use on the premises of retail marijuana stores, as explored in the last Section, one provision in particular, NRS 453D.400(8), seems to anticipate (and, arguably, even necessitate) a hybrid retail-consumption approach in Nevada. This approach is a significant departure from that taken by Nevada's lawmakers in S.B. 236, which would have required consumption-establishment patrons to first purchase their marijuana in a standalone retail business and then travel with their marijuana to a standalone consumption lounge. This "bring your own" model to social consumption is the minority approach, reflected in S.B. 236 and Oregon's S.B. 307. If Nevada lawmakers ultimately decide that a hybrid approach is preferable for Nevada, they have several bills, regulations, and ordinances to take inspiration from, including, most notably, Alaska's proposed regulations, West Hollywood's ordinance, and San Francisco's ordinance.

1. *Legal Barriers*

Assuming that NRS 453D.400(8) does in fact grant the authority that it purports to, Nevada's legislators may address the primary barrier to an approach providing for a point of purchase and consumption in one premises as soon as 2019. Legislators will have to wait until the 2021 session, however, to address the barriers currently prohibiting a single point of consumption and production (and/or cultivation). The archetypal Amsterdam "coffeeshops" (that sell so-called "space cakes" baked onsite)⁴⁸⁵ will therefore not be a component of Las Vegas's recreational marijuana industry any time soon. However, if in 2021 Nevada's legislators decide that they *should* be a part of Las Vegas's marijuana-tourism industry, several provisions in NRS 453D will stand in their way.

The first statutory obstacle precluding a hybrid production-consumption establishment is the definition of public place. Because neither marijuana production nor cultivation facilities are excluded from that definition (unlike, specifically, retail marijuana stores), marijuana consumption on certain areas of those premises would, under at least this Paper's analysis,⁴⁸⁶ be unlawful. The second obstacle is the definition of "marijuana product manufacturing facility" itself, which expressly prohibits such establishments from selling marijuana and mari-

⁴⁸⁵ See generally, e.g., Thijs Roes, *Meet the People Revolutionizing Weed Edibles in Amsterdam*, VICE: MUNCHIES (UK) (Oct. 3, 2016, 2:00 AM), https://munchies.vice.com/en_uk/article/qknje5/meet-the-people-revolutionizing-weed-edibles-in-amsterdam [https://perma.cc/QA8R-E2XM].

⁴⁸⁶ As noted by Director Contine, under the LCB's competing interpretation, "it [would] seem[] that [Chapter 453D of NRS] would allow for use at licensed marijuana establishments other than retail stores even without a separate business license . . ." Contine Letter, *supra* note 420, at 2.

juana products directly to consumers.⁴⁸⁷

Additionally, hybrid production-consumption establishments in Nevada would create a host of regulatory challenges for the Department of Taxation. First, without changes to the regulations, such an establishment would subject to the same labeling, packaging, and testing requirements as those for products sold for offsite consumption.⁴⁸⁸ Such regulations are as important as they are extensive, but they were not written with the Amsterdam bakery in mind. For instance, if such a bakery/consumption establishment were subject to existing regulations for marijuana products sold for consumption offsite, then that bakery would be required to send a sample from each batch of freshly baked marijuana product to a testing facility,⁴⁸⁹ await the results, and then portion, package, and properly label those products. These regulations would be even more prohibitive on a restaurant-concept twist on the bakery concept (i.e., a restaurant that cooks made-to-order, marijuana-infused dishes). This procedure hardly conforms to the romantic notion of Amsterdam's gritty coffeeshop bakeries (which are generally unregulated, and even technically illegal⁴⁹⁰).

2. *Proposed Solutions for Nevada*

In light of NRS 453D.800(8)'s language—which at least purportedly grants to the legislator the authority to amend relevant provisions of Chapter 453D in 2019 “to provide for the conditions in which a locality may permit consumption of marijuana in a retail marijuana store”—this Paper proposes that Nevada adopt the hybrid retail-consumption approach exemplified by Alaska's proposed regulation. Among the hybrid approaches, Alaska's regulation (which would allow Alaska's existing retail marijuana stores to apply for newly defined “onsite consumption endorsements” authorizing the addition of designated areas for consumption) in particular is uniquely suited for Nevada's situation.

As such, Alaska's proposed regulation provides the best model for a statutory solution social-consumption industry in Nevada. Much of its language can be adapted for use in a statutory amendment to Chapter 453D pursuant to NRS 453D.400(8). This Paper further proposes that the Department of Taxation should also look to those more-specific provisions of the Alaska regulation that are not needed in the statutory amendment. Additionally, the Department should look to Massachusetts's draft regulations, West Hollywood's ordinance,

⁴⁸⁷ NEV. REV. STAT. § 453D.030(12) (2017). The same prohibition also applies to “marijuana cultivation facilities.” *Id.* § 453D.030(9).

⁴⁸⁸ See generally Nev. Dep't of Taxation, Permanent Adult-Use Marijuana Regulation, Regulation 092-17 (Jan. 16, 2018) <https://tax.nv.gov/uploadedFiles/taxnvgov/Content/FAQs/Marijuana-Perm-Reg-LCB-File-No-R092-17.pdf> [<https://perma.cc/C2UL-T3US>].

⁴⁸⁹ See generally *id.*

⁴⁹⁰ See generally S.N., *Why Amsterdam's Coffeeshops Are Closing*, *ECONOMIST: THE ECONOMIST EXPLAINS* (Jan. 10, 2017), <https://www.economist.com/blogs/economist-explains/2017/01/economist-explains-man> [<https://perma.cc/WR7G-MQ9D>].

and San Francisco's ordinances. Local Governments should begin with West Hollywood's ordinance, but should ultimately look to all of the above-mentioned approaches in crafting an ordinance that best fits the needs of their communities.

Under this Paper's proposed approach, Legislators will first need to address the definitions section of NRS 453D. Legislators would need to add perhaps several new defined terms, including, at a minimum, a definition for "designated consumption area."⁴⁹¹ A bill might also add additional defined terms if that would prove useful. For instance, legislators could define "onsite consumption endorsement,"⁴⁹² or perhaps "retail marijuana store premises" (which would include both designated consumption areas and all other areas of the premises)⁴⁹³ to help distinguish between prohibited acts on the entire premises versus prohibited acts specifically prohibited in designated consumption areas or non-designated consumption areas of the premises. Legislators might also amend the definition of "retail marijuana store" to include retail marijuana stores with onsite consumption endorsements.

This Paper further proposes that, like under Alaska's approach, the general retail area and the consumption area of a retail store, though within the same premises, should be physically segregated.⁴⁹⁴ A general statement of this requirements should be added to the legislation, but decisions about setting specific requirements should be delegated to the Department of Taxation. Such decisions include, for instance, the choice of whether to allow retail stores to sell directly to consumers in the consumption area all or certain types of marijuana and/or marijuana products that may be purchased in the general retail area.

Another consideration is whether patrons may take with them off the premises of the retail store any purchased but unconsumed marijuana or marijuana products. If lawmakers choose to allow onsite consumption of general-retail products (as opposed to, perhaps onsite-consumption-specific products subject

⁴⁹¹ See, e.g., DENVER, COLO., MUN. CODE § 6-301(4) (2017) ("Designated consumption area shall mean a designated area where consumers are expressly permitted to consume cannabis."); see also, e.g., *Alaska Draft Regulation*, supra note 215, § 306.990(27) ("'[M]arijuana consumption area' means a designated area within the licensed premises of a retail marijuana store that holds a valid onsite consumption endorsement, where marijuana and marijuana products, excluding marijuana concentrates, may be consumed.").

⁴⁹² See generally *Alaska Draft Regulation*, supra note 215, § 306.370.

⁴⁹³ See, e.g., *id.* § 306.990(b)(28).

⁴⁹⁴ See *id.* § 306.370(a)(1) ("A licensed retail marijuana store with an approved onsite consumption endorsement is authorized to . . . sell marijuana and marijuana product, excluding marijuana concentrates, to patrons for consumption on the licensed premises only in an area designated as the marijuana consumption area and separated from the remainder of the premises, either by being in a separate building or by a secure door and having a separate ventilation system[.]."); see also, e.g., DENVER, COLO., MUN. CODE § 6-302 (2017) ("The designated consumption area identified on a cannabis consumption permit may be (i) an area located inside or adjacent to a license premises or other business, (ii) a temporary location inside of or adjacent to a licensed premises or other business, or (iii) a temporary location not located inside of or adjacent to a licensed premises or other business.").

to different labeling and amount/potency limitations, as explored in the next section), then lawmakers should consider allowing patrons to take unconsumed marijuana off the premises, provided that it is safely re-packaged.⁴⁹⁵

If, as this Paper suggests, lawmakers prefer limited retail sales of marijuana for consumption to certain products and items in individual servings, then lawmakers should prohibit patrons from leaving the premises with unconsumed marijuana. Lawmakers should attempt to create an industry where tourists want to consume marijuana in designated consumption areas. If patrons can take unconsumed marijuana off the premises, they would likely be tempted to continue consuming outside the club or perhaps even in their cars. The Department of Taxation should be tasked with setting the requirements necessary to ensure that tourists are incentivized to purchase marijuana and consume it only in designated areas. Additional suggestions are provided in the next Section.

In addition to the approach this Paper proposes for 2019 (what West Hollywood's ordinances refer to "[c]annabis consumption areas that are ancillary to . . . retail premises"⁴⁹⁶), changes in 2021 might include creating a class of consumption establishments where retail sale is ancillary to consumption. As such, they should be limited to the sale of only single-serving marijuana for consumption, but they should be granted more flexibility in terms of onsite non-marijuana food production and service etc. This new class of marijuana establishment might be called "limited-retail consumption establishment," in which lawmakers might permit, for instance some limited production or preparation of marijuana products (e.g., marijuana-infused food in a restaurant-concept establishment). The 2021 approach could also include a permitting scheme for consumption in indoor designated areas at special events like outdoor concerts or festivals. Nevada lawmakers should look to provisions of Oregon's S.B. 307 on "temporary event licenses."⁴⁹⁷

Lawmakers should proceed with caution on the issue of allowing limited-retail consumption establishments to produce marijuana products or marijuana-infused food onsite. The risk of inconsistent or mistakes in doses could prove a threat to the safety of Nevada's residents and tourists. This Paper suggests that lawmakers look to San Francisco's three-category permit scheme for consumption establishments, with the highest level of permissible onsite production being limited to specific, regulated types of marijuana products and narrowly defined types of preparation. Lawmakers could also look to San Francisco's approach to regulating marijuana tours.⁴⁹⁸ Although San Francisco's ordinance does not allow consumption on the premises of manufacturing or cultivation

⁴⁹⁵ See *Alaska Draft Regulation*, *supra* note 215, § 306.370(a)(3) ("[P]erson[s] may] remove from the licensed premises marijuana or marijuana product that has been purchased on the licensed premises for consumption under this section, provided it is packaged in accordance with 3 AAC 306.345.").

⁴⁹⁶ W. HOLLYWOOD, CAL., MUN. CODE tit. 5, art. 2, § 5.70.041(13)(d) (2018).

⁴⁹⁷ S.B. 307 § 2, 2017 Leg., 79th Sess. (Or. 2017).

⁴⁹⁸ S.F., CAL., POLICE CODE art. 16, § 1621 (2018).

facilities,⁴⁹⁹ lawmakers could look to Colorado's S.B. 17-063 scheme for allowing consumption on the premises of an establishment with nearly any other category of marijuana license.⁵⁰⁰

To the extent social consumption lounges would even be legal under S.B. 236 and/or Las Vegas's draft ordinance, there are several reasons why this approach is less desirable than a retail-consumption hybrid approach. The most significant of these reasons is the potential for consumption of marijuana in moving vehicles traveling from retail marijuana stores to consumption lounges. Driving under the influence of marijuana is a significant and legitimate concern that S.B. 236's approach might prove inadequate to address. Additionally, under the "bring your own" approach taken by S.B. 236, patrons will be required to bring into consumption only lawfully purchased marijuana. However, it might prove difficult for consumption lounges under S.B. 236's approach to adequately enforce that requirements. Although additional packaging requirements could be issues to address that specific concern, a hybrid retail-consumption establishment would, as a practical matter, be much better equipped to prevent the onsite consumption of unlawfully obtained marijuana.

If, however, Nevada's lawmakers ultimately prefer a variation of the "bring your own" approach taken by S.B. 236, they should consider integrating into that new legislation something akin to the provisions of S.B. 307 regarding delivery to consumption establishments. S.B. 307 would have amended Oregon's marijuana-delivery statute to accommodate deliveries by retail stores to patrons of standalone consumption lounges.⁵⁰¹ Las Vegas's ordinance briefly addresses the issue of delivery,⁵⁰² but the Department should consider changes in the current regulations dealing with lawful deliveries so that deliveries to consumption-lounge patrons are fully accommodated and adequately regulated.⁵⁰³ To that end, the Department should look closely at S.B. 307's delivery scheme. Finally, in enacting ordinances pursuant to a new version of S.B. 236, local governments should anticipate changes in laws regarding the onsite sale of marijuana and include a general carve out for the prohibition of onsite retail sale of marijuana.⁵⁰⁴

⁴⁹⁹ *Id.* § 1620.

⁵⁰⁰ S.B. 17-063 § 3, 71st Gen. Assemb., Reg. Sess. (Colo. 2017).

⁵⁰¹ *See generally* S.B. 307 § 7.

⁵⁰² *L.V. Draft Ordinance, supra* note 231, § 1 (6.96.070(F)) ("It is unlawful for any business subject to licensing as a consumption lounge to . . . [a]llow the delivery to the establishment of marijuana or marijuana products except in accordance with applicable [state regulatory] requirements. . .").

⁵⁰³ *E.g., Hearing on S.B. 236 Before the S. Comm. on Judiciary*, 2017 Leg., 79th Leg. Sess. (Nev. Mar. 9, 2017) (statement of Jacqueline Holloway, Director, Department of Business License, Clark County) ("We would like to add [a] definition[] of 'delivery[to the bill.]' ").

⁵⁰⁴ *See* DENVER, COLO., MUN. CODE § 6-309(b) (2017) ("It shall be unlawful for any person to directly or indirectly sell, provide, transfer, or distribute cannabis for remuneration within a designated consumption area, *unless otherwise permitted by state law.*" (emphasis added)).

D. Marijuana and Related Limitations and Restrictions

There is perhaps one unforeseen potential limitation in the language of NRS 453D.400(8) that may limit a social-consumption industry, at least until 2021, to smoking and vaping: its language includes “marijuana,” but not “marijuana products.” Although “marijuana” is widely defined to include “every compound, manufacture, salt, derivative, mixture, or preparation of [any] plant [of the genus *Cannabis*],” it does not include “[t]he weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products.”⁵⁰⁵ The Act defines “marijuana products” as “products comprised of marijuana or concentrated marijuana and other ingredients that are intended for use or consumption, such as, but not limited to, edible products, ointments, and tinctures.”⁵⁰⁶

The definition of marijuana might be construed as encompassing marijuana products because it includes everything except “the *weight* of other ingredients.” However, the phrase “marijuana and marijuana products” is used frequently, and distinctly from just “marijuana,” throughout the act,⁵⁰⁷ which might be construed as indicating that marijuana and marijuana products are distinct categories of items. This would mean that lawmakers will be constrained to providing for only smoking and vaping of marijuana in social-consumption establishments and not edible consumption of marijuana products. Such a limitation to a consumption industry, at least in its initial stage, might prove a prudent approach, however. By excluding from onsite consumption the most potent marijuana items (such as edibles), lawmakers can test a consumption industry and compare changes in the law with changes in data and progress the industry in a safe and controlled way.

Regardless of how Nevada’s lawmakers decide to navigate any restrictions on the types of products that can be consumed in consumption establishments, this Paper proposes that legislators should permit only the sale of marijuana and products that are specifically labeled and packaged, in individual servings, for onsite consumption. The general one-ounce limitation on retail sales of marijuana for offsite consumption is likely inappropriate for retail sales of marijuana for consumption onsite. This is especially so in Nevada, where the goal of a social-consumption industry to mitigate unlawful public consumption by tourists. At a minimum, lawmakers should impose a general restriction akin to that included in Massachusetts’s draft regulations: “[Marijuana] Products consumed on the premises of marijuana social consumption establishments shall be provided only in individual servings.”⁵⁰⁸ Legislators might also consider adding a

⁵⁰⁵ NEV. REV. STAT. § 453D.030(8) (2017).

⁵⁰⁶ *Id.* § 453D.030(13).

⁵⁰⁷ *See, e.g., id.* § 453D.030(18) (“ ‘Retail marijuana store’ means an entity licensed to purchase *marijuana* from marijuana cultivation facilities, to purchase *marijuana and marijuana products* from marijuana product manufacturing facilities and retail marijuana stores, and to sell *marijuana and marijuana products* to consumers.” (emphasis added)).

⁵⁰⁸ *Mass. Draft Regulation, supra* note 219, § 500.145(1)(b).

new definition for “individual onsite-consumption serving.”

Legislators should additionally delegate the authority to determine specific limitations on what, in terms of amount and potency, would qualify as an individual serving to the Department of Taxation. This paper endorses the specific limitations in Alaska’s proposed regulation, which limits a single transaction to either one gram of marijuana sold for consumption onsite or a serving of 10 mg of THC in a marijuana product.⁵⁰⁹ The Department should also have the authority to set packaging and labeling requirements specific for onsite-consumption individual servings of marijuana and marijuana products. Finally, the Department should also have the authority to limit the sale of individual servings to certain items. For instance, the Department might consider prohibiting high-potency products like marijuana concentrates.⁵¹⁰

E. Miscellaneous Restrictions

This Paper proposes that, at least in 2019, retail marijuana stores with onsite consumption endorsement should not have the general flexibility to provide food, alcohol, and entertainment, as should standalone consumption establishments with limited-retail licenses (pursuant to proposed legislative changes in 2021). As a general rule, changes to laws and regulations should preserve a palpable, general distinction between retail marijuana stores (with or without ancillary and limited consumption areas) and consumption establishments (with or without ancillary and limited retail sales of marijuana). This approach will help the Nevada’s Department of Taxation largely keep intact current regulations for retail stores while giving the Department time to consider future regulations for a more diverse consumption industry. It will also help to prevent consumer confusion for Nevada’s residents and tourists alike.

The 2019 approach should be treated as a sort of pilot program in terms of the diversity of non-marijuana offerings that patrons can enjoy in addition to marijuana consumption. As such, the Department of Taxation should have general authority over what non-marijuana items a retail marijuana store may serve its consumption-area patrons. This Paper first proposes that retail stores should be permitted to offer only pre-packaged, non-marijuana infused food/snacks and non-marijuana, non-alcoholic beverages. This will help the Department enforce any prohibitions on service of food or snacks produced onsite and of unlabeled marijuana-infused food/snacks or drinks. Further, Nevada should part ways with Colorado’s S.B. 17-063. Under S.B. 17-063, patrons may bring outside non-cannabis food and beverages for consumption in the establishment,⁵¹¹

⁵⁰⁹ For instance, Alaska’s regulation limits a single transaction to either one gram of marijuana sold for consumption onsite or a serving of 10 mg of THC in a marijuana product. *Alaska Draft Regulation*, *supra* note 215, § 306.370(a)(2)(A)–(B).

⁵¹⁰ See, e.g., *Alaska Draft Regulation*, *supra* note 215, § 306.370(b)(1) (“A licensed retail marijuana store with an approved onsite consumption endorsement may not . . . sell marijuana concentrate for consumption in the marijuana consumption area[.]”).

⁵¹¹ S.B. 17-063 § 3, 71st Gen. Assemb., 2nd Reg. Sess. (Colo. 2017).

but patrons may not bring outside marijuana, marijuana-products, or marijuana-infused food or beverages.⁵¹² The problem with this approach is enforcement: unpackaged or repackaged marijuana-infused food or beverages are generally indistinguishable from non-marijuana counterparts. Nevada lawmakers should prohibit retail stores from permitting any onsite consumption of outside food or beverages to ensure that patrons will not bring in outside marijuana products for onsite consumption. Alcohol should also be categorically prohibited. As should live entertainment.

A 2021 solution that creates a new limited-retail license for standalone consumption establishments should be more permissive with respect to the diversity of services and non-marijuana products that such establishments may offer in consumption areas. This will help these establishments survive in what will be a competitive space. Because these establishments will not have general-retail licenses, they should be permitted to offer patrons non-marijuana food produced onsite and a wide array of services in general to accommodate a variety of business concepts (e.g., a massage parlor that offers marijuana-infused lotions). Lawmakers might even consider permitting such consumption establishments to serve alcohol under certain conditions. For instance, Massachusetts's draft regulations would give consumption establishments the flexibility to serve either marijuana or alcohol, but not both, any given time.⁵¹³ Under such a rule, a consumption establishment could cater to tourists (who are perhaps more interested in consuming marijuana than alcohol) on weekends and cater to locals (who may or may not prefer consuming alcohol) during weekdays.

The Department of Taxation should have general authority to impose such restrictions on one or both types of consumption-establishments proposed by Paper. For instance, a prohibition that should apply to both is a provision in Alaska's proposed regulations that is prudent restriction particularly for Nevada's consumption industry: consumption establishments should be prohibited from "encourage[ing] or permit[ting] an organized game or contest on the licensed premises that involves consuming marijuana or marijuana product or the awarding of marijuana or marijuana product as prizes[.]"⁵¹⁴

F. Indoor Air Quality and Odor Nuisance

In the main hearing on the original version of S.B. 236, several citizens and lawmakers voiced their concerns about air-quality regulations for consumption lounges.⁵¹⁵ In light of the almost universal concern about indoor air quality in

⁵¹² *Id.*

⁵¹³ *Mass. Draft Regulation, supra* note 219, § 500.145(4).

⁵¹⁴ *Alaska Draft Regulation, supra* note 215, § 306.370(b)(11).

⁵¹⁵ *See, e.g., Hearing on S.B. 236 Before the S. Comm. on Judiciary, 2017 Leg., 79th Leg. Sess. (Nev. Mar. 9, 2017)* (statements of Grace Crosley, Nevadans for Informed Marijuana Regulation); *Hearing on S.B. 236 Before the Assemb. Comm. on Gov't Aff, 2017 Leg., 79th Leg. Sess. (Nev. May 12, 2017)* (statements of Amber Joiner, Assemb.).

social-consumption lounges, it makes sense that most (if not all) approaches in other jurisdictions outside of Nevada preclude the smoking of tobacco in places where smoking marijuana would be permitted. Present Nevada law, however, takes a rather lax approach. How should lawmakers address the issue of indoor air quality for Nevada's social-consumption establishments? Nevada's Clean Indoor Air Act (NCIAA)⁵¹⁶ is not a legal obstacle for a social-consumption industry in Nevada because it currently applies only to tobacco smoke.⁵¹⁷ However, lawmakers might consider making several small changes to the law to accommodate a social-consumption industry without compromising the health of its employees and patrons.

Enacted with the intent to "protect[] families and children from the harmful effects of secondhand smoke[,]"⁵¹⁸ the NCIAA generally prohibits smoking tobacco in any form in (broadly defined) "indoor places of employment."⁵¹⁹ The statute does not, however, prohibit smoking tobacco in every place of employment.⁵²⁰ Rather, smoking tobacco is expressly allowed in: areas within casinos where minors are prohibited; enclosed areas within stand-alone bars, taverns and saloons; "age-restricted stand-alone bars, taverns and saloons"⁵²¹; strip clubs; brothels; retail tobacco stores; convention centers; and private residences.⁵²² But convention centers and private residences are not completely unregulated. For smoking tobacco in an area of a convention facility, for instance, the trade show or meeting must: (1) not be open to the public; (2) be produced or organized by a business that relates to tobacco or convenience stores; and (3) involve displaying tobacco products.⁵²³ The statute requires each in each place where smoking is prohibited a "clear[] and conspicuous[]" "No Smoking" sign.⁵²⁴

1. *Proposals for Nevada*

For this Paper's proposed approach for 2019, concerns about indoor air quality in designated consumption areas of retail marijuana stores can be addressed by regulators and local governments. The Department of Taxation should consider setting certain minimum requirements for indoor air filtration

⁵¹⁶ NEV. REV. STAT. § 202.2483 (2017); *see also id.* §§ 202.2485–.2497.

⁵¹⁷ *See generally* NEV. REV. STAT. § 202.2483 (2017).

⁵¹⁸ *Bent Barrel, Inc. v. Sands*, 373 P.3d 895, No. 56100, 2011 WL 5307873 at *3 (2011) (unpublished order of affirmance).

⁵¹⁹ NEV. REV. STAT. § 202.2483(1) (2017). The statute defines "place of employment" as: "any enclosed area under the control of a public or private employer which employees frequent during the course of employment including, but not limited to, work areas, restrooms, hallways, employee lounges, cafeterias, conference and meeting rooms, lobbies and reception areas." *Id.* § 202.2483(12)(h) (2017).

⁵²⁰ *See id.* § 202.2483(3).

⁵²¹ *See generally id.* § 202.2483(12)(a) (providing definition).

⁵²² *Id.* § 202.2483(3).

⁵²³ NEV. REV. STAT. § 202.2483(3)(f)(1)–(3) (2017).

⁵²⁴ *Id.* § 202.2483(9).

systems specifically for designated consumption areas. Additionally, regardless of whether the Department sets minimum standards, local governments should consider special, additional requirements for odor and air quality controls in designated consumption areas. The approach taken in Las Vegas’s draft ordinance—which would apply the same odor control requirements to consumption lounges as those for marijuana establishments in general⁵²⁵—may prove insufficient.

Given that many retail marijuana stores are licensed to sell to not only recreational users but also to medical patients, smoking tobacco in even designated consumption areas should remain prohibited. As “indoor places of employment,” retail marijuana stores already fall under the smoking prohibition of NRS 202.2483. One area the Department of Taxation and/or local governments should explore is whether to distinguish between requirements for retail marijuana stores that permit smoking and vaping in designated areas versus retail stores that use designated consumption areas as “vape lounges” (i.e., just vaping and no smoking by combustion). If there is a sufficient reason for making such a distinction, lawmakers can look to the NRS definition of “[v]apor [nicotine] product.”⁵²⁶ At present, however, most jurisdictions do not make this distinction.

For this Paper’s proposed approach for 2021, however, legislators will have several considerations to potentially address. For instance, under that suggested second-stage approach, consumption establishments with limited retail licenses might fall under one of two exceptions to the NCIAA’s general prohibition on smoking tobacco in indoor places of employment: either as “[c]ompletely enclosed areas with stand-alone bars, taverns and saloons in which patrons under 21 years of age are prohibited from entering”⁵²⁷ or “[a]ge-restricted stand-alone bars, taverns and saloons.”⁵²⁸ If so, legislators might consider amending either or both of those definitions to exclude social-consumption establishments from those definitions. Such an amendment to the NCIAA might assuage some opposition from lawmakers and citizens who have legitimate concerns about indoor air quality in consumption establishments. If lawmakers are interested in allowing local governments to issue temporary permits for smoking marijuana at marijuana trade shows, lawmakers should look to the NCIAA’s provisions on smoking tobacco in “[t]he area of a convention facility at which at a meeting or trade show.”⁵²⁹

⁵²⁵ See *L.V. Draft Ordinance*, *supra* note 231, § 1 (6.96.080(A)).

⁵²⁶ See NEV. REV. STAT. § 202.2485(5).

⁵²⁷ *Id.* § 202.2483(3)(b); see also *id.* § 202.2483(12)(n) (providing definition of “stand-alone bar, tavern or saloon”).

⁵²⁸ *Id.* § 202.2483(3)(c); see also *id.* § 202.2483(12)(a) (providing definition of “[a]ge-restricted stand-alone bar, tavern or saloon”).

⁵²⁹ Under Nevada’s NCIAA,

G. “Gram” Shop Liability

Nevada law protects licensed vendors of alcoholic beverages from any civil liability for damages subsequently caused by their patrons—including damages that were the direct result of a patron’s consumption of alcohol on the premises.⁵³⁰ Should the same general civil immunity that applies to alcohol-consumption establishments apply to marijuana-consumption establishments? This is a complex issue that most approaches across jurisdictions have not substantively addressed. Colorado’s S.B. 17-063 is the outlier, and it would have applied to marijuana-consumption establishments the same civil liability laws that apply to alcohol-consumption establishments. Nevada should consider this or a similar approach in 2021, at least as applied to standalone consumption establishments. Uncertainty in how Nevada will impose civil liability for consumption establishments, coupled with present uncertainties in insurance law, may dissuade prospective proprietors of social-consumption establishments.

H. Driving Under the Influence

Any solution at any level of government should include provisions for preventing driving under the influence of marijuana, whether to or from retail marijuana stores with consumption endorsements or consumption establishments. Nevada legislators should statutorily impose two related requirements in the 2019 approach. First, the suggested changes should require local ordinances to contain a transportation-plan requirement on businesses as a condition on locally-issued consumption permits and an enforcement plan to address any transportation-related issues. The statute should require the Department to reject any local ordinance that does not meet those minimum requirements. Second, before issuing a consumption endorsement to a retail marijuana store, the Department should be required to collect and review the substance of that retail marijuana store’s specific transportation plan. In drafting language that imposes such general requirements, lawmakers (likely regulators and/or local govern-

Smoking tobacco is not prohibited in . . . [t]he area of a convention facility in which a meeting or trade show is being held, during the time the meeting or trade show is occurring, if the meeting or trade show:

- (1) Is not open to the public;
- (2) Is being produced or organized by a business relating to tobacco or a professional association for convenience stores; and
- (3) Involves the display of tobacco products[.]

NEV. REV. STAT. § 202.2483(3)(f).

⁵³⁰ NEV. REV. STAT. § 41.1305(1) (2015) (“A person who serves, sells or otherwise furnishes an alcoholic beverage to another person who is 21 years of age or older is not liable in a civil action for any damages caused by the person to whom the alcoholic beverage was served, sold or furnished as a result of the consumption of the alcoholic beverage.”); *Rodriguez v. Primadonna Co.*, 216 P.3d 793, 798 (Nev. 2009) (“[I]t is well settled in Nevada that commercial liquor vendors, including hotel proprietors, cannot be held liable for damages related to any injuries caused by the intoxicated patron . . .”).

ments) should look to Massachusetts's proposed regulations, which require that every social-consumption establishment must maintain:

A reasonable [written] plan to assist patrons in acquiring taxi, ridesharing, or other third-party transportation services. Any such plan must, at a minimum, provide an area with electrical outlets and ports for charging common types of cell phones, identify designated pick-up areas near the premises for ridesharing or taxi services, and provide assistance in calling for taxi services for patrons who do not have access to ridesharing services[.]⁵³¹

A more stringent alternative might require a consumption establishment to provide transportation services at no cost for patrons.

I. The Neighbors

This Paper proposes that local governments considering local ordinances on social consumption should look to the Denver ordinance's community support requirements as a model approach to balancing the needs of the industry with the concerns of the industry's neighbors. Denver's community-support requirements (or a similar but related approach) has two primary benefits. First, it requires prospective consumption-business owners to reach out and thereby give notice to the members of the community in which the consumption business model will ultimately exist. Second, it provides neighborhoods with a procedural mechanism to voice their support for or opposition to a prospective social-consumption establishment and its location. Nevada's legislators could go so far as statutorily requiring that compliant local ordinances must impose a reasonable community-support requirement.

J. Zoning

An issue primarily for Nevada's local governments is where to zone consumption establishments. Zoning requirements at the state and local levels already exist for retail marijuana stores. In a 2019 solution, should lawmakers create any additional zoning restrictions for either state-issued consumption endorsements or locally issued consumption permits for retail marijuana stores? And in a 2021 solution, should the same zoning requirements that apply to retail marijuana stores (with or without consumption endorsements/permits) also apply to standalone consumption establishments? Given state and locally imposed distance restrictions on the locations of marijuana establishments, how will lawmakers address the concern that activist citizens will open establishments that qualify as "community facilities" near consumption establishments to thwart their ability to annually renew their licenses/endorsements?⁵³² Finally, should consumption establishments be zoned in a central area to create a "Little

⁵³¹ *Mass. Draft Regulation*, *supra* note 219, § 500.145(5)(c).

⁵³² *See supra* note 400.

Amsterdam” in Las Vegas, or zoning ordinances be structured to disperse these establishments throughout the city?

1. *Zoning for Retail Marijuana Stores in Nevada*

Under present Nevada law, marijuana dispensaries cannot be located within 1000 feet of a public or private preschool or K-12 school that existed when the marijuana establishment application was submitted.⁵³³ Also, dispensaries cannot be within 300 feet of a “community facility.”⁵³⁴ Las Vegas similarly requires that dispensaries not be located within 1000 feet of any school or within 300 feet of any city park; church or house of worship; individual care center licensed to care for more than twelve children; community recreational facility; and any place that primarily provides recreation to minors including, but not limited to, commercial recreation or amusement, libraries, art galleries, museums, teen dance centers, and martial arts studios.⁵³⁵ The City also does not allow dispensaries on the property abutting Fremont Street west of 8th Street.⁵³⁶

2. *Proposals for Nevada*

Under this Paper’s 2019 approach, because social consumption will be limited to designated areas of retail marijuana stores, social consumption will be subject to, at a minimum, the zoning restrictions currently on retail marijuana stores. This Paper proposes that the City of Las Vegas (and other local governments) consider imposing additional zoning restrictions on consumption permits for retail marijuana stores. The City should work with law enforcement to identify an ideal, centralized area, to limit where these permits can be used. This would allow the city to create its own pilot program at the local level to test this industry in a controlled regulatory environment before allowing it to expand.

In finding an ideal central location, the City should look beyond its overlays pertaining to marijuana establishments. For instance, as an alternative to the proposed zoning restrictions for consumption lounges under Las Vegas’s 2017 draft ordinance, Las Vegas’s “adult use” overlay⁵³⁷ could be used as an additional restriction on where retail marijuana stores might be permitted to operate designated consumption areas. This overlay might prove the best place for both a pilot program in 2019 (for retail marijuana stores currently operating in the zone) and beyond (for consumption establishments generally).

First, the neighbors (strip clubs, etc.) of retail marijuana stores within this

⁵³³ NEV. REV. STAT. § 453D.210(5)(c)(1) (2017).

⁵³⁴ *Id.* § 453D.210(5)(c)(2).

⁵³⁵ LAS VEGAS, NEV., UNIFIED DEVELOPMENT CODE § 19.12.70(1) (2017).

⁵³⁶ *Id.* § 19.12.70(12).

⁵³⁷ See CLARK COUNTY, NEV., CODE OF ORDINANCES §§ 30.48.500–.570 (2017). See generally Amy L. Baker, *Gentlemen’s Clubs and Casinos in Las Vegas*, 14 U. NEV. L.V. GAMING RES. & REV. J. 79, 86 (2010).

overlay are less likely to complain about onsite consumption. Second, it could, potentially, be used to address an issue that was raised in a hearing on S.B. 236: the possibility of activist citizens opening a business or establishment that would classify as a community center near a consumption lounge to disrupt the lounge's ability to get its licensed renewed annually. Activists may not be as aggressively opposed to marijuana consumption happening next door to strip clubs and adult toy stores than elsewhere. If "out of sight, out of mind" is the reasoning behind clustering adult entertainment and adult retail businesses, then perhaps the City might consider regulating marijuana like strip clubs.

Looking forward to 2021, Las Vegas might impose less restrictive zoning limitations on stand-alone consumption establishments than on retail marijuana stores with onsite-consumption permits. The zoning restrictions in Las Vegas's 2017 draft ordinance are likely appropriate for such an expansion of Las Vegas's social-consumption industry. Alternatively, the City could attempt to cluster consumption establishments in a central area. This would provide tourists with multiple types of consumption businesses all within walking distance of each other. Apropos, this area could be deemed Las Vegas's "Little Amsterdam."⁵³⁸

A Las Vegas "Little Amsterdam" could be located, generally, somewhere in the large C-M commercial industrial zones and the M industrial zones running along the east side of U.S. 95 on Industrial Road from East Desert Inn Road to East Charleston Blvd.⁵³⁹ These zones are located in and around what is known as the Design District of Downtown Las Vegas.⁵⁴⁰ This district is described as "a mix of commercial services, warehousing, storage, and industrial uses, occupying utilitarian buildings concentrated along the Union Pacific Railroad. Currently, the district serves as a significant employment hub, in close proximity to both downtown corridor and the Las Vegas Strip, with many businesses serving the casino and entertainment industry."⁵⁴¹ The goals for this district "include the conversion of declined warehouses or plants into accommodation for film, fashion, virtual gaming, green tech, and other creative-related industries. Vacant and underutilized properties could be used as temporary open spaces for outdoor relaxation and social gathering."⁵⁴² Because this area is located between the strip and the downtown/Fremont area, it would serve as a

⁵³⁸ See generally Associated Press, *This U.S. City May Become the New Amsterdam*, HIGH TIMES (Nov. 3, 2016), <https://hightimes.com/news/this-u-s-city-may-become-the-new-amsterdam/> [<https://perma.cc/3FHC-AFEQ>].

⁵³⁹ Clark County Dep't of Planning, *Medical Marijuana Establishments*, CITY OF L.V.: ARCGIS ONLINE ORGANIZATION, <http://lasvegas.maps.arcgis.com/apps/OnePane/basicviewer/index.html?appid=c1667b5dc2704219a3b9bfa957d6a9c2> [<https://perma.cc/FY9H-EJJY>] (last visited Apr. 18, 2018).

⁵⁴⁰ *Vision 2045 Downtown Las Vegas Masterplan*, CITY OF L.V. 224 (2016), <https://www.lasvegasnevada.gov/cs/groups/public/documents/document/chjk/mdex/~edisp/prd011906.pdf> [<https://perma.cc/2RTJ-J3RD>].

⁵⁴¹ *Id.*

⁵⁴² *Id.*

great potential location for a Las Vegas “cannabis corridor,” or ever perhaps a “Little Amsterdam.”

CONCLUSION

This White Paper and its Appendices are intended to serve Nevada’s lawmakers in reaching the best solution to a problem that, if left to escalate further, will lead to a culture that no Nevadan wants. Without a solution to the problem of implementing a marijuana social-consumption industry, Nevada will be a place where visitors (and to a lesser extent, residents) are left with no choice but to consume marijuana unlawfully. After purchasing marijuana and then being told that they cannot smoke it anywhere, tourists will likely scoff at Nevada’s public-consumption prohibition—*at Nevada law*. Regardless of their personal opinions on whether marijuana decriminalization is prudent, Nevada’s lawmakers have a choice: either Nevada will be a place where tourists are invited to enjoy, among other things, a thoughtfully regulated marijuana industry, or Nevada will become a place where tourists are invited to purchase a lawful product that they cannot lawfully consume—in other words, a place of tacit approval for breaking the law. “*No one* wants that.”⁵⁴³

⁵⁴³ See quotation accompanying *supra* note 1 (emphasis added).