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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

EMERALD ENTERPRISES, LLC and JOHN M. LARSON,
Appellants,

v.

CLARK COUNTY,
Respondent,

and

ROBERT W. FERGUSON, Attorney General of the State of Washington,
Intervenor.

PETITION FOR REVIEW

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I. INTRODUCTION

In 2012, Washington citizens approved Initiative 502 legalizing the production and sale of adult use marijuana in Washington State. The initiative established a statewide regulatory scheme intended to allow law enforcement to focus on violent and property crimes, generate tax revenue, and take marijuana out of the hands of illegal drug organizations. The law mandates the Washington State Liquor and Cannabis Board site stores throughout the state to ensure adequate access to licensed sources of marijuana products to discourage purchases from the illegal market.

Under article XI, section 11 of our state's Constitution, a local government may only enact local legislation that is not in conflict with state law. It is well settled in our state that an ordinance conflicts with state law if it permits what state law forbids or forbids what state law permits. An ordinance also irreconcilably conflicts with state law if it thwarts the legislature's purpose.

At issue here is a Clark County ordinance banning state licensed marijuana businesses. On its face, the ordinance prohibits what state law permits: the lawful production and sale of adult use marijuana. In denying access to county residents, the ordinance undoubtedly frustrates full implementation of Washington's marijuana regulatory scheme. The ordinance is thus unconstitutional.

Despite these realities, the Court of Appeals found no conflict and upheld the constitutionality of the ordinance. In doing so the Court of Appeals disregarded well settled conflict preemption authority of this Court. The court's analysis sidestepped a fundamental fact: Clark County's ordinance "forbids what state law permits." Accordingly, the Court should grant review.

II. IDENTITY OF PETITIONER

Appellants Emerald Enterprises, LLC and John Larson ("Emerald") ask the Court to accept review of the Court of Appeals decision designated in Section III of this Petition.

III. COURT OF APPEALS DECISION

Emerald petitions for review of the decision of Division II of the Washington State Court of Appeals filed March 13, 2018 upholding as constitutional Clark County Ordinance No. 40.260.115(B)(4). The decision is attached hereto as **Appendix A.**

IV. ISSUES PRESENTED FOR REVIEW

Issue 1: Under article XI, section 11 of the Washington State Constitution, an ordinance conflicts with general laws if it prohibits that which a statute permits. CCC 40.260.115(B)(4) prohibits activities that are authorized by state law and subjects businesses to civil and criminal penalties. Does the ordinance conflict with state law?

Issue 2: An ordinance irreconcilably conflicts with state law if it thwarts the legislature's purpose. I-502 creates a tightly regulated,

statewide marijuana distribution system. CCC 40.260.115(B)(4) prohibits licensed marijuana sales thus undermining the statewide regulatory scheme. Does CCC 40.260.115(B)(4) irreconcilably conflict with state law?

Issue 3: An ordinance conflicts with state law if it provides for an exercise of power that the statutory scheme did not confer to local governments. I-502 granted the authority of siting retail outlets to the WSLCB and contains no opt-out provisions for local government. In banning state-licensed activities, does CCC 40.260.115(B)(4) irreconcilably conflict with state law?

V. STATEMENT OF THE CASE

A. Voters Approve I-502 to Bring Washington's Marijuana Market Under Strict Regulatory Control

In November 2012, Washington citizens approved Initiative 502 ("I-502"). Codified at Chapter 69.50 RCW (the "UCSA"), the law established a robust regulatory system legalizing and regulating the production and sale of adult use marijuana. Laws of 2013, c 3 § 1. Under I-502, Washington's prior prohibition scheme was replaced with a tightly regulated, state-licensed system similar to that for controlling hard alcohol. *Id.* I-502 decriminalizes the use and possession of marijuana with the goals of (1) allowing law enforcement resources to be focused on violent and property crimes; (2) generating new state and local tax revenue; and (3) taking marijuana out of the hands of illegal drug organizations. *Id.*

B. I-502 Replaces Black Market Production and Distribution of Marijuana in Washington with a Tightly Regulated Statewide System Administered by the WSLCB.

All regulatory authority under I-502 is vested with the Washington State Liquor and Cannabis Board ("WSLCB"). RCW 69.50.345. The rules implemented by the Board cover all aspects of marijuana production and sale: regulation of equipment, record keeping, methods of production, processing and packaging, security, employees, retail locations, and labeling. *Id; see also* RCW 69.50.342.

The WSLCB is charged with siting retail outlets throughout the State by taking into consideration (a) population distribution, (b) security and safety issues, and (c) the provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market. RCW 69.50.345(2); 69.50.354. Nothing in I-502, the UCSA, or the regulations promulgated by WSLCB expressly state that a city or a county may ban marijuana businesses from their jurisdiction.

C. Clark County Enacts CCC 40.260.115(B)(4) and Bans Marijuana Businesses.

In May 2014, the County passed CCC 40.260.115(B)(4) banning the production, processing, and retail sales of marijuana within its jurisdiction. The ordinance nullifies any license issued by the WSLCB that authorizes the holder to operate a marijuana retail outlet within the boundaries of unincorporated Clark County.

D. Emerald Challenges CCC 40.260.115(B)(4) and the Superior Court Upholds the Ordinance as Constitutional Despite its Prohibiting what is Permitted by State Law.

Emerald filed an action in Cowlitz County Superior Court in September 2014 seeking a declaration that CCC 40.260.115(B)(4) was unconstitutional. The trial court declined to enter such an order. The court found CCC 40.260.115(B)(4) neither preempted by nor unconstitutionally conflicted with state law.

In December 2015, Emerald began WSLCB licensed retail sales of marijuana in the County. In January 2016, the County ordered Emerald to cease all sales of marijuana. Emerald appealed to the County's Hearing Examiner and then to the Superior Court. In August 2016, the Clark County Superior Court affirmed the Hearing Examiner finding that CCC 40.260.115(B)(4) did not unconstitutionally conflict with state law.

Both trial court decisions were appealed to Division II and the causes were ultimately consolidated. The Court of Appeals decision was filed March 13, 2018. Emerald now seeks review from this Court.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In upholding Clark County's ordinance, the Court of Appeals fails to address two fundamental questions. First, how giving every city and county in the state the ability to ban this state licensed activity does not render meaningless Washington's adult use marijuana regulatory scheme. Second, and even more fundamental, how an

ordinance which "forbids what state law permits" may stand under Washington's constitution.

As authorized by RAP 13.4(b), review should be accepted for the following reasons. First, the decision is in conflict with well-established conflict-preemption authority. Second, the decision is in conflict with the Court of Appeals' decision in *Dep't of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 337 P.3d 364 (2014). Finally, uniform implementation throughout the state of Washington's marijuana law is an issue of substantial public interest that should be determined by the Supreme Court. The Court should accept review.

A. Review Should Be Accepted Because the Decision of the Court of Appeals is in Conflict with Supreme Court Authority Establishing the Test for Conflict Preemption

This Court announced the test for conflict preemption in *City of Bellingham v. Schampera*, 57 Wn.2d 106, 356 P.2d 292 (1960).

> In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits.

Id. at 111, (internal citations omitted). This test has been employed consistently since. *See Weden v. San Juan Cty.*, 135 Wn.2d 678, 693, 958 P.2d 273, 280 (1998); *Parkland Light & Water Co. v. Tacoma–Pierce County Bd. of Health,* 151 Wn.2d 428, 433, 90 P.3d 37 (2004); *Entertainment Industry Coalition v. Tacoma-Pierce County Health Department*, 153 Wn.2d 657, 664, 105 P.3d 985 (2005); *Lawson v.*

City of Pasco, 168 Wn.2d 675, 682, 230 P.3d 1038, 1042 (2010). Here, the Court of Appeals applied a different test.

1. The *Schampera* test is the proper conflict test

In AGO 1982 No. 14, the attorney general addressed local municipalities' authority to ban the sale and possession of firearms in their jurisdictions. The attorney general addressed this preemption question as follows,

> let us return to Article XI, § 11, supra, and *identify once again, as we have in numerous previous opinions*, the applicable test of conflict or inconsistency. As explained by our State Supreme Court in the oft-cited case of *Bellingham v. Schampera*, 57 Wn.2d 106, 356 P.2d 292 (1960), in the absence of an express statutory exemption the ultimate question to be asked in the case of any local ordinance involving an exercise of the police power is whether the ordinance (a) permits or licenses that which some state law forbids or (b) prohibits that which a state law permits.

AGO 1982 No. 14.[1] There, the attorney general concluded, "a general prohibition against the sale or possession of handguns, at any time or place, within the limits of its territorial jurisdiction …. would have the effect of prohibiting conduct which state law, instead, sanctions and regulates. Importantly, the AGO makes no mention of an "unabridged right."

Similarly, in its briefing for *Dep't of Ecology v. Wahkiakum County,* the attorney general articulated the following test for determining the existence of article XI, section 11 conflict:

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[1] Available at http://www.atg.wa.gov/ago-opinions/regulation-or-prohibition-handguns-or-other-firearms-countues-cities-or-towns.

> An ordinance conflicts with the general laws when it "prohibits what state law permits," or when it thwarts the state's policy or the Legislature's purpose.

Appellant's Opening Brief at p. 17-18; *Dep't of Ecology v. Wahkiakum County* (COA Cause No. 44700-2-II)(internal citations omitted, attached as **Appendix B**). Again, no mention is made of the necessity of an "unabridged right."

2. <u>The attorney general advanced a different conflict preemption rule to the Court of Appeals in this case</u>

Despite the unequivocal position taken in *Wahkiakum*, the attorney general advanced a different preemption rule in this case. Here, the attorney general argued that under *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998), conflict could exist "only when the state law creates an entitlement to engage in the activity." (Response Brief of Attorney General at p. 23). No explanation is offered for the new formulation of the rule.

Inexplicably, the attorney general took exactly the opposite position with to the *Wahkiakum* court. There, the attorney general argued that *Weden* must be distinguished. The attorney general stated that the distinctions between the statewide biosolid regulatory scheme in *Wahkiakum* and the boat registration requirement of *Weden* are "stark." Appellant's Reply Brief at p. 9; *Dep't of Ecology v. Wahkiakum County* (COA Cause No. 44700-2-II)(Attached as **Appendix C**). In distinguishing *Weden*, the attorney general argued further,

> [a]llowing local governments to regulate a watercraft that has been registered merely for tax purposes is in no way resembles

> [sic] allowing local governments to ban land application projects that have been permitted through the rigorous, often multi-year application process.

Id. at 10. Again, no mention was made to the *Wahkiakum* court of the requirement of an "unabridged right" for finding constitutional conflict.

3. <u>The rule adopted by the Court of Appeals conflicts is in conflict with *Shampera*</u>

At the urging of the County and intervenor Attorney General, the Court of Appeals found that Clark County's ordinance did not irreconcilable conflict with state law because the UCSA does not create an *unabridged right* to engage in the specific activity prohibited by the Ordinance. (Slip op. 8, 9, 16) The Court of Appeal's emphasis on an *unabridged right* is a misapplication of this Court's well settled test.

As explained in *Schampera*, the question to be asked in the case of any local ordinance involving an exercise of police power is whether the ordinance (a) permits or licenses that which a state law forbids, or (b) prohibits that which a state law permits. 57 Wn.2d at 111. The inquiry does not focus on an *unabridged right* but must focus on whether the substantive conduct proscribed (or licensed) by the two laws are at odds.

In *Schampera*, the appellant challenged Bellingham's DUI ordinance arguing that it conflicted with the state DUI statute because the ordinance-imposed penalties in excess of those provided by

statute. *Id.* at 108. The Court concluded that the ordinance did not conflict because both laws prohibited the same conduct.

> The statute, as well as the ordinance, in the case at bar, is prohibitory, and the difference between them is only that the ordinance goes farther in its prohibition—*but not counter to the prohibition under the statute*. The city does not attempt to authorize by this ordinance what the Legislature has forbidden; not does it forbid what the Legislature has expressly licensed, authorized, or required.

Id. at 111(emphasis added). No conflict existed, because the Bellingham ordinance simply went farther in its prohibitions. The existence of an *unconditional right* simply does not factor in the analysis.

Town of Republic v. Brown, 97 Wn. 2d 915, 652 P.2d 955, 958 (1982) is instructive. Comparing the City of Republic's DUI ordinance with the State DUI statute, the Court determined that the ordinance provided for a *presumption* of being under the influence if a driver's blood alcohol level ("BAC") was found to be 0.10 percent or greater, while the statute set forth a *per se* violation of the statute at the same BAC. *Id.* at 920. Additionally, the ordinance did not contain the mandatory sentence that was provided in the statute.

The Court held the Republic ordinance conflicted with the state statute by permitting conduct (driving with a BAC over .10 and a discretionary jail sentence) which was forbidden by statute. *Id.* The DUI statute created no "right or entitlement" that was prohibited by the

local ordinance. Nonetheless, conflict existed because the ordinance permitted that which state law forbid.

Here, the subject matter of the ordinance and statute is identical: the regulation of marijuana businesses. However, CCC 40.260.115(B)(4) does not "simply go farther in its prohibitions", the ordinance expressly prohibits that which is permitted by state law. It matters not under Washington caselaw whether a party asserts the existence of an "unabridged right." Where local law prohibits what state law permits, an irreconcilable conflict exists. Such is the case here. The Court of Appeals employed a standard not consistent with Washington case law. Review should be granted.

4. The Court of Appeals' decision is in conflict with *Parkland Light* and *Entertainment Industry Coalition*

Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health, 151 Wn.2d 428, 433, 90 P.3d 37 (2004) resulted from a dispute over a Board of Health's resolution requiring municipal water districts to fluoridate their water. This Court held that the resolution conflicted with a statute which gave water districts the authority to control the content of their water systems. *Id.* at 434. The Court took great exception to the fact that the resolution deprived the water districts the specific statutory power and discretion provided by the Legislature. *Id.* Similarly, the Ordinance here divests the WSLCB of its statutory grant of authority to regulate.

As in *Parkland Light*, CCC 40.260.115(B)(4) replaces state law

with local law. The ordinance strips WSLCB of its delegated authority. The Court of Appeals holding conflicts with *Parkland Light.*

In *Entertainment Indus. Coal. v. Tacoma-Pierce County Board of Health*, 153 Wn.2d 657, 105 P.3d 985 (2005), businesses filed an action challenging a county resolution banning smoking in all public establishments. The Court held that the resolution irreconcilably conflicted with specific state statutory provisions which allowed smoking areas to be designated by the owner of an establishment. *Id.* at 664. The resolution prohibited what was permitted by state law and was invalidated as unconstitutional. The same analysis applies here. Thus, the Court of Appeals decision conflicts.

5. The Court of Appeals' holding is in conflict with *Rabon v City of Seattle* and *Lenci v. City of Seattle*

The Court of Appeals relies on *Rabon v. City of Seattle* for the proposition, "[t]he fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law." (Slip op. at 7, 15). However, the cited language omits a critical qualifier. The full citation follows,

> The fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law. *A local ordinance may require more than state law requires where the laws are prohibitive. Lenci v. City of Seattle*, 63 Wn.2d 664, 671, 388 P.2d 926 (1964).

Rabon v. City of Seattle, 135 Wn.2d 278, 292, 957 P.2d 621, 627 (1998) (emphasis added). The Court of Appeals disregards the requirement that statute and ordinance are prohibitive in its application

of *Rabon.* The reliance on this misstatement of the law necessitates further review by this Court.

In *Rabon,* the Court upheld an ordinance prohibiting the possession of vicious dogs. The Court's opinion hinged on the determination that the statute at issue was prohibitive in nature: the law required special registration for dangerous dogs and the challenged ordinance was not unconstitutional because it went further in its prohibition. *Id.* at 293. Such is not the case here.

The provisions of the USCA authorizing adult use marijuana are not prohibitory. As recognized by the Court of Appeals,

> [t]he UCSA legalizes, with caveats, recreational marijuana and permits its regulated sale. It gives the Board authority to adopt rules regarding "[r]etail outlet locations and hours of operation," and requires that it promulgate rules for the licensing of retail stores. The licensing scheme creates the framework allowing select people to legally sell marijuana.

(Slip op. at 7)(internal citations omitted). Plainly, these statutes do not prohibit conduct. These statutes authorize the lawful production and sale of adult use marijuana throughout the state. Accordingly, *Rabon* is inapposite and the Court of Appeals' reliance is misplaced.

Lenci v. City of Seattle is similarly in conflict with the Court of Appeals' analysis. *Lenci* concerned an auto wrecker's challenge to an ordinance which required a fence taller than that required by the relevant statute. 63 Wn.2d 664, 388 P.2d 926 (1964). Of considerable import is the explanation given by the court in *Lenci* in holding the challenged ordinance did not conflict with state law,

> [i]t is well-settled that a city may enact local legislation upon subjects already covered by state legislation so long as its enactments do not conflict with the state legislation; and the fact that a city charter provision or ordinance enlarges upon the provisions of a statute, by requiring more than the statute requires, does not create a conflict unless the statute expressly limits the requirements.

Id. at 670-71 (internal quotations omitted).

When taken in context, for the *Rabon* rule requires, (1) the ordinance and statute must both be *prohibitive* in nature, and (2) where the laws are both prohibitive, the ordinance can go farther in its prohibition. Such an analysis does not apply to the County's ban. The statutes authorizing the production and retailing of adult use cannabis are not *prohibitive*. The UCSA is *permissive*. The ordinance does not go farther in its prohibition. The ordinance goes *counter* to what is authorized by the UCSA. *Rabon* does not save the ordinance.

B. Review Should Be Accepted Because the Decision is in Conflict with *Dep't of Ecology v. Wahkiakum County*

In *Dep't of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 337 P.3d 364 (2014), Division II Court of Appeals invalidated an ordinance banning the application of biosolids within Wahkiakum county. The suit was initiated by Washington's Department of Ecology to enforce the state's biosolids program which was intended to facilitate and encourage recycling, rather than disposal, of sewage waste throughout the state of Washington.

The Court of Appeals found the county's ordinance unconstitutional under article XI, section 11 because it (1) prohibited

what the state law permitted, (2) thwarted the legislative purpose of the statutory scheme, and (3) allowed the exercise of power that the statutory scheme did not confer on local governments. *Id.* at 378. The Court of Appeals holding in the instant case conflicts with its holding in *Wahkiakum*.

1. As in *Wahkiakum,* Clark County's ordinance prohibits what state law permits

The *Wahkiakum* Court directly recognized this Court's established conflict preemption rule: a county ordinance that prohibits what state law permits is in conflict with general laws and in violation of article XI, section 11.

> [T]he legislature directed Ecology to create a comprehensive regulatory scheme to manage biosolids, including land application of class B biosolids. Under the regulatory scheme, Ecology may issue permits for land application of class B biosolids, provided the application for the permit meets certain standards. Thus, Ecology had the authority to regulate and permit the use and disposal of class B biosolids. And, Ecology's regulations have the force of state law. Because the County's ordinance conflicts with state law by banning what has been permitted, it impermissibly prohibits what state law explicitly permits.

Id. at 379 (internal citations omitted). The instant decision squarely conflicts with this reasoning.

The Court of Appeals ignores the similarity between the state's biosolid act and the UCSA statutes intended to create uniform access to marijuana throughout the state. The court disregards the significance of both acts' statewide application and the regulatory authority granted to their respective governing agencies. Critically, the

Emerald court sidesteps the fundamental issue: that the Clark County ordinance "prohibits what state law explicitly permits."

2. As in *Wahkiakum,* Clark County's ordinance thwarts the legislature's purpose

The Wahkiakum court found the ban unconstitutional because it usurped state law and replaced it with local law.

> Ecology argues that upholding the County's ordinance thwarts the legislature's purpose by allowing any county in the state to prohibit land application of class B biosolids. The County responds that Ecology's argument must fail because Ecology cannot show that all counties would ban the land application. But, the County fails to recognize the salient point in Ecology's argument—if all counties had the power to determine whether to ban land application of class B biosolids, then the entire statutory and regulatory scheme enacted to maximize the safe land application of biosolids would be rendered meaningless.

Id. at 383 (internal citations omitted). Despite the clarity with which the reasoning was articulated in *Wahkiakum*, Division II simply disregarded its earlier holding in this case.

Without analysis or explanation as to the divergence from the *Wahkiakum* holding, the Court of Appeals attempts to explain the issue away in a footnote, "Emerald points out that if all local governments enacted ordinances like the County's, the UCSA's statewide regulatory scheme would be rendered meaningless. However, this hypothetical fact situation is not the case before us." (Slip op. at n. 9). The court's disregard for this consideration is in absolute conflict with its decision in *Wahkiakum*.

3. <u>The Court of Appeal's misapplication of *Rabon v Seattle* conflicts with *Wahkiakum*</u>

The Court of Appeals relied on *Rabon* for the proposition that because an activity can be licensed under state law does not mean that the activity must be allowed under local law. (Slip op. at 7, 15). As argued above, this reading omits a crucial qualifier: that the statute must be prohibitive in nature. (*See supra*). Further, this misconstruction of *Rabon* directly conflicts with the Court of Appeals' holding in *Wahkiakum.*

In *Wahkiakum*, Division II unequivocally stated that a local municipality did not have the authority to ban an activity permitted under state law.

> Even if the County had authority to more strictly regulate land application of biosolids, it does not have the authority to entirely prohibit the land application of class B biosolids when such application is allowed under a comprehensive regulatory scheme that has been enacted in accordance with legislative directive.

Wahkiakum County, 184 Wn. App. at 380.[2] The *Wahkiakum* court doubled down on this rationale later in the opinion stating,

> the County may have the authority to further regulate land application of biosolids to comply with other laws, we do not agree that the County has the authority to completely ban the land application of class B biosolids when such a ban conflicts with state law.

Id. at 384. And again,

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[2] *See also Second Amendment Found. v. City of Renton*, 35 Wn. App. 583, 668 P.2d 596 (1983)(local firearm ordinance may not entirely prohibit an use authorized under state law); *Yarrow First Assocs. v. Town of Clyde Hill*, 66 Wn.2d 371, 376, 403 P.2d 49 (1965) ("the power to regulate streets is not the power to prohibit their use").

> the County may regulate biosolids if necessary to comply with other applicable laws. However, the County does not have the authority to completely ban the land application of all class B biosolids when that ban conflicts with state law.

Id at 385. The conflict between *Emerald* and *Wahkiakum* is easily observed. Pursuant to RAP 13.4(b)(2), review should be granted.

C. Review Should Be Accepted Because the Uniform Implementation of Washington's Marijuana Regulatory Scheme is a Matter of Substantial Public Interest

The regulation of adult use marijuana is a statewide concern. Washington voters enacted the measure specifically to generate new state and local tax revenue, take marijuana out of the hands of illegal drug organizations, and tightly regulate its distribution. It cannot be inferred from the voters' pamphlet that Washington voters intended that local city and county councils could render I-502 meaningless through local legislation. Despite the clear directive of Washington's citizens, access to regulated marijuana varies greatly throughout the state because of local bans and moratoria.

About 30% of the state population lives in communities where adult use marijuana retail sales are not allowed.[3] Of Washington's 142 cities with more than 3,000 residents, a total of 77 cities have passed

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[3] Darnell, A.J. & Bitney, K. Washington State Institute for Public Policy, *I-502 evaluation and benefit-cost analysis: Second required report.* (2017)(attached as **Appendix D**); Dilley, J.A., Hitchcock, L., McGroder, N., Greto, L.A., & Richardson, S.M; International Journal of Drug Policy, *Community-level policy responses to state marijuana legalization in Washington State*, (2017)(attached as **Appendix E**).

permanent bans and 4 have rolling moratoriums.[4] Of Washington's 39 counties, six have enacted permanent bans and one county is under moratorium.[5] Plainly, a "legalized state" does not necessarily translate into consistent and uniform access to marijuana markets in all communities.

The Court of Appeals decision allows local municipalities to undermine what Washington voters approved: a uniform and tightly regulated, state-licensed system for adult use marijuana similar to that for controlling hard alcohol. The decision furthers uncertainty about the law and encourages litigation between licensees and local governments. A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue. See *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Such is the case here. Resolution of these constitutional issues will clarify local governments authority under the initiative and discourage future suits. Review should be granted.

VII. CONCLUSION

CCC 40.260.115(B)(4) conflicts with state law because it prohibits lawful marijuana business activity that is expressly permitted

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[4] Municipal Research and Services Center; http://mrsc.org/Home/Explore-Topics/Legal/Regulation/Marijuana-Regulation-in-Washington-State.aspx (last accessed 4/10/2018).
[5] *Id.*

under state law. If Clark County were permitted to impose such a ban, all Washington counties and cities would be empowered to do the same. Such local autonomy cannot be reconciled with the stated goals of Washington marijuana reform, specifically the “provision of adequate access to licensed sources of marijuana products to discourage purchases from the illegal market.”

Review should be accepted. The Court of Appeals decision is in conflict with the well settled conflict analysis established by *Schampera* and its prodigy. Next, the decision is in conflict with the Court of Appeals’ decision in *Dep't of Ecology v. Wahkiakum County*. Finally, uniform implementation throughout the state of Washington’s marijuana law is an issue of substantial public interest that should be determined by the Supreme Court. Accordingly, the Court should grant review of this case.

Respectfully Submitted this 12th day of April 2018.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that I served, via electronic mail, a true and correct copy of the pleading to which this certification is attached, upon the following:

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EXHIBIT “A”

Filed
Washington State
Court of Appeals
Division Two

March 13, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EMERALD ENTERPRISES, LLC, and JOHN LARSON, Appellants, v. CLARK COUNTY, a Washington State County, Respondent.	No. 47068-3-II consolidated with No. 49395-1-II PUBLISHED OPINION

MELNICK, J. — At issue in this case is whether Clark County can lawfully ban the retail sale of marijuana within its unincorporated areas.[1] Emerald argues that a Clark County ordinance (Ordinance) prohibiting the retail sale of marijuana in its unincorporated areas violates article XI, section 11 of the Washington Constitution because it forbids what Washington's Uniform Controlled Substances Act (UCSA) permits, thwarts the state statutory scheme's legislative purpose, and exercises power the UCSA did not confer on local governments. Emerald also contends the Ordinance is either expressly or impliedly preempted by chapter 69.50 RCW. We uphold the Ordinance.

[1] This consolidated appeal is from two cases. In one, Emerald Enterprises, LLC and John M. Larson (collectively Emerald) appeal the Cowlitz County Superior Court's ruling that Clark County's marijuana ban is not preempted by Washington's drug laws. Second, Emerald appeals the Clark County Superior Court's affirmation of the Clark County Hearing Examiner's final order which ordered Emerald to cease all sales of marijuana and marijuana products and revoked Emerald's building permit.

FACTS

I. BACKGROUND

On November 6, 2012, Washington voters approved Initiative 502 (I-502). LAWS OF 2013, ch. 3. The expressed purposes of I-502 included allowing law enforcement to "focus on violent and property crimes," generating "new state and local tax revenue for education, health care, research, and substance abuse prevention," and taking "marijuana out of the hands of illegal drug organizations." Initiative 502, LAWS OF 2013, ch. 3, § 1.

The legislature subsequently codified I-502 within Washington's Uniform Controlled Substances Act (UCSA).[2] Former ch. 69.50 RCW (2014). As amended, the UCSA legalized[3] the limited production, processing, and sale of recreational marijuana to persons twenty-one years and older. Former RCW 69.50.360 (2014). It also created a regulatory state licensing system through the Washington State Liquor and Cannabis Board (Board). Former RCW 69.50.325-.369 (2014).

The Board adopted rules governing marijuana sales. Former ch. 314-55 WAC (2014) (adopted pursuant to statutory authority provided at RCW 69.50.345). In October 2013, the Board established the application requirements for marijuana retailer licenses. Former WAC 314-55-015 to -050, -079, -081 (2014). After determining the maximum number of stores per county, the Board held a lottery for licenses from prospective retailers. Former WAC 314-55-081(1) (2014).

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[2] In this opinion we refer to "I-502" as the initiative voted on by the public. "UCSA" refers to the relevant sections of the Washington statutes that codified I-502. The parties do not distinguish between the two. We use the broader term "UCSA" whenever reasonably likely to reflect the parties' arguments because I-502 has been amended more than once since the voters passed it.

[3] The Washington State Liquor and Cannabis Control Board's website says, "Initiative 502 legalized marijuana use for adults however there are still a number of restrictions." https://lcb.wa.gov/mj-education/know-the-law. While some may use the term "decriminalize," we use the term utilized by the Board.

Before granting any license, the Board conducted mandatory background checks, including any history of administrative violations. Former WAC 314-55-020(3) (2014). Cities, counties, or other authorities could object to a business receiving a license. Former WAC 314-55-020(1), -050(9) (2014). However, the final decision to issue a retail license remained with the Board. Former WAC 314-55-050 (2014).

In January 2014, at the Board's request, the Attorney General's Office (AGO) issued an opinion regarding the authority of local governments to ban marijuana businesses.[4] The AGO opinion analyzed both field and conflict preemption, and opined that state law did not preempt local government action in this area. According to the AGO, local governments retained the authority to enact local bans on marijuana sales.

On May 27, 2014, Clark County (County) passed an Ordinance, which banned, as applicable here, the retail sale of recreational marijuana within unincorporated Clark County. Clark County Code (CCC) 40.260.115.[5] It forbade the sale of retail recreational marijuana so long as the federal government listed marijuana as a controlled substance. CCC 40.260.115(B)(4). It did not do the same for medical marijuana. CCC 40.260.115(B)(3).

Notwithstanding the Ordinance, Emerald applied to the Board for a retail license to sell marijuana in the unincorporated area of Clark County. The County objected. RCW 69.50.331(7)(b). Nonetheless, in September 2014, the Board issued Emerald's license for the retail sale of recreational marijuana.

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[4] Clerk's Papers (CP) at 294-302 (2014 Op. Att'y Gen. No. 2).

[5] The Ordinance has other components. This opinion, refers to the retail sale of recreational marijuana unless otherwise noted.

II. Procedural Facts

A. Cowlitz County Proceeding

Emerald challenged the Ordinance and sought declaratory and injunctive relief in Cowlitz County Superior Court. Emerald argued that the UCSA preempted the Ordinance. Emerald and the County filed cross motions for summary judgment on the preemption issue. The AGO intervened on behalf of the County. In December 2014, the superior court ruled that the UCSA did not preempt the Ordinance. The trial court granted summary judgment in favor of the County and the AGO. This appeal followed.[6]

B. Clark County Proceeding

With the 2014 appeal stayed, Emerald moved ahead with development plans. In September 2015, Emerald applied for a building permit to make improvements to the retail space it rented in a commercial building in the County. Emerald described the proposed use as "'General retail . . . . Business will sell novelties, crafts, collectibles, and general merchandise.'" CP (49395-1) at 24. On December 2, 2015, the County issued Emerald a building permit authorizing the planned improvements.

Emerald then began Board-licensed retail sales of marijuana in the County in December 2015. By January 2016, the County became aware of Emerald's activities and ordered Emerald to cease all sales of marijuana and marijuana products. The County also revoked Emerald's building permit.

Emerald appealed to the Clark County Hearing Examiner (Examiner), who ruled in favor of the County. The Examiner found that Emerald sold marijuana in violation of the General

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[6] This court stayed Emerald's appeal pending the resolution of the related case. We then consolidated the cases on appeal.

Commercial Zoning District, and had obtained its building permit based on a misrepresentation. Pursuant to the Land Use Petition Act (LUPA),[7] Emerald appealed to the Clark County Superior Court, which affirmed the Examiner. This appeal followed.

ANALYSIS

STATE LAW DOES NOT PREEMPT THE ORDINANCE

Emerald's consolidated appeal asserts a single assignment of error involving preemption, i.e. that the "trial court erred in finding that [the Ordinance] does not irreconcilably conflict with state law." Br. of Appellant at 2. Specifically, Emerald argues that the Ordinance violates article XI, section 11 of the Washington Constitution because it irreconcilably conflicts with the UCSA. In addition, Emerald contends that the Ordinance is either expressly or impliedly preempted by I-502 and the UCSA. We disagree.

A. Legal Principles

We review "an order granting summary judgment de novo, engaging in the same inquiry as the trial court." *Weden v. San Juan County*, 135 Wn.2d 678, 689, 958 P.2d 273 (1998). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).[8]

Emerald argues the Ordinance is preempted by state law and thus unconstitutional. Under article XI, section 11 of the Washington Constitution, counties may make and enforce all regulations that do not conflict with state law. Constitutional preemption challenges are reviewed de novo. *Watson v. City of Seattle*, 189 Wn.2d 149, 158, 401 P.3d 1 (2017).

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[7] Ch. 36.70C RCW *et seq.*

[8] The parties do not argue that any material facts are in dispute.

B. County Police Powers Under the Washington Constitution

In Washington, local governments wield significant regulatory powers. *See* WASH. CONST. art. XI, § 11. They derive from Article XI, section 11 which states, "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." This provision, known as "home rule," presumes that local governments are autonomous. *See Watson*, 189 Wn.2d at 166. "The scope of [a county's] police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people." *State v. City of Seattle*, 94 Wn.2d 162, 165, 615 P.2d 461 (1980).

We therefore presume that the County has the regulatory authority to enact the Ordinance and the County's ordinance is valid unless preempted. WASH. CONST. art. XI, § 1; *Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 225-26, 351 P.3d 151 (2015); *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009); *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 477, 61 P.3d 1141 (2003). Because enacted ordinances are presumed constitutional, Emerald has the burden of showing unconstitutionality beyond a reasonable doubt. *Pierce County v. State*, 150 Wn.2d 422, 430, 78 P.3d 640 (2003); *Weden*, 135 Wn.2d at 693.

C. The USCA Does Not Irreconcilably Conflict with the Ordinance

We consider an ordinance to be consistent with article XI, section 11 unless it either "prohibits what the state law permits," "thwarts the legislative purpose of the statutory scheme," or "exercises power that the statutory scheme did not confer on local governments." *Dep't of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 378, 337 P.3d 364 (2014). Emerald argues that the Ordinance irreconcilably conflicts with the UCSA for all three reasons, and is therefore unconstitutional under article XI, section 11. We disagree.

1. The Ordinance Does Not Prohibit What State Law Permits

Emerald contends that the Ordinance prohibits what the UCSA permits. We disagree.

A local law "must yield" to a state statute on the same subject matter if "'a conflict exists such that the two cannot be harmonized.'" *Weden*, 135 Wn.2d at 693 (quoting *Brown v. City of Yakima*, 116 Wn.2d 556,561, 807 P.2d 353 (1991)); WASH. CONST., art. XI, § 11. The focus of the inquiry is on the substantive conduct proscribed by the two laws. For example, *Kirwin* held that an ordinance may punish littering more harshly than state law because both prohibit the same underlying conduct. 165 Wn.2d at 826. No conflict exists "if the provisions can be harmonized." *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004). Here, the County's local ban on retail marijuana stores can be harmonized with state law.

The UCSA legalizes, with caveats, recreational marijuana and permits its regulated sale. RCW 69.50.325 to .390. It gives the Board authority to adopt rules regarding "[r]etail outlet locations and hours of operation," RCW 69.50.342(1)(f), and requires that it promulgate rules for the licensing of retail stores. RCW 69.50.345. The licensing scheme creates the framework allowing select people to legally sell marijuana. RCW 69.50.325.

But while the UCSA permits the retail sale of marijuana, it does not grant retailers an affirmative right to sell marijuana. RCW 69.50.325(3)(a) states that "[t]here shall be a marijuana retailer's license," but does not require the issuance of licenses. RCW 69.50.354 states that retail outlets "may be licensed" by the Board, but does not require the issuance of licenses. And the general rule is that the fact that an activity can be licensed under state law does not mean that the activity must be allowed under local law. *Rabon v. City of Seattle*, 135 Wn.2d 278, 292, 957 P.2d

621 (1998); *Weden*, 135 Wn.2d at 695; *Lawson v. City of Pasco*, 168 Wn.2d 675, 682-84, 230 P.3d 1038 (2010).

Similarly, nothing in the UCSA states that a county may not prohibit retail recreational marijuana sales. RCW 69.50.354 states that the Board may determine the maximum number of retail outlets in each county, but does not set a minimum number.

The UCSA did not create a specific right to a retail license in the County, nor did it authorize retail stores in the unincorporated parts of every county. As a result, Emerald's reliance on *Parkland Light*, 151 Wn.2d 428, and *Entertainment Industries Coalition v. Tacoma-Pierce County Health Department*, 153 Wn.2d 657, 664, 105 P.3d 985 (2005), is unpersuasive.

In *Parkland Light*, a county health board resolution removed discretion from the water districts to manage the disposal of biosolids in their water systems. 151 Wn.2d at 433-34. The resolution stripped water districts of discretion granted by law. *Parkland Light*, 151 Wn.2d at 434. Emerald argues that the Ordinance in this case similarly takes away authority statutorily granted to the Board. However, the UCSA does not empower the Board to ensure that marijuana retail locations open in every jurisdiction; the law merely directs the Board to regulate sales when they occur. RCW 69.50.325, .342, .345, .354, .357. The Ordinance and the UCSA can be simultaneously enforced.

In *Entertainment Industries Coalition*, a county resolution imposed a complete smoking ban despite a state law delegating to business owners the right to designate smoking and nonsmoking areas in their establishments. 153 Wn.2d at 664. Because the resolution prohibited what state law permitted, it was struck down. *Entm't Indus. Coal.*, 153 Wn.2d at 664.

This case is different. The UCSA authorizes the Board to designate the maximum number of licenses for each county, not the exact number of stores in each jurisdiction. RCW 69.50.354.

Therefore, unlike the business owners in *Entertainment Industries Coalition*, who were granted discretion to designate smoking locations by state law and deprived of that discretion by local law, receipt of a Board license does not confer the specific right to open a retail location in a given jurisdiction.

A marijuana retailer license "shall not be construed as a license for, or an approval of, any violations of local rules or ordinances, including . . . zoning ordinances." WAC 314-55-020(15) (Board regulation). Board licensing is an additional requirement for opening a new business. We conclude the UCSA does not create a right to engage in the specific activity prohibited by the Ordinance.

2. Does Not Thwart Legislative Purpose

Emerald also argues that the Ordinance unconstitutionally conflicts with the UCSA because it thwarts the will of voters and the legislative purpose of the state law. Emerald contends that the intent of the law is to address marijuana distribution as a statewide concern by generating new state and local tax revenue, taking marijuana out of the hands of illegal drug organizations, and tightly regulating its distribution. While Emerald accurately summarizes the relevant statement of intent, Initiative 502, LAWS OF 2013, ch. 3, § 1, it fails to demonstrate how this purpose irreconcilably conflicts with the Ordinance.

We consider legislative purpose and intent as an integral part of the article XI, section 11 conflict analysis. An ordinance irreconcilably conflicts with state law if it "thwarts the legislative purpose of the statutory scheme." *Wahkiakum County*, 184 Wn. App. at 378. Because the UCSA began by initiative, our consideration of intent involves both the voters' intent and the legislative intent. *Roe v. TeleTech Customer Care Mgmt. (Colorado), LLC*, 171 Wn.2d 736, 746, 257 P.3d 586 (2011). Here, we construe the applicable statutes not because they are ambiguous, but to

determine whether the Ordinance banning marijuana sales in the County thwarts the legislative purpose.

The voters' pamphlet described I-502 by stating, "Without violating state law, people over age 21 could grow, distribute, or possess marijuana, as authorized under various types of licenses." CP (47068-3) at 152. It did not discuss an "opt out" provision for cities or counties. The "Argument For" section included the justification that "[t]reating adult marijuana use as a crime costs Washington State millions in tax dollars and ties up police, courts, and jail space. We should focus our scarce public safety dollars on real public safety threats." CP (47068-3) at 160. Furthermore, the pamphlet stated the tax money would become revenue for funding health care, research, and drug prevention, and that the law would take profit away from organized crime.

We also rely on the purpose statements expressed in the voters' pamphlet for I-502. As relevant, the purposes are to: (1) allow law enforcement resources to be focused on violent and property crimes; (2) generate new state and local tax revenue for education, health care, research, and substance abuse prevention; and, (3) take marijuana sales out of the hands of illegal drug organizations. Initiative 502, LAWS OF 2013, ch. 3, § 1.[9]

Emerald relies on *Wahkiakum County*, which concluded that a county ordinance prohibiting the application of Class B biosolids conflicted with state law. 184 Wn. App. at 377. In 1992, the legislature enacted a statewide statutory biosolids program, chapter 70.95J RCW, to be implemented and managed by the Department of Ecology (Ecology). RCW 70.95J.020. The statute authorized Ecology to regulate and permit the use, disposal, and application of Class B

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[9] Emerald characterizes all three statements of intent as speaking to matters of "statewide, general concern." Br. of Appellant at 26. Emerald points out that if all local governments enacted ordinances like the County's, the UCSA's statewide regulatory scheme would be rendered meaningless. However, this hypothetical fact situation is not the case before us.

biosolids. RCW 70.95J.020, .025; *Wahkiakum County*, 184 Wn. App. at 379. In 2011, Wahkiakum County passed an ordinance wholly prohibiting the land application of Class B biosolids within the county. *Wahkiakum County*, 184 Wn. App. at 374.

Wahkiakum County decided that the ordinance conflicted with the state laws regulating the disposal and land application of biosolids, in part because allowing piecemeal regulation could thwart the intent of the legislature. 184 Wn. App. at 383. "[I]f all counties had the power to determine whether to ban land application of class B biosolids, then the entire statutory and regulatory scheme enacted to maximize the safe land application of biosolids would be rendered meaningless." *Wahkiakum County*, 184 Wn. App. at 383. Here, Emerald argues that upholding the Ordinance would similarly allow the UCSA to be "gutted by local bans." Br. of Appellant at 27.

Emerald's reliance on *Wahkiakum County* is unpersuasive because the state biosolids law and the UCSA advance distinct legislative purposes. The purpose behind the biosolids statute was to ensure that "to the maximum extent possible . . . [biosolids were] reused as a beneficial commodity." RCW 70.95J.005(2); *Wahkiakum County*, 184 Wn. App. at 382. The statute established a clear preference for disposal through reuse, such as land application, in place of incineration or disposal in a landfill. RCW 70.95J.005(2); *Wahkiakum County*, 184 Wn. App. at 382. Wahkiakum County's ordinance frustrated the state law's legislative purpose specifically because it banned the exact disposal method the state scheme sought to maximize.

The purpose of the UCSA is not to encourage the sale, production, or use of marijuana. It is unlike the statute in *Wahkiakum County*, where the legislature encouraged a specific disposal method. The UCSA allows and regulates the sale of marijuana, rather than encouraging it. This distinction is important. The ordinance in *Wahkiakum County* frustrated Ecology's mandate to

encourage "to the maximum extent possible" the safe disposal of biosolids through land application. RCW 70.95J.005(2); 184 Wn. App. at 382. In this case, the Ordinance frustrates no such mandate. The UCSA authorizes the Board to regulate marijuana sales. The Board has no mandate to maximize or encourage sales. *See* RCW 69.50.342, .354.

The legislature promulgated the section of the UCSA at issue to reallocate law enforcement resources, generate tax revenue, and create an alternative to the illegal drug market. Initiative 502, LAWS OF 2013, ch. 3, § 1. There is no evidence of legislative intent to regulate the location of retail stores within counties. Rather, the UCSA requires the Board to set a maximum number of retail licenses for each county, not to regulate the specific location of each store. RCW 69.50.345. The Board's own regulations clarify that retail licenses do not supersede local law, including local zoning authority. WAC 314-55-020(15). A ban on retail stores within unincorporated Clark County does not, without more, thwart the purpose and intent of the legislature.[10]

Moreover, subsequent amendments to RCW 69.50.540 strongly indicate that the legislature intended to preserve the right of local governments to ban retail stores. Former RCW 69.50.540 (2014), *amended by* LAWS OF 2017, 3rd Spec. Sess., ch. 1, § 979; LAWS OF 2015, 3rd Spec. Sess., ch. 4, § 967; LAWS OF 2015, 2nd Spec. Sess., ch. 4, § 206. In 2015, the legislature reconciled the medical and recreational marijuana statutes. LAWS OF 2015, ch. 70. The legislature also passed SUBSTITUTE H.B. 2136, 63rd Leg., Reg. Sess. (Wash. 2014), which reformed marijuana tax regulation. Former RCW 69.50.540(2)(g)(i) (2014), *amended by* LAWS OF 2015, 2d Spec. Sess.,

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[10] Thwarting legislative purpose would be of greater concern if, as a practical matter, the ban made it very difficult or impossible for Clark County residents to legally purchase marijuana through an authorized retailer. However, this is not the case before us, nor has Emerald argued that the Ordinance has the practical effect of a county-wide ban. We note that numerous licensed retailers operate in the incorporated areas of Clark County, including in nearby Vancouver.

ch. 4, § 206. As amended, the language of RCW 69.50.540 establishes new revenue sharing guidelines:

> (i) . . . [T]he legislature must appropriate an amount equal to thirty percent of all marijuana excise taxes deposited into the general fund . . . for distribution to counties, cities, and towns as follows:
>
> (A) Thirty percent must be distributed to counties, cities, and towns where licensed marijuana retailers are physically located . . .
>
> (B) Seventy percent must be distributed to counties, cities, and towns ratably on a per capita basis. Counties must receive sixty percent of the distribution, which must be disbursed based on each county's total proportional population. *Funds may only be distributed to jurisdictions that do not prohibit the siting of any state licensed marijuana producer, processor, or retailer.*

RCW 69.50.540(2)(g)(i)(A)-(B) (emphasis added).

This amendment allows counties, cities, and towns to share in the financial benefits resulting from marijuana retail sales in their jurisdictions. Thirty percent of the tax revenue is earmarked for the jurisdictions where retail stores are physically located, returning a share of locally generated taxes to the cities and towns. RCW 69.50.540(2)(g)(i)(A). Seventy percent is distributed to counties, cities, and towns on a per capita basis, even if there are no retail locations operating within the jurisdiction. RCW 69.50.540(2)(g)(i)(B). This amendment particularly benefits counties, which receive sixty percent of this distribution based on their proportional population. These financial carrots, however, are accompanied by a stick: "[f]unds may only be distributed to jurisdictions that do not prohibit the siting of any state licensed marijuana producer, processor, or retailer." RCW 69.50.540(2)(g)(i)(B). Thus, local jurisdictions that allow retail sales receive a share of tax revenues. Jurisdictions that ban marijuana sales do not.

By expressly contemplating that local jurisdictions can "prohibit the siting of any state licensed marijuana . . . retailer[,]" the UCSA acknowledges that local governments retain zoning

authority over retail locations. RCW 69.50.540(2)(g)(i)(B).[11] The amendments to RCW 69.50.540 also demonstrate that the legislature did not intend to strip local governments of that authority. Instead, the revenue sharing mechanism created by RCW 69.50.540(2)(g)(i) uses financial incentives to encourage local governments to allow marijuana sales. This cooperative approach is consistent with the legislature's expressed intent to enter into a "partnership with local jurisdictions"[12] regarding marijuana policy, and strongly suggests the legislature intended to preserve the right of local governments to ban retail stores.

3. The County Did Not Exercise Unauthorized Power

Finally, Emerald argues that the Ordinance conflicts with the UCSA because it exercises authority not conferred to local government. Emerald argues that while local regulation may be more stringent than state law, it cannot completely ban an activity permitted by state statute—and that doing so here prevents the Board from exercising its statutory authority. *See* Br. of Appellant at 28 (citing *Great W. Shows, Inc. v. City of Los Angeles*, 27 Cal. 4th 853, 867-68, 44 P.3d 120 (2002)).

As an initial matter, Emerald has framed the issue incorrectly. The issue is not whether the legislature granted the County exclusionary authority, but whether state law specifically *removes* authority that the County is presumed to possess. *See* WASH. CONST. art. XI, § 11 (counties may "make and enforce . . . all such local police, sanitary, and other regulations as are not in conflict

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[11] Any other reading of RCW 69.50.540(2)(g)(i)(B) would render the statutory language distinguishing between jurisdictions that do and do not ban sales meaningless. *Whatcom County v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (courts must construe statutes such that no provision is "rendered meaningless or superfluous").

[12] LAWS OF 2015, 2d spec. sess., ch. 4, § 101 ("The legislature further finds that a partnership with local jurisdictions in this effort is imperative to the success of [competing with the unregulated illegal market and generating state revenue].").

with general laws."); *City of Seattle*, 94 Wn.2d at 165 (the police power of local government is "as extensive as that of the legislature, so long as the subject matter is local and the regulation does not conflict with general laws."). Nevertheless, an ordinance that exercises authority reserved by state law is unconstitutional. *Wahkiakum County*, 184 Wn. App. at 378.

In this case, Emerald fails to meet its burden to demonstrate unconstitutionality. The Board's authority is to license and regulate, not to guarantee that marijuana is sold in every unincorporated area in the state. As stated in *Rabon*, "[t]he fact that an activity may be licensed under state law does not lead to the conclusion that it must be permitted under local law." 135 Wn.2d at 292. This principle is more commonly applied to laws preventing conduct, not allowing it. *See Lawson*, 168 Wn.2d at 677; *Weden*, 135 Wn.2d at 694.

In *Lawson*, the owner of a mobile home park challenged a city ordinance prohibiting the placement of recreational vehicles (RVs) in the park. 168 Wn.2d at 677-78. The owner argued that the Mobile Home Landlord Tenant Act, chapter 59.20 RCW, affirmatively authorized siting RVs in mobile home parks by virtue of regulating mobile home tenancies. *Lawson*, 168 Wn.2d at 683. In rejecting this argument, *Lawson* concluded that the simple statutory "acknowledgement" that RVs may be present on mobile home parks "is not equivalent to an affirmative authorization of their presence." 168 Wn.2d at 683.

Similarly, in *Weden*, the local government adopted an ordinance prohibiting the operation of personal watercraft on all marine waters in San Juan County. 135 Wn.2d at 684-85. A coalition in favor of personal watercraft use challenged the ordinance, arguing that state vessel registration laws preempted the ordinance. *Weden*, 135 Wn.2d at 688. In upholding the ordinance, *Weden* concluded that vessel registration was "nothing more than a precondition to operating a boat. No unconditional right is granted by obtaining such registration." 135 Wn.2d at 695.

In this case, as in *Lawson* and *Weden*, the UCSA leaves the County's Article XI, section 11 police powers in place. The regulatory powers the UCSA delegates to the Board amount to just that, the power to regulate. They do not affirmatively authorize retailers to engage in the regulated activity over the objections of local authorities. The UCSA does not create an explicit "unabridged right" to buy or sell marijuana any more than the statute in *Weden* creates a right to operate personal watercraft. In both cases, licensing is a "precondition" to participation in the regulated activity. *Weden*, 135 Wn.2d at 695. Because the power the UCSA delegates to the Board neither include nor preclude local governments' zoning authority, the Ordinance does not conflict with state marijuana laws by exercising authority delegated to the Board.

D. The UCSA Does Not Preempt the Ordinance

Emerald also argues that the Ordinance is expressly and impliedly preempted by state law. State law preempts a local ordinance if the "statute occupies the field, leaving no room for concurrent jurisdiction, or if a conflict exists such that the statute and the ordinance may not be harmonized." *Lawson*, 168 Wn.2d at 679.

Field preemption arises when a state regulatory system occupies the entire field on a given subject matter, leaving no room for local regulation. *Lawson*, 168 Wn.2d at 679. Field preemption may be express, in which case further analysis is unnecessary. *See Brown*, 116 Wn.2d at 560. Field preemption may also be implied "from the purpose of the statute and the facts and circumstances under which it was intended to operate." *Lawson*, 168 Wn.2d at 679.

Conflict preemption arises if the Ordinance directly and irreconcilably conflicts with a state statute such that the two cannot be harmonized. *Lawson* at 682; *Brown*, 116 Wn.2d at 561.

1. The UCSA Does Not Expressly Preempt the Ordinance

Emerald, relying on RCW 69.50.608, argues that the UCSA expressly preempts the Ordinance. We disagree.

Express preemption requires a clear indication of legislative intent to occupy the entire field. *Lawson*, 168 Wn.2d at 679. Here, there is none.

RCW 69.50.608 states:

> The state of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to controlled substances that are consistent with this chapter. Such local ordinances shall have the same penalties as provided for by state law. Local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of the city, town, county, or municipality.

Although the Ordinance does not "set[] penalties for violations of the controlled substances act," RCW 69.50.608, Emerald nevertheless maintains that a total ban on marijuana sales is "inconsistent with the requirements of state law." Br. of Appellant at 31 (quoting RCW 69.50.608). Because the statute narrowly limits its preemption to criminal violations of the UCSA, we disagree.

The UCSA mandates that the Board regulate a specific list of relevant activities, including aspects of production, processing and sale. RCW 69.50.325-.369. Absent clear statutory language to the contrary, the County retains jurisdiction in all matters not explicitly delegated to the Board.[13] WASH. CONST. Art. XI, § 1; 2014 Op. Att'y Gen. No. 2. Furthermore, in this case the County's

[13] As discussed, Board regulations explicitly recognize local governments' retained zoning authority: "The issuance or approval of a [state] license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to . . . zoning ordinances." WAC 314-55-020(15).

exercise of that jurisdiction which resulted in a local ban on the sale of marijuana is not inconsistent with chapter 69.50 RCW. We are mindful that the UCSA does not *require* marijuana sales; it merely sets conditions for sales that do occur, and penalties if those conditions are violated. RCW 69.50.325-.369.

2. The UCSA Does Not Impliedly Preempt the Ordinance

Emerald next argues that field preemption can be implied from the statements of purpose in the UCSA as well as from "the facts and circumstances upon which the statute was intended to operate." Br. of Appellant at 30, 33, 34. Emerald asserts that successfully replacing the illegal marijuana market with a "tightly-regulated, state-licensed system" requires marijuana regulation to be uniform throughout the state. Br. of Appellant at 34. We disagree with Emerald that the UCSA impliedly preempts the ordinance.

Field preemption may be implied from the statutory purpose, as well as the facts and circumstances in which the statue was intended to operate. *Lawson*, 168 Wn.2d at 679. When a statute is enacted by initiative, a court's purpose inquiry includes consideration of "the intent of the voters who enacted the measure." *Roe*, 171 Wn.2d at 746. This analysis "focuses on the language of the statute 'as the average informed voter voting on the initiative would read it.'" *Roe*, 171 Wn.2d at 746 (quoting *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2001)). We normally only look to extrinsic evidence of voter intent, such as statements in the voters' pamphlet, if the statute is ambiguous. *Amalgamated Transit*, 142 Wn.2d at 205-06. However, because Emerald's argument is that Washington's statutory regulation of marijuana impliedly preempts the entire field of recreational marijuana regulation, we must

examine the underlying statutory purpose. Because the laws in question arise from I-502, we consider the initiative, including relevant statements in the voters' pamphlet.[14]

Emerald's implied preemption argument asserts that allowing piecemeal county-level bans[15] would render the UCSA's intent to establish a regulated marijuana market "meaningless." Br. of Appellant at 33-35. Emerald correctly points out that one of I-502's goals was to provide a safe, regulated alternative to illegal marijuana sales. Initiative 502, LAWS OF 2013, ch. 3, § 1. However, the accomplishment of this goal does not necessitate that every unincorporated area in Washington or even every municipality in Washington allow the sale of marijuana. In addition, Emerald bears the burden to demonstrate preemption. *Cannabis Action Coal.*, 183 Wn.2d at 226. Courts will not interpret a statute as stripping local governments of legislative authority absent clear statutory intent. *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 891-92, 795 P.2d 712 (1990). Emerald fails to show that the UCSA impliedly strips the County of its ability to exercise police power through zoning regulation. On the contrary, a closer reading of the UCSA indicates that the legislature intended to leave local governments' zoning authority undisturbed.

The UCSA empowers the Board to influence the location of marijuana retail outlets in two ways. First, the Board determines the maximum number of retail locations in a given jurisdiction. RCW 69.50.345(2), .354. Second, the Board has the final say in retail licensing decisions. RCW 69.50.331(7)(b)-(c); WAC 314-55-050.

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[14] Because this argument is inextricably interwoven with Emerald's argument about statutory purpose, we discussed this topic in more detail in Part C.2, above.

[15] This hypothetical factual scenario is not before us. We are merely determining the lawfulness of the County's Ordinance.

These powers are distinct from the County's zoning authority. The Board's authority to determine the maximum number of retail locations allowed under state law does not give it the power to determine *where* a store is located within a given jurisdiction. Similarly, the fact that the Board can overrule a local government's objection to licensing means that the County does not have final authority to decide who gets a license. It does not mean that the UCSA strips the County of its power to determine whether retail marijuana businesses can operate within its jurisdiction.

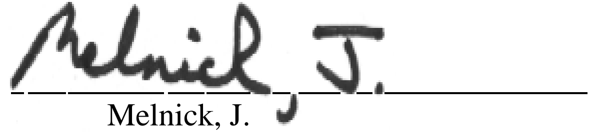
This interpretation is consistent with the Board's own regulations, which explicitly recognize that local governments retain zoning authority. WAC 314-55-020(15) states: "The issuance or approval of a [state] license shall not be construed as a license for, or an approval of, any violation of local rules or ordinances including, but not limited to . . . zoning ordinances." Where "'an agency is charged with the administration and enforcement of a statute, the agency's interpretation of an ambiguous statue is accorded great weight in determining legislative intent.'" *Jametsky v. Olsen*, 179 Wn.2d 756, 764 n.2, 317 P. 3d 1003 (2014) (quoting *Waste Mgmt. of Seattle, Inc. v. Transp. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994)).[16] The legislature has failed to amend the statute in response to this regulation, indicating apparent legislative acquiescence.[17] In fact, the legislature rejected a proposed I-502 amendment containing explicit zoning preemption language. H.B. 2322, 63rd Leg., Reg. Sess. (Wash. 2014).

[16] The AGO, conducting its own analysis, similarly concluded that regulations implementing I-502 did "not occupy the entire field of marijuana business regulation." CP at 298.

[17] "The Legislature is deemed to acquiesce in the interpretation of the court if no change is made for a substantial time after the decision." *State v. Coe*, 109 Wn.2d 832, 846, 750 P.2d 208 (1988); *see also Baker v. Leonard*, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993) ("Legislative silence regarding the construed portion of the statute in a subsequent amendment creates a presumption of acquiescence in that construction.").

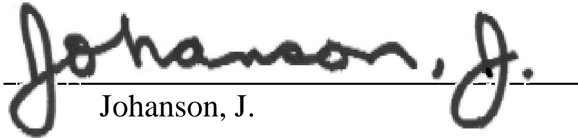
In sum, the UCSA does not occupy the entire field of marijuana regulation in Washington. Because state law has not explicitly or impliedly occupied the entire field, the County retains its zoning authority.

We affirm the trial court's order granting summary judgment.

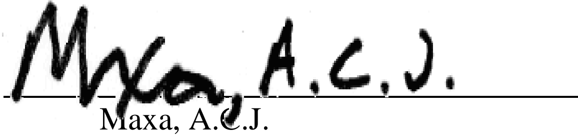


Melnick, J.

We concur:



Johanson, J.



Maxa, A.C.J.

EXHIBIT “B”

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY ________
DEPUTY

NO. 44700-2

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

v.

WAHKIAKUM COUNTY, a political subdivision of Washington State,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Biosolids are an organic, nutrient-rich material derived from the treatment of municipal wastewater. As biosolids, such material meets U.S. Environmental Protection Agency standards for protection of human health and the environment, developed to ensure a biosolids product that can safely be applied to land as fertilizer.

In Washington's biosolids statute, the Legislature has directed the Department of Ecology (Ecology) to ensure "to the maximum extent possible" that wastewater sludge is treated and reused as fertilizer on farms, forests, and land reclamation sites, in a manner that protects public health. The statute is explicit on the method for attaining this goal: Ecology will adopt rules incorporating federal standards for treating wastewater sludge to biosolids quality, allowing it to be applied to land with minimal risk to public health; and Ecology will implement a statewide biosolids management and permitting program to ensure its beneficial use on land. The Legislature further promoted this maximum reuse policy by authorizing Ecology under a companion solid waste statute to prohibit the disposal of sewage sludge in landfills, the primary alternative to reuse.

To implement this maximum reuse policy, Ecology established the biosolids management program, adopting the federal standards for

producing four kinds of biosolids product and applying them to land under a permit system. Each of these four products, together with its land application regime, has a role within the program. This program, adopted by legislative mandate, is the method by which the statute is designed to achieve its goal.

Wahkiakum County has enacted an ordinance prohibiting the land application of two of the program's four biosolids products—the two whose production and reuse, as a matter of fact and economic necessity, make up most of the program. The ordinance conflicts with the biosolids program and thwarts its statutory purpose. Each of the County's prohibitions by itself constitutes an impermissible total ban on an activity that state law promotes in the strongest terms possible, to the extent of virtually requiring it. By prohibiting the land application of these two biosolids products, the County impermissibly interferes with, and thwarts, the method by which the statute is designed to reach its goal. Because article XI, section 11 of the Washington Constitution prohibits local governments from adopting ordinances that prohibit what the state permits or requires, or that thwart the State's policy, the County's ordinance is preempted under the Washington Constitution.

The County argued below, and the trial court accepted, that because its ordinance does not prohibit the land application of all biosolids

products, it is merely a more stringent regulation within the county's authority rather than a total ban, making it permissible under the constitution. The argument fails for the reasons stated above, but it also fails on its own terms: the ordinance operates as a de facto ban of virtually all land application of biosolids in the county. As a matter of fact and as a matter of economic necessity, the two types of biosolids product whose land application is prohibited by the ordinance are used so pervasively on farms, forests, and land reclamation sites across the state that a ban on their use would undermine the reuse mission of the biosolids program. The current use of these products cannot be changed without enormously costly conversions of wastewater treatment system infrastructure and operations. If Wahkiakum County were empowered to impose such a ban, this would imply that all counties and cities are empowered to do the same, essentially authorizing all local governments to say "not here." This cannot be reconciled with the Legislature's goal of maximum reuse. For the Legislature's intent to be realized, biosolids have to go somewhere.

Because the County's ordinance is an obstacle to the full implementation of state law, it is conflict preempted. The February 22, 2013, decision of the Cowlitz County Superior Court upholding the ordinance should be reversed.

II. ASSIGNMENT OF ERROR

The trial court erred when it held that Wahkiakum County Ordinance No. 151-11 is constitutional because it can be harmonized with the state biosolids law and Ecology's biosolids regulation.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Do Wahkiakum County's prohibitions on the land application of septage and Class B biosolids amount to total bans on activities authorized and promoted by statute?

2. Do Wahkiakum County's prohibitions on the land application of septage and Class B biosolids amount to a de facto total ban of virtually all land application of biosolids?

IV. STATEMENT OF THE CASE

A. Regulatory Background

1. Municipal Sewage Sludge, Septage, Biosolids, and Land Application

Wastewater is generated in homes, businesses, industries, and run-off from various sources. CP 132 (58 Fed. Reg. at 9249). Much of it is collected in municipal sewer systems and carried to publicly owned wastewater treatment plants, where it is treated to meet federal Clean Water Act requirements before being released into the environment. *Id.* This wastewater treatment produces two end products: an effluent which is sent back to surface or ground water after treatment, and sewage sludge, which is a solid, semi-solid, or liquid residue. *Id.*

Sewage sludge is valuable as a source of fertilizer and as a soil conditioner. CP 132 (58 Fed. Reg. at 9249); RCW 70.95J.005(1)(d). When it meets pollutant concentration limits and has been properly treated to reduce pathogens and the potential to attract vectors,[1] it qualifies as biosolids and may, under a permit, be applied to land. RCW 70.95J.010(1); WAC 173-308-160, -170, -180. Places it can be applied include agricultural land, forests, land reclamation sites, public fields, lawns, and home gardens. WAC 173-308-210, -250. Land application practices include spraying or spreading sewage sludge onto the land surface, injecting it below the land surface, or incorporating it into the soil to either condition the soil or fertilize crops or vegetation. WAC 173-308-080. In liquid form, it can be applied with tractors, tank wagons, or irrigation systems, or it can be injected under the surface layer of the soil. CP 142 (58 Fed. Reg. at 9259). Dewatered or dried, it can be applied to the surface and then incorporated into the soil by plowing or disking. *Id.*

Treating wastewater to federal Clean Water Act standards generates immense quantities of residual sewage sludge, and its proper management has become increasingly important. CP 132 (58 Fed. Reg. at 9249). In 1993, the Environmental Protection Agency (EPA) reported that the quantity of municipal sewage sludge in the United States had

[1] Vectors are rodents, flies, etc.

almost doubled in the 20 years since the passage of the Clean Water Act. *Id.* In 1992, the Washington State Legislature found that the amount of sludge was expected to double again within the next 10 years. RCW 70.95J.005(1)(b). The ability to effectively treat and return wastewater and sewage sludge to the environment in a protective manner is of paramount importance from both a public health and an environmental perspective. CP 132 (58 Fed. Reg. at 9249). Recognizing that sewage sludge production will continue to increase and that sewage sludge has great potential as a fertilizer, federal agencies and our state Legislature have advocated recycling it as biosolids through land application. *See* CP 134 (58 Fed. Reg. at 9251); RCW 70.95J.005.[2]

2. The Biosolids Statute

The Legislature enacted the biosolids statute, Chapter 70.95J RCW, in 1992. The Legislature's express purpose was to authorize and direct Ecology to implement the policy of maximum reuse of sewage sludge with minimal public health risk. RCW 70.95J.005(2).

First, the Legislature authorized Ecology to administer a biosolids management and permitting program, and gave Ecology discretion to

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[2] The other options for dealing with sewage sludge are to incinerate it or bury it in a landfill. CP 141 (58 Fed. Reg. at 9258). Incineration is wasteful, costly, and heavily regulated under federal and state clean air laws. CP 143 (58 Fed. Reg. at 9260). Landfill disposal is expressly discouraged by state law and regulations, in order to encourage beneficial use. RCW 70.95.255; WAC 173-308-300(9).

delegate permitting authority to local health departments. RCW 70.95J.007. Prior to passage of Chapter 70.95J RCW, the regulation of sewage sludge fell under county jurisdiction, and Ecology had no authority to issue or enforce biosolids permits, issue penalties, or delegate permitting authority to counties. CP 51–65. The Legislature intended to change the law by granting Ecology that authority and withdrawing local authority to regulate biosolids under the solid waste law. RCW 70.95J.020(4); *see also* WAC 173-308-060 ("Biosolids are not solid waste and are not subject to regulation under solid waste laws").

Second, the Legislature anticipated forthcoming federal rules that were to provide the technical standards for treating and land applying biosolids, at 40 C.F.R. § 503. The Legislature directed Ecology to adopt rules that would, at a minimum, conform to those federal rules, forming the basis for the state biosolids management and permitting program. RCW 70.95J.020(1).

The state statute goes further than the federal minimum standards, in at least two ways. First, although the federal regulations encourage the beneficial reuse of biosolids, the statute promotes this reuse in the strongest possible terms, virtually requiring it. The Legislature declared that "a program shall be established to manage municipal sewage sludge" and that "the program shall, *to the maximum extent possible*, ensure that

municipal sewage sludge is *reused as a beneficial commodity . . . .*" RCW 70.95J.005(2) (emphasis added). In a corresponding change to the state's solid waste management law, the Legislature gave Ecology the authority to prohibit the disposal of sewage and septic tank sludge in landfills, with any exemptions to be based on "the economic infeasibility of using or disposing of the sludge ... other than in a landfill." RCW 70.95.255. Ecology has adopted this landfill prohibition in its biosolids regulations, together with its limited "economic infeasibility" exemption. *See* WAC 173-308-300(9). As a result, absent a showing of economic infeasibility, municipalities must dispose of sewage sludge either through biosolids land application or by incinerating it in compliance with Clean Air Act standards.

Second, the Legislature did not grant local governments authority to prescribe the terms of the biosolids program. Instead, it required Ecology to implement the program by developing standards that define the various types of biosolids and the applicable management criteria. Once those program requirements were adopted by rule, the Legislature expected Ecology to issue biosolids permits to facilities seeking to apply biosolids to the land. The Legislature gave Ecology the authority to delegate to local governments, at its sole discretion, the authority to issue and enforce such permits; and to withdraw any such delegation if it "finds

that a local health department is not effectively administering the permit program."[3] RCW 70.95J.080.

3. Washington's Biosolids Program

Ecology adopted the biosolids management regulation, Chapter 173-308 WAC, in 1998. Its stated purpose echoes that of the statute: to protect human health when biosolids are managed, to encourage the maximum beneficial use of biosolids, and to establish the standards that allow sewage sludge and septage to be managed as biosolids and applied to the land. WAC 173-308-010(2); RCW 70.95J.005(2).

The biosolids quality standards are threefold, consisting of pollutant concentration limits, vector attraction reduction standards, and standards for pathogen reduction. WAC 173-308-160, -170, -180. These standards are used to define four types of biosolids quality product. Depending on the pathogen reduction standards to which they have been treated, biosolids are classified as a Class A or Class B product. WAC 173-308-170. Class A biosolids are produced through a treatment process that kills pathogens to undetectable levels. CP 147–148. Class B biosolids are produced by a process that kills at least 99 percent of

[3] Following enactment of the biosolids law, local health departments continue to have primary permitting and enforcement authority over solid waste handling and disposal. RCW 70.95.020(1), .160. Sewage sludge not treated to biosolids standards is considered solid waste and is regulated as such. RCW 70.95.030(20). But because biosolids are not considered solid waste, they are not subject to local authority granted by the state solid waste law. RCW 70.95J.020(4); WAC 173-308-060.

pathogen indicators, or have actually been tested to confirm the elimination of at least 99 percent of pathogen indicators. CP 147. Class A biosolids that meet an additional, heightened pollutant concentration standard qualify as Exceptional Quality, or EQ, biosolids. *See* WAC 173-308-080. Finally, septage is also a form of biosolids. RCW 70.95J.010(1). It comes from septic systems rather than wastewater treatment plants. WAC 173-308-080. Because of its long residence in septic tanks before being pumped out, domestic septage is considered to be sufficiently stabilized with respect to pathogens that it requires no further pathogen treatment prior to land application. CP 147.

Each of these biosolids products has a land application regime appropriate to it. WAC 173-308-210, -250, -260, -270. Biosolids that meet Class A pathogen reduction standards require no further pathogen reduction at the land application site. CP 146. As a result, they can be applied to land with no pathogen-related restrictions. WAC 173-308-210. Treatment to Class A standards is necessary when public access or waiting periods cannot be controlled. When Class A biosolids also meet EQ standards for pollutant concentrations they can be used to fertilize lawns and home gardens. CP 147; WAC 173-308-250, -260.

Class B biosolids and septage receive their final pathogen reduction after being applied to the land. CP 147. Because both Class B

biosolids and septage may still contain some pathogens, the regulations impose periods of restrictions on crop harvesting, domestic animal grazing, and site access for certain periods following their application to land. CP 148; WAC 173-308-210, -270. For example, harvesting of food crops, feed crops, and fiber crops must wait at least 30 days beyond land application of Class B biosolids. WAC 173-308-210(5)(a). Public access to land with low potential for public exposure must be restricted for at least 30 days. *Id.* And WAC 173-308-270(4)(a) provides similarly for septage. The rationale for the additional restrictions for Class B biosolids and septage is to ensure that the land application of Class B biosolids is equally protective of human health and the environment as the land application of Class A biosolids. CP 148.

While Class A biosolids may be used anywhere that Class B biosolids and septage may be used, they are typically used only where access restrictions are impractical, such as lawns and home gardens, and thus account for only 12 percent of biosolids managed in the state. CP 148. Class B biosolids and septage are used much more extensively, on farms, forests, and land reclamation sites, where access restrictions are practical. *Id.*

B. Undisputed Costs of Maintaining a Biosolids Program Deprived of Class B Biosolids and Septage

About 88 percent of biosolids managed in the state are Class B biosolids or septage, used on farms, forests, and land reclamation sites. CP 148. About 12 percent, presumably all Class A, goes to the remaining uses, on public contact sites, lawns, or home gardens. *Id.*

The superior court invited additions to the record relating to the costs and burdens imposed by a prohibition of Class B and septage. CP 475. Many treatment facilities in Washington with an existing Class B biosolids production program have at some point considered acquiring new equipment and changing operations in order to convert to Class A biosolids production. CP 149. In response to the court's invitation, Ecology sought information from these facilities on what it would cost for a facility that currently produces Class B biosolids to convert to Class A production. CP 149. The results of Ecology's efforts to gather this information are captured in undisputed declarations submitted by Ecology. CP 196–456. *See especially*, CP 151–161 (summarizing results). The surveyed facilities range from the small facility serving the town of Cathlamet in Wahkiakum County to the enormous facilities serving metropolitan King County. *Id.*

Facilities that considered converting typically evaluated several alternatives for producing Class A biosolids. CP 150. The technologies for treating sludge to Class A standards involve different equipment than is used for treating it to Class B standards. *Id.* For some technologies, such as composting, the purchase of real property might be necessary. *Id.* In every case where a facility compared continuing an existing Class B program to converting to a Class A program, the cost of converting was significant. *Id.* Ecology obtained cost comparisons from 12 representative facilities. CP 151. Of these 12, only one decided to make the conversion. CP 151.

King County found that converting its South Treatment Plant to the least expensive Class A biosolids program would have cost $29,140,000 more than continuing with its existing Class B program. CP 243, 297, 306. King County's West Point Treatment Plant found that conversion would have cost $27,940,000 more than continuing with its existing Class B program. CP 244, 262, 271. Together, the costs of converting these two facilities would have approached $60,000,000. Central Kitsap County Wastewater Facility found that converting to Class A would cost in the range of $3,000,000 to $7,000,000 more than continuing with its existing Class B program. CP 153, 163–165, 168, 179. The City of Kennewick Wastewater Treatment Facility found that conversion would

cost $5,500,000 more than continuing with its existing Class B program. CP 197. The City of Everett found that the cost of converting ranged from $9,000,000 to almost $35,000,000 more than the cost of continuing the existing Class B program. CP 155, 237.

Most of the facilities compared the cost of continuing an ongoing Class B process with the costs of converting to a Class A process. CP 150. However, in some cases, the facility considering a conversion could not continue with its existing Class B operation because that operation had become obsolete or inadequate. *Id.* These cases were more akin to considering alternatives for an entirely new facility: there were substantial equipment or real estate costs no matter whether the facility converted to a Class A operation or selected a new Class B operation. CP 150–151. However, even in such cases, it was still more costly to convert to Class A than to improve the Class B capacity because the methods and equipment for producing Class A biosolids are much more expensive. CP 151. The one representative facility that did choose to convert fell into this category. CP 159–160.

In addition to the significant costs of conversion, it also takes a considerable amount of time for generators of biosolids to change their treatment system. Professionals knowledgeable about the timeframes necessary to implement significant changes at biosolids treatment facilities

estimate that it takes five to seven years to fully implement a change from a Class B to a Class A biosolids treatment system. CP 160.

C. Statement of Procedural Facts

In April 2011, the Board of Wahkiakum County Commissioners adopted Ordinance No. 151-11, entitled "An Ordinance Regarding the Regulation of the Use of Biosolids." The Ordinance provides that "No Class B biosolids, septage, or sewage sludge may be applied to any land within the County of Wahkiakum." CP 48–49.

In May 2011, Ecology filed a civil action in Cowlitz County Superior Court against Wahkiakum County, requesting, under the Uniform Declaratory Judgments Act, Chapter 7.24 RCW, that the court declare Wahkiakum County Ordinance No. 151-11 invalid because it violates the Washington State Constitution, article XI, section 11.

In August 2011, Ecology filed a motion for summary judgment requesting that the Cowlitz County Superior Court declare Wahkiakum County Ordinance No. 151-11 invalid. Wahkiakum County filed a cross-motion for summary judgment, seeking dismissal of all causes of action. After hearing arguments in September 2011, the court denied summary judgment, but invited Ecology to seek a rehearing after the parties submitted an undisputed factual record relating to whether the costs were

prohibitive for wastewater treatment facilities in the state to convert to Class A biosolids production and management. CP 475.

In September 2012, Ecology filed a motion for rehearing on summary judgment and submitted undisputed declarations and reports from 12 facilities in the state that had evaluated the costs of converting from Class B biosolids production to Class A production. After considering this additional information, the court denied Ecology's motion and granted summary judgment to Wahkiakum County, concluding the ordinance did not violate the Washington Constitution and dismissing the case with prejudice. This appeal followed.

V. ARGUMENT

A. Standard of Review

On appeal from summary judgment, an appellate court engages in the same inquiry as the trial court. RAP 9.12; *Parkland Light & Water Co. v. Tacoma-Pierce Cnty Bd. of Health*, 151 Wn.2d 428, 432, 90 P.3d 37 (2004). After considering all evidence and reasonable inferences in the light most favorable to the nonmoving party, summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Interpreting a statute presents a question of law subject to de novo review. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621,

627, 869 P.2d 1034 (1994). While an ordinance is presumed constitutional and the party challenging its validity bears the burden of proof, *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991), whether a statute preempts an ordinance is a question of law subject to de novo review. *Parkland Light & Water*, 151 Wn.2d at 432. Similarly, whether an ordinance is reasonable, local, or conflicts with a general law for purposes of article XI, section 11 of the Washington Constitution is purely a question of law subject to de novo review. *Weden v. San Juan Cnty.*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998).

B. Wahkiakum County Ordinance No. 151-11 Conflicts With State Law and Is Therefore Unconstitutional

1. A local ordinance may not prohibit what state law permits and may not thwart state policy

Article XI, section 11 of the Washington Constitution empowers local governments to "make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." An ordinance conflicts with the general laws when it "prohibits what state law permits," *Entm't Indus. Coal. v. Tacoma-Pierce Cnty. Health Dep't*, 153 Wn.2d 657, 663, 105 P.3d 985 (2005), or when it thwarts the state's policy or the Legislature's purpose. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 694, 169 P.3d 14 (2007); *Ritchie v. Markley*, 23 Wn. App. 569, 574, 597 P.2d 449 (1979); *Diamond Parking,*

Inc. v. City of Seattle, 78 Wn.2d 778, 781, 479 P.2d 47 (1971). The general laws referred to in article XI, section 11, include not only statutes, but also regulations promulgated by state agencies with delegated rule-making authority and direction to adopt rules implementing the laws they enforce. *Gen. Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986).

These state conflict-preemption principles mirror U.S. Supreme Court holdings that federal law preempts state law when compliance with both "is a physical impossibility" or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. Nat'l Solid Wastes Mgmt. Assoc'n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992). While not binding, federal courts' preemption analyses should be persuasive here because the same underlying principles apply.[4]

A local ordinance may not entirely prohibit an activity authorized under state law. *Second Amendment Found. v. City of Renton*, 35 Wn. App. 583, 589, 668 P.2d 596 (1983) (holding that local governments may

[4] While not binding on state courts, federal precedent in areas addressed by similar provisions in our state constitution can be meaningful and instructive. *State v. Gunwall*, 106 Wn.2d 54, 60–61, 720 P.2d 808, 812 (1986) ("The opinions of the Supreme Court, while not controlling on state courts construing their own constitutions, are nevertheless important guides on the subjects which they squarely address."); *Sanders v. City of Seattle*, 160 Wn.2d 198, 208, 156 P.3d 874 (2007) ("when interpreting our state constitution, we have held that federal case law interpreting federal constitutional provisions is persuasive, though not binding, precedent.").

enact reasonable regulations of state licensed activities within their borders but they may not prohibit them outright); *Yarrow First Assocs. v. Town of Clyde Hill*, 66 Wn.2d 371, 376, 403 P.2d 49 (1965) (holding that cities may regulate roads within their boundaries but may not entirely prohibit their use); *see also*, *Blanton v. Amelia Cnty.*, 261 Va. 55, 540 S.E.2d 869 (2001) (Supreme Court of Virginia's holding that local ordinance banning biosolids land application conflicted with state statute and regulations that expressly authorize the land application of biosolids conditioned upon the issuance of a permit). This principle applies equally to a local ordinance that amounts to a de facto total ban of a state authorized activity. *Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs of the Cnty. of Rogers*, 27 F.3d 1499, 1508 (10th Cir. 1994) (holding that an ordinance amounting to an explicit or de facto total ban of an activity encouraged by statute is ordinarily preempted).

The Washington Supreme Court has held that where a local ordinance thwarts or interferes with the "coordinated system" established by statute, it is in direct conflict with article XI, section 11 of the state constitution. *Biggers*, 162 Wn.2d at 699; *Diamond Parking*, 78 Wn.2d at 781; *Parkland Light & Water*, 151 Wn.2d at 434. Similarly, the U.S. Supreme Court has also held: "In determining whether state law stands as an obstacle to the full implementation of a federal law, it is not enough to

say that the ultimate goal of both federal and state law is the same. A state law also is pre-empted if it interferes with the *methods* by which the federal statute was designed to reach th[at] goal." *Gade*, 505 U.S. at 103 (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987)) (emphasis added) (citations and internal quotation marks omitted).

Under these principles, the Wahkiakum ordinance is preempted.

2. State law authorizes and promotes in the strongest possible terms the land application of sewage sludge that meets biosolids quality standards

Washington's biosolids statute authorizes and promotes in the strongest possible terms the land application of all sewage sludge that meets biosolids quality standards. RCW 70.95J.005(2); *see also* WAC 173-308-010(2)(a), (c). It directs Ecology to ensure "to the maximum extent possible" that sewage sludge is reused as fertilizer on farms, forests, and land reclamation sites, in a manner that minimizes risk to public health. *Id.* To minimize such risk, the statute provides that sewage sludge may be applied to land only after it is brought to the federal biosolids standards to be incorporated into rule by Ecology. The statute deems biosolids a valuable product and directs Ecology to implement a statewide biosolids management and permitting program to ensure its application to land. RCW 70.95J.005(2).

In a corresponding change to the state's solid waste management law, the Legislature gave Ecology the authority to prohibit the disposal of municipal sewage sludge and septage in landfills, with any exemptions to be based on "the economic infeasibility of using or disposing of the sludge . . . other than in a landfill." RCW 70.95.255. Ecology's biosolids regulations have adopted this landfill prohibition, together with its limited "economic infeasibility" exemption. *See* WAC 173-308-300(9).

To carry out these mandates and policies, Ecology has established the program, at Chapter 173-308 WAC, to promote and regulate the production and use of biosolids. The program establishes processes for producing four kinds of biosolids: septage, Class B biosolids, Class A biosolids, and Exceptional Quality (EQ) biosolids. WAC 173-308-080, -160, -170, -180. Each of these products qualifies as biosolids because it meets regulatory limits on pollutant concentrations and standards for minimizing or eliminating vector attraction and pathogens. *Id.* Septage meets these standards through the process of stabilization from long residence in a septic tank. Class B and Class A biosolids meet the standards through secondary treatment at public wastewater treatment facilities, differing only in the degree of pathogen reduction treatment they receive, with Class B biosolids treated to eliminate 99 percent of pathogens, and Class A biosolids treated to eliminate all trace of

pathogens. CP 147–148; WAC 173-308-170. EQ biosolids are Class A biosolids that meet a more stringent pollution concentration limit. WAC 173-308-080.

The program provides for a land application regime appropriate to each of these biosolids products. WAC 173-308-210, -250, -260, -270. EQ biosolids may be land applied with no restrictions and no permit; it can be sold or given away in bags for use on lawns and home gardens. WAC 173-308-250, -260. The other products require a permit and a site-specific land application plan. WAC 173-308-210, -270. A permit for land applying Class B biosolids or septage must include periods of restricted public access, grazing, and crop harvesting. *Id.* During this period, pathogen elimination is completed through exposure to environmental and biological conditions. CP 147. A permit for land applying Class A biosolids does not require such restrictions. WAC 173-308-210. Each of these products, together with its land application regime, has a role within the statutorily mandated program.

3. Wahkiakum County's prohibitions are total bans of activities authorized and encouraged by state law and regulation

Class B biosolids, because it meets biosolids standards, is deemed by law to be a valuable biosolids product. WAC 173-308-210 specifically addresses the management requirements for land applying Class B

biosolids to farms, forests, and land reclamation sites with minimal risk to public health. Under WAC 173-308-210, Class B biosolids may be applied to the land under a permit and according to a site-specific land application plan. No further treatment for pathogens is required beyond Class B pathogen reduction treatment and final pathogen elimination through exposure to environmental and biological conditions during required periods of restriction on public access, grazing, and crop-harvesting. Class B biosolids is a recognized valuable commodity, and its land application is an activity both authorized and promoted by statute.

Similarly, septage meeting the conditions in WAC 173-308-270 is considered a biosolids quality product. RCW 70.95J.010(1). Under WAC 173-308-270, septage may be applied to land under a permit and according to a site-specific land application plan. No further treatment for pathogens is required beyond the stabilization that occurs due to the long residence in the septic tank and final pathogen elimination through exposure to environmental and biological conditions during required periods of restriction on public access, grazing, and crop-harvesting. Thus, the land application of septage is an activity independently authorized and encouraged by law.

The County's ordinance prohibits all land application of septage and all land application of Class B biosolids, subjecting any person who

applies either product to land in Wahkiakum County to a fine of one thousand dollars for each load of septage or Class B biosolids they apply. These are total bans of activities authorized and promoted by the state.

Moreover, these prohibitions impermissibly interfere with the state's method for achieving its goals. *Biggers*, 162 Wn.2d at 699; *Diamond Parking*, 78 Wn.2d at 781; *Parkland Light & Water*, 151 Wn.2d at 434; *Gade*, 505 U.S. at 103. The biosolids program is the method by which the law is designed to attain its goal of maximizing the reuse of sewage sludge. The production of biosolids products through various forms of treatment, and the land application of these products in ways appropriate to them, are essential elements of the program. The state's method for ensuring that biosolids land application is maximized is to establish treatment standards that minimize health risks. When treated to these standards, sludge qualifies as biosolids and may be land applied with minimal risk. By its prohibitions, the County's ordinance does interfere with the method designed to reach the state's goal. Indeed, the ordinance interferes to such a degree that it thwarts the very purpose of the statutorily mandated program.

4. Wahkiakum County's ordinance is a de facto ban of all biosolids land application within the county

The County argued below, and the trial court accepted, that because its ordinance does not prohibit the land application of Class A biosolids, it is merely a further, more stringent regulation rather than a total ban, and is therefore permissible under the state constitution. This argument attempts to avoid the principle that ordinances amounting to a total ban of an activity promoted by statute will ordinarily be preempted, by contending that its prohibitions do not amount to a total ban of any statutorily encouraged activity. This argument fails for three reasons.

First, it fails because, as argued in the previous section, the County's prohibitions on septage land application and Class B biosolids land application are not merely further, more stringent regulations. They are total bans of activities promoted by statute and regulation. It also fails because the prohibitions interfere with the methods by which the statute is designed to reach its goal.

But the County's argument also fails on its own terms. Even if the County had some further authority to regulate in the biosolids field,[5] its ordinance works as a de facto ban of virtually all biosolids land application in the County. As a matter of fact and as a matter of economic

[5] RCW 70.95J.020(4) provides reason to conclude that the County lacks any such authority, stating that "materials that [qualify] as a biosolid shall be regulated pursuant to this chapter."

necessity, Class B biosolids and septage, the two types of biosolids prohibited from being land applied by the ordinance, are used so pervasively across the state that they essentially constitute the entire practice of biosolids application. CP 148. This cannot be changed without enormously costly conversions of wastewater treatment system infrastructure and operations. CP 150–160. The County's prohibitions thus amount to a de facto total ban on biosolids land application.

a. Ordinances that amount to a de facto total ban of an activity that is otherwise encouraged by statute will ordinarily be preempted

When analyzing whether an ordinance conflicts unconstitutionally with a statute, it is the material effect of the ordinance that matters. *Gade*, 505 U.S. at 107. The impact of the ordinance on the objectives of a statute must be examined to determine whether it thwarts the statute's policy in a material way. *Blue Circle Cement*, 27 F.3d at 1509. Thus, "ordinances that amount to an explicit or de facto total ban of an activity that is otherwise encouraged by [statute] will ordinarily be preempted." *Id.* at 1508.

Local ordinances have been declared invalid where they amounted to de facto bans of activities encouraged by law. In *Blue Circle Cement*, the Tenth Circuit considered whether a local ordinance conflicted with the federal Resource Conservation and Recovery Act (RCRA). *Blue Circle*

Cement, 27 F.3d at 1504–08. The ordinance imposed a conditional use permit requirement and thus empowered local government to ban the recycling of hazardous waste through burning it as an alternative fuel, even where this activity occurred at a RCRA permitted facility under the terms of the permit. *Id.* at 1502. Blue Circle Cement challenged the ordinance as preempted under federal law. The county defended the ordinance partly on the ground that RCRA has a "savings clause" that expressly permits states and local governments to adopt more stringent provisions. *Id.* at 1506. But in the face of the county's de facto ban, the court gave no weight to the statute's savings clause. Noting that the purpose of the law was to facilitate resource recovery and conservation, that the materials were valuable as energy sources, and that Congress's goal was to replace land disposal with advanced treatment, recycling, and incineration, the court held that whatever power the savings clause reserved to local authorities, "it does not vest in such authorities the power to ban outright the important activities that [the statute] is designed to promote." *Id.* at 1505–06. The Blue Circle court's reasoning is at least as compelling here, where the Legislature did not include an explicit savings clause.[6]

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[6] Unlike RCRA, Chapter 70.95J RCW contains no savings clause. Its regulation, Chapter 173-308 WAC, provides only that: "Facilities and sites where biosolids are applied to the land must comply with other applicable federal, state and

In *ENSCO, Inc. v. Dumas*, 807 F.2d 743 (8th Cir. 1986), a county defended its ban on storage, treatment, or disposal of a particular class of hazardous waste as merely a more stringent requirement. The Eighth Circuit held the ordinance invalid because the ordinance "through its ban on storage, treatment, and disposal in essence mandates that these wastes in [the] County will not be handled in the manner deemed safest by Congress and the EPA." *ENSCO*, 807 F.2d at 745. Similarly, the Supreme Court of Arkansas, in *Jacksonville v. Arkansas Department of Pollution Control and Ecology*, 308 Ark. 543, 824 S.W.2d 840, 842 (1992), held that both state and federal law preempted a local ordinance from barring the future incineration of hazardous waste because the ordinance frustrated RCRA's "preference for treatment rather than land disposal of hazardous waste." Finally, in *Ogden Environmental Services v. City of San Diego*, 687 F. Supp. 1436 (S.D. Cal. 1988), another case involving a de facto ban, the federal district court found invalid a local ordinance that imposed a conditional use permit requirement on such activity without specifying any criteria for obtaining such a permit. The court held that the ordinance conflicted with federal law because it was a de facto ban on hazardous waste storage facilities and frustrated RCRA's

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local laws, regulations, and ordinances, including zoning and land use requirements." WAC 173-308-030(6). This neither provides for nor recognizes local authority to impose "more stringent requirements."

general objective to facilitate treatment in place of land disposal. *Ogden Envtl. Servs.*, 687 F. Supp. at 1446–47.

In sum, courts in multiple jurisdictions have recognized that an ordinance amounting to a de facto total ban of an activity that is otherwise encouraged by statute will ordinarily be preempted.

b. Wahkiakum County's ordinance effectively bans all biosolids land application within the county

Biosolids generated in Wahkiakum County consist entirely of Class B biosolids and septage. CP 27, 317–318. Beyond Wahkiakum County, around 88 percent of all biosolids managed in the state are either septage or Class B biosolids, the rest presumably being Class A. CP 148. Increasing the percentage of Class A biosolids is not feasible: publicly owned wastewater treatment facilities in the state have conformed their practices to the state's biosolids management regulations by treating their sludge to produce a Class B product; to change this, new treatment facilities would need to be built or existing treatment facilities would have to convert to Class A treatment operations. CP 150. Numerous facilities in Washington, ranging from the small facility serving the town of Cathlamet in Wahkiakum County to the enormous facilities serving metropolitan King County, have considered and evaluated converting to

Class A biosolids production. *Id.* Almost all have found the economic and practical obstacles prohibitive. *Id.*[7]

By banning the land application of all biosolids produced in Wahkiakum County and virtually all of the biosolids produced in the rest of the state, Wahkiakum County effectively eliminates the possibility of land applying biosolids in Wahkiakum County, leaving no room at all for the state to permit and regulate it. The County's ordinance thus operates as a de facto ban of biosolids land application, undermining the program in the county. If all other counties in the state were to adopt regulations similar to Wahkiakum's, there would be no effective biosolids land application anywhere in the state—a result clearly contrary to the Legislature's intent in adopting the biosolids statute. Wahkiakum County is attempting to exercise a power that could not be simultaneously conferred on all counties in the state without destroying the biosolids program.

Considering a similar issue, the California Court of Appeal, in *City of Los Angeles v. County of Kern*, 214 Cal. App. 4th 394, 154 Cal. Rptr.

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[7] King County found that converting two of its facilities would have cost almost $60,000,000 more than continuing their Class B programs. CP 243, 244, 262, 271, 297, 306. Central Kitsap County found that converting its facility would have cost in the range of $3,000,000 to $7,000,000 more than continuing its Class B program. CP 153, 163–165, 168, 179. The City of Kennewick found that conversion would have cost $5,500,000 more than continuing its Class B program. CP 197. The City of Everett found that the cost of converting ranged from $9,000,000 to almost $35,000,000 more than the cost of continuing its Class B program. CP 155, 237.

3d 122 (2013), held: "An ordinance of one local government that prohibits, within its jurisdiction, the employment by another local government of a major, widely accepted, comprehensively regulated form of recycling is not consistent with [the state law's] mandate." *City of L.A.*, 214 Cal. App. 4th at 416. The court reasoned: "If we held that Kern County is empowered to ban land application of biosolids, we would necessarily be implying that all counties and cities are empowered to do the same. . . . [L]os Angeles has to do something with its biosolids. The same goes for every city and county in the state. Kern County asks us to adopt a position that would authorize all local governments to say 'not here.' That principle would not be consistent with a statute that requires all local governments to adhere to waste management plans in which recycling is maximized." *Id.* at 417–418. The *City of L.A.* court's reasoning is persuasive and speaks directly to the point here.

VI. CONCLUSION

Because the County's ordinance is an obstacle to the full implementation of state law, it is conflict preempted. The February 22,

2013, decision of the Cowlitz County Superior Court upholding the ordinance should be reversed.

RESPECTFULLY SUBMITTED this 22nd day of July 2013.

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STATE OF WASHINGTON
BY ____
DEPUTY

NO. 44700-2

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellant, v. WAHKIAKUM COUNTY, a political subdivision of Washington State, Respondent.	CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 22nd day of July 2013, I caused to be served a true and correct copy of Appellant Department of Ecology's Opening Brief in the above-captioned matter upon the parties herein as indicated below:

DANIEL H. BIGELOW WAHKIAKUM COUNTY PROSECUTING ATTORNEY 64 MAIN STREET, P.O. BOX 397 CATHLAMET, WA 98612	[x] U.S. Mail [ ] By Fax [ ] By Email

the foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22nd day of July 2013, at Olympia, Washington.

TERESA L. TRIPPEL, Legal Assistant

EXHIBIT “C”

NO. 44700-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

v.

WAHKIAKUM COUNTY, a political subdivision of Washington State,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The issue in this case is whether Wahkiakum County's biosolids ordinance thwarts Washington's biosolids law, preventing it from accomplishing its full purpose. While the County suggests that its ordinance can be harmonized with the biosolids statute, under established Washington case law a local government cannot legislate so as to prevent a law from achieving its purpose. Here, the ordinance prohibits essential and substantial elements of the statutorily mandated biosolids program–land application of Class B biosolids and septage–thereby frustrating the full implementation of the law.

The County's reliance on biosolids management "options" other than land application ignores the terms of the statute: the law is comprehensive with respect to the field of biosolids management, and land application is the sole biosolids management approach embraced by the statute. Within that approach, state regulations authorize distinct land application regimes for Class B biosolids and septage, designed specifically for areas where access restrictions are practicable, such as farms, forests, and land reclamation sites. These are activities that the regulations specifically authorize, conditioned on the issuance of a permit; to prohibit them as the County does conflicts with that authorization.

The County's reliance on a state regulation acknowledging that local ordinances may apply to land application of biosolids is misplaced. The plain language of the statute requires that biosolids be applied to the land "to the maximum extent possible." By arguing that a local ordinance is applicable even when it shrinks "the maximum extent possible" to a sliver, the County twists the meaning of those words, attempting to redefine state policy and the purpose of the statute.

The County's contention that the land application of Class A biosolids is safer than the land application of Class B is incorrect. The very purpose of the more stringent land application regime required for Class B biosolids (restricting public access and crop harvesting for certain periods) is to ensure that their use is just as protective of human health as is the use of Class A biosolids.

The County's suggestion that the economic difficulties for local governments and ratepayers created by bans of Class B biosolids are somehow irrelevant to this preemption analysis is contrary to the express purpose of the law. The Legislature stated that it created the biosolids program in large part to alleviate the financial burdens that sludge management was placing on local governments and ratepayers; it also provided for certain narrow exemptions from program requirements based

on economic feasibility. Facts about financial burdens are very much to the point.

Because the County's ordinance operates to thwart the state policy and legislative purpose of the state biosolids law, it is conflict preempted. The February 22, 2013, decision of the Cowlitz County Superior Court upholding the ordinance should be reversed.

II. ARGUMENT

A. The Standard of "Beyond a Reasonable Doubt" Does Not Raise the Bar in a Conflict Preemption Case

Whether an ordinance conflicts with a general law for purposes of article XI, section 11 of the state constitution is purely a question of law subject to de novo review. *Weden v. San Juan Cnty.*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998). A legislative enactment is presumed constitutional and the burden is on the challenger to show its unconstitutionality beyond a reasonable doubt. *Island Cnty. v. State*, 135 Wn.2d 141, 955 P.2d 377 (1998). Throughout its brief, the County contends, without support, that establishing conflict with the general laws is more difficult under a "beyond a reasonable doubt" burden than without reference to such a burden. *See, e.g.*, Respondent's Brief (Resp'ts Br.) at 19–20. To the contrary, showing such a conflict between a local ordinance and state law establishes as a matter of law that the ordinance is unconstitutional beyond a reasonable doubt. *See, e.g.*, *Parkland Light & Water Co. v. Tacoma-*

Pierce Cnty. Bd. of Health, 151 Wn.2d 428, 434, 90 P.3d 37 (2004) ("A local regulation that conflicts with state law fails in its entirety"); *Diamond Parking, Inc. v. City of Seattle*, 78 Wn.2d 778, 781, 479 P.2d 47 (1971) ("If the ordinance is given the effect for which the appellant contends, the legislative purpose is necessarily thwarted"); *Ritchie v. Markley*, 23 Wn. App. 569, 597 P.2d 449 (1979); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007).

The County also contends that, where other state and federal conflict preemption cases are cited, these cases are not relevant unless it is also shown that they imposed a similar burden of proof. Resp'ts Br. at 37–38, 42. But, again, the standard of "beyond a reasonable doubt" is necessarily met when it is shown that an irreconcilable conflict exists between a local ordinance and a statute.

The County relies on *Johnson v. Johnson*, 96 Wn.2d 255, 263, 634 P.2d 877 (1981) in support of its contention that this standard raises the bar. At issue in *Johnson* was whether a statute failed to further a public purpose. *Johnson*, 96 Wn.2d at 259. The challenger contended that the statute's stated public purpose was not its real purpose, which was, allegedly, to benefit a private party. *Id.* This was a factual dispute in which the burden on the challenger was to prove its allegation by producing "evidence which establishes . . . the actual, only, or even

primary intent of the legislature." *Id.* The Court stated that it would sustain the statute if it could conceive of any facts that supported the statute's constitutionality. *Id.* at 258. The standard for the challenger was to disprove, beyond a reasonable doubt, any legislative declaration of the statute's purpose. *Id.*

In the present case, by contrast, Ecology does not seek to disprove the stated legislative purpose of the biosolids statute or to question the plain language of the County's prohibitions. Rather, it embraces the statute's express declarations, takes the ordinance at its face, and argues that the ordinance is invalid because it conflicts irreconcilably with the plainly stated legislative purpose.

B. The Ordinance's Prohibitions Cannot Be Harmonized With the Biosolids Law

The Washington Legislature requires that biosolids be applied to the land "to the maximum extent possible," and not, as the County implies, "to the extent deemed preferable by local government." By arguing that its ordinance is valid and applicable even though it shrinks "the maximum extent possible" to a sliver, the County necessarily implies that a local government has the power to redefine state policy and the purpose of the statute.[1]

[1] The County also suggests incorrectly that the legislative findings at RCW 70.95J.005 do not indicate the legislative purpose of the statute. Resp'ts Br. at 20.

The County offers three arguments in an effort to show that the law must make room for its ordinance. Resp'ts Br. 9–18. One is built on a misreading of *Weden*, 135 Wn.2d 678; a second on a misreading of *Welch v. Board of Supervisors of Rappahannock County, Va.*, 888 F. Supp. 753 (W.D. Va. 1995); and a third on a mistaken view of the role of "savings clauses" as they bear on conflict preemption.

1. *Weden* provides no support for the position that the biosolids law can accommodate the County's ordinance

The County's ordinance eliminates activities that are essential to, and constitute the substantial core of, Washington's biosolids program. This is apparent from a review of the program's legislative mandate and regulatory structure; it is also apparent from the program's actual, physical implementation. The law is concerned with applying biosolids on farms, forests, and land reclamation sites. RCW 70.95J.005(1)(d), (2). The rules for applying Class B biosolids are specifically designed for these areas, where it is practical to restrict public access and crop harvesting. WAC 173-308-210(5). Although Class A biosolids may be land applied at such sites as well, their treatment is designed for a different, much smaller

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To the contrary, the Washington Supreme Court has used legislative findings to determine the intent of a law. *See, e.g.*, *State v. Shawn P.*, 122 Wn.2d 553, 561–62, 859 P.2d 1220 (1993) ("The purpose of this legislation is stated in the following legislative findings . . . ."). Moreover, the County also misreads the statute because the statement of purpose to maximize beneficial use of biosolids is in a free-standing subsection after the findings wherein "[t]he legislature *declares* that . . . the program shall, to the maximum extent possible, ensure that municipal sewage sludge is reused as a beneficial commodity." RCW 70.95J.005(2) (emphasis added).

niche where access and harvesting restrictions are impractical, such as lawns and home gardens. WAC 173-308-250, -260. With respect to the program's actual implementation, it is undisputed that at least 88 percent of biosolids managed in the state are Class B or septage, CP 148, that almost all wastewater treatment facilities and infrastructure across the state are designed to produce Class B but not Class A biosolids, *id.*, that Class A biosolids cannot be produced on a large scale without a massive rebuilding of facilities and infrastructure, and that none at all can be produced in Wahkiakum County. CP 150–60. Thus, what remains after eliminating land application of Class B biosolids and septage is, at best, an inconsequential sliver of the statutorily required biosolids program.[2]

The County argues that reducing the program in this way is not in conflict with the law. Resp'ts Br. at 13. First, the County contends, or at least implies, that *Weden* stands for the proposition that a local ordinance conflicts with the state law authorizing an activity only when it totally bans the authorized activity. Resp'ts Br. at 11, 13. Then, the County contends that its ordinance is not a total ban. Resp'ts Br. at 13. From these premises, it concludes that its ordinance does not conflict with state law. This view of Washington preemption law is mistaken: neither

[2] As Ecology shows by its argument at Section II.D below, even this sliver is illusory: the practical effect of the ordinance is to virtually eliminate the land application of biosolids in Wahkiakum County.

Weden nor any other Washington case holds that a local ordinance is in conflict with a state law authorizing an activity only if it totally bans the authorized activity.

Weden addressed the legality of a county ordinance prohibiting the use of motorized personal watercraft (PWCs) on marine waters and a lake in the county. *Weden*, 135 Wn.2d at 684. At issue was whether the ordinance conflicted with a statute requiring registration of such watercraft. *Id.* at 694. The Court held that it did not: "The statute was enacted to raise tax revenues and to create a title system for boats. . . . No unconditional right is granted by obtaining such registration." *Id.* at 694–95. The Court further reasoned: "Registration of a vessel is nothing more than a precondition to operating a boat. No unconditional right is granted by obtaining such registration. . . . Reaching the age of 16 is a precondition to driving a car, but reaching 16 does not create an unrestricted right to drive a car however and wherever one desires." *Id.* at 695.

Contrary to the County's representation, the majority opinion in *Weden* does not support a proposition that a local ordinance is in conflict with a state law authorizing an activity only if it totally bans the authorized activity. Nor does the dissent, which the County actually cites, put forward such a principle. Resp'ts Br. at 11. Instead, the dissent

explains, "[w]here a state statute licenses a particular activity, counties may enact reasonable regulations of the licensed activity within their borders but they may not prohibit same outright."[3] *Weden*, 135 Wn.2d at 720. But this language does not support the County's position that an ordinance is in harmony with a law so long as it does not totally ban what the law authorizes or requires. *See* Resp'ts Br. at 13, 47. If an ordinance prevents a law from achieving its purpose, there is irreconcilable conflict, whether or not it is a total prohibition that creates the frustration. *Diamond Parking*, 78 Wn.2d at 781; *Ritchie*, 23 Wn. App. at 574; *Biggers*, 162 Wn.2d at 699. *See also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992).

The distinctions between the present case and *Weden* are stark. Washington's biosolids program requires detailed investigation and rigorous planning before a farm, forest, or land reclamation site is permitted for biosolids application; applying for such a permit bears no resemblance to registering personal watercraft. *See* WAC 173-308-90001 (minimum content for a permit application); WAC 173-308-90003 (minimum content for a site specific land application plan); WAC 173-308-90005 (procedures for issuing permits). Allowing local governments to regulate a watercraft that has been registered merely for tax purposes is

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[3] As the *Weden* dissent points out, had that principle been taken to be relevant to the matter, it would have dictated a different outcome.

in no way resembles allowing local governments to ban land application projects that have been permitted through the rigorous, often multi-year application process.

2. *Welch* provides no support for the position that the ordinance can be harmonized with the biosolids law

The County's reliance on *Welch v. Board of Supervisors of Rappahannock County, Va.*, 888 F. Supp. 753 (W.D. Va. 1995), actually works against its own position, because that case recognizes that an ordinance is preempted where it conflicts with a statute that contains a strong, express preference for a method that the ordinance bans.

Citing *Welch*, the County argues that its ordinance can be harmonized with the state biosolids law because there are alternatives to applying Class B biosolids and septage to land in Wahkiakum County: they can be dumped into a landfill, incinerated, shipped to another county, or treated to Class A standards and land applied. Resp'ts Br. at 12, 13. However, *Welch* provides no support for this argument: the federal Clean Water Act, which is *Welch's* concern, lacks the mandated preference of the Washington biosolids law; and both landfilling and incineration of biosolids run counter to that mandate.

In *Welch*, a federal district court held that the federal Clean Water Act did not preempt a county ordinance banning land application of

sewage sludge.[4] *Welch*, 888 F. Supp. at 757–58. The issue was whether the Clean Water Act encourages the land application of biosolids to such an extent that a ban on such application is preempted. *Id.* at 755. The court held that it did not because the Clean Water Act does not express any preference for land application at all. The *Welch* court distinguished its case from *ENSCO, Inc. v. Dumas*, 807 F.2d 743 (8th Cir.1986). There, by contrast, the Eighth Circuit found that a county ordinance banning the storage, treatment, or disposal of certain "acute hazardous waste" within the county's boundaries conflicted with the Resource Conservation and Recovery Act's objective of encouraging the safe disposal and treatment of hazardous waste. *Welch*, 888 F. Supp. at 757 (citing *ENSCO*, 807 F.2d at 745). Thus, in contrast to *ENSCO*, where a county banned the treatment and disposal of a substance that federal law affirmatively instructed it to treat and dispose of safely, in *Welch* a county had banned one of three possible methods of use or disposal, where the Clean Water Act preferred none of the methods over the others. *Welch*, 888 F. Supp. at 757.

This analysis shows the decisive importance of a strong, express preference for a particular method. The Washington biosolids law includes such a strong, express preference. It requires Ecology to implement a comprehensive program that will ensure, to the maximum

[4] The court also held that the Commerce Clause of the U.S. Constitution did not preempt the ordinance's ban. *Welch*, 888 F. Supp. at 760.

extent possible, that sewage sludge is safely reused on farms, forests, and in land reclamation. RCW 70.95J.005. Far from offering land application as merely one of several equally acceptable options, the biosolids law requires it to the maximum extent possible, the corollary of which is that alternatives to it should be avoided to the extent possible.[5]

Ecology's regulations authorize distinct land application regimes for Class B biosolids and septage, designed specifically for areas where access restrictions are practicable, such as farms, forests, and land reclamation sites. WAC 173-308-210(5), -270. These are activities that the regulations specifically authorize, conditioned on the issuance of a permit. Prohibiting them throughout the County conflicts with that authorization and the statute's maximum reuse policy.

3. WAC 173-308-030(6) provides no support for the position that the biosolids law accommodates the County's ordinance

The County argues incorrectly that WAC 173-308-030(6), which allows for traditional local regulation, somehow provides a loophole for the County to undermine the state biosolids program. Resp'ts Br. at 13–18. WAC 173-308-030(6) provides: "Facilities and sites where biosolids

[5] State law expressly discourages landfill burial and the biosolids law leaves incineration unmentioned altogether. It is beyond the pale to suggest, as the County does, that one "option" offered by the law for the disposition of Wahkiakum County's biosolids is to let them be land applied in other counties. *See* Resp'ts Br. at 12. It is true that Wahkiakum County's biosolids may be land applied in other counties. But that is not an option for what can be done with them in Wahkiakum County.

are applied to the land must comply with other applicable federal, state and local laws, regulations, and ordinances, including zoning and land use requirements." The County contends that its ban is an "applicable ordinance" under this provision and thus "[t]hat is the end of the inquiry." Resp'ts Br. at 15.

WAC 173-308-030 recognizes, unremarkably, that other federal, state and local laws, regulations and ordinances might apply to biosolids or sewage sludge transportation, facilities, or land application sites. The regulation even mentions specific examples, including state regulations pertaining to transportation, the State Environmental Policy Act, the state Water Pollution Control Act, the federal biosolids regulations, and local zoning and land use requirements. WAC 173-308-030(1)–(6). Other examples would include time, place, and manner restrictions, such as restrictions on night and weekend applications and notice requirements for neighbors and local governments. This regulation, consistent with state preemption law, allows for reasonable local laws that do not conflict with state law.[6]

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[6] *See, e.g.*, *Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410, 419 (M.D. Pa. 2003) ("[M]unicipal regulations [of land application of biosolids] are permissible if they further the goals of [the state biosolids law and], such regulations cannot impose onerous requirements that stand as obstacles 'to the accomplishment and execution of the full purposes and objectives of the legislature.' ") (granting summary judgment striking down local regulations that impeded land application and upholding in part regulations pertaining to registration, testing, and hours of hauling). *See also Blanton v. Amelia Cnty.*, 261 Va. 55, 540 S.E.2d 869 (2001). In *Blanton*, the state's Biosolids Use

WAC 173-308-030(6) does not reserve to local governments substantive authority over land application, which is the purpose of a savings clause. Savings clauses are a routine feature in federal and state environmental statutes and expressly reserve authority to the locality, typically to enact more stringent standards on the activity in question. However, even if WAC 173-308-030(6) were interpreted to be a savings clause, it could not authorize a local government to adopt an ordinance that conflicts with state law. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000) ("saving clause . . . does not bar the ordinary working of conflict pre-emption principles").

Moreover, the County offers no response to the point that the biosolids law already expressly provides for a local role. Local jurisdictions may seek delegation of portions of program authority. RCW 70.95J.080. Delegated localities can then, on a site-specific basis and subject to Ecology review, impose additional requirements that recognize the specific needs and values of local communities in regard to land application of biosolids. *Id.* Wahkiakum County has not sought delegated authority. Nor does the County rebut that the state biosolids law

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Regulations required compliance with "local government zoning and applicable ordinances." Despite this, the Virginia Supreme Court held that a local ordinance banning land application was invalid because it was inconsistent with the state biosolids law, which "expressly authorized the land application of biosolids conditioned upon the issuance of a permit." *Blanton*, 261 Va. at 874.

was enacted in 1992 against a backdrop of local control over land application, affirmatively moving regulatory authority over biosolids management from local governments to the state. Appellant's Brief (App. Br.) at 6–9.

C. The Biosolids Statute Does Not Require Deference to Local Authority Either on Its Own Terms or Because It References the Federal Regulations

The County argues, mistakenly, that the Clean Water Act and its regulations somehow authorize local governments to ban the land application of biosolids, even where this obviously conflicts with state law, in violation of the state constitution. No court has adopted this position, and the references to federal regulations in the biosolids law provide no support for this interpretation.

There are two provisions in the biosolids law referencing federal regulations. The first announces the Legislature's intent to provide the authority and direction that will allow Ecology to seek delegation to administer the federal sludge program. RCW 70.95J.007. The second directs Ecology to adopt rules for a biosolids management program that will, at a minimum, conform to federal technical standards at 40 C.F.R. § 503 for the use and management of sewage sludge. RCW 70.95J.020(1).

Both the Clean Water Act, 33 U.S.C. § 1345(e), and its rules at 40 C.F.R. § 503 contain a savings clause allowing more stringent or extensive

state or local regulations. From this, the County concludes that the State is required to do the same. Resp'ts Br. at 18–27. The argument fails. Merely because the Clean Water Act and its regulations do not preempt local bans on land application does not mean that it expressly authorizes them despite state constitutional limitations to the contrary.[7]

The County cites *Welch v. Board of Supervisors of Rappahannock County, Va.*, 888 F. Supp. 753 (W.D. Va. 1995), *U.S. v. Cooper*, 173 F.3d 1192, 1201 (9th Cir. 1999), and *County Sanitation District 2 of Los Angeles County v. County of Kern*, 127 Cal. App. 4th 1544, 1610, 27 Cal. Rptr. 3d 28, 76 (2005), in support of its argument. Resp'ts Br. at 23, 24, 25. Each of these cases held that both the Clean Water Act and 40 C.F.R. § 503 expressly decline to preempt state and local governments from adopting more stringent sludge management standards. This, of course, is not what is at issue here. Federal law and regulations relating to sludge management establish minimum standards and leave it to the states to adopt their own policies and programs, so long as the minimum standards are met.

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[7] At least one court has encountered the argument and called it bizarre: "[The County of] Kern argues bizarrely that if the [state law] were construed to prohibit local bans on land application, it would somehow 'conflict' with the federal Clean Water Act." *City of L.A. v. Cnty. of Kern*, 509 F. Supp. 2d 865, 894 (2007), *dismissed in part, vacated in part and remanded on prudential standing grounds*, 581 F.3d 841 (2009) (absence of a restriction is not an express grant of authority).

None of these three cases has any bearing on the issue of whether Wahkiakum County's ban conflicts with state law. In *Welch*, a federal district court held that a county ordinance banning the land application of sewage sludge did not violate the Commerce Clause of the U.S. Constitution and was not preempted by the federal Clean Water Act. *Welch*, 888 F. Supp. at 756. The case does not apply here because Ecology does not argue that Wahkiakum County's ordinance violates the federal Commerce Clause or that the federal Clean Water Act preempts the County's ordinance.

In *U.S. v. Cooper*, a federal appeals court held that neither the federal Clean Water Act nor EPA sludge management regulations preempted the requirements of a city NPDES permit. *Cooper*, 173 F.3d at 1201. Again, Ecology does not argue that either the Clean Water Act or EPA sludge management regulations preempt the County's ordinance. And, in *County Sanitation District 2 of Los Angeles County v. County of Kern*, the California Court of Appeal held that Kern County's ordinance restricting the land application of biosolids did not violate the federal Commerce Clause. *Cnty. Sanitation Dist.*, 127 Cal. App. 4th at 1610.[8]

[8] Earlier this year, the California Court of Appeal affirmed a preliminary injunction against a local biosolids ban because it was likely preempted by the California Integrated Waste Management Act's mandate that localities recycle biosolids and other solid waste "to the maximum extent feasible." *City of L.A. v. Kern Cnty.*, 214 Cal. App. 4th 394, 416, 154 Cal. Rptr. 3d 122, 138 (2013), *petition for review granted on other*

Here, the state Legislature has established a biosolids management program that meets the federal minimum requirements, and has further declared its policy that the program shall, to the maximum extent possible, reuse municipal sewage sludge as a beneficial commodity. The County's ordinance, because it frustrates state law, is invalid.

D. Costs of Converting Facilities From Class B Production to Class A Production Are Highly Relevant

The statewide economic and infrastructure ramifications of a ruling allowing local governments to undermine the state biosolids program are both significant and highly relevant. The County's argument to the contrary ignores the Legislature's purpose to alleviate economic burdens on local governments and ratepayers. Resp'ts Br. at 27–34.

Undisputed facts show that the County's ordinance effectively eliminates the possibility of applying biosolids to land within its borders, leaving no room for the state to permit and regulate it. App. Br. at 29–30. Biosolids generated in Wahkiakum County consist entirely of Class B biosolids and septage. CP 27, 317–18. At least 88 percent of biosolids managed in the state are Class B or septage. CP 148. Almost all wastewater treatment facilities and infrastructure across the state are designed to produce Class B, but not Class A, biosolids. *Id.* Class A

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grounds, 302 P.3d 572 (Ca. 2013). The recycling directive for biosolids in the California Waste Management Act is remarkably similar to the Washington biosolids law's requirement that the biosolids be beneficially used "to the maximum extent possible."

biosolids cannot be produced on a large scale without a massive rebuilding of facilities and infrastructure and none at all are produced in Wahkiakum County. CP 150–60. Numerous facilities in the state have considered and evaluated converting to Class A biosolids production and almost all have found the economic and practical obstacles prohibitive. CP 150.

The County argues that information about the expense of converting a public wastewater treatment facility from Class B production to Class A production cannot be used to support the argument that its ordinance is a de facto ban, citing *Johnson*, 96 Wn.2d at 263, in support. Resp'ts Br. at 29, 33. Yet *Johnson* does not support the County's position. In that case the Department of Social and Health Services had tried to collect overdue child support from Mr. Johnson. Mr. Johnson complained that the provision of this service to his ex-wife, at state cost, was a gift of public funds for private purpose, and that the statute authorizing it was unconstitutional. The Court found that the collection program did further public purposes, preventing ten percent of participants from going on welfare. The Court held: "Although a more cost effective program may be conceivable, that does not render RCW 74.20.040 unconstitutional." *Johnson*, 96 Wn.2d at 263. *Johnson* has no relevance to the present case. Ecology argues that Wahkiakum County's ordinance is unconstitutional because it conflicts with state law, not because it fails to use public funds

in a cost-effective way or because there are more cost effective ways to ban biosolids.

The Legislature created the biosolids program because it found that "[s]ludge management is often a financial burden to municipalities and to ratepayers," and that "[p]roperly managed municipal sewage sludge is a valuable commodity and can be beneficially used in agriculture, silviculture, and in landscapes as a soil conditioner." RCW 70.95J.005. Moreover, the Legislature authorized Ecology to prohibit the disposal of sewage sludge in landfills, but allowed for case-by-case exemptions when land application is economically infeasible. RCW 70.95.255. Far from finding financial burdens irrelevant, the Legislature actually created the biosolids program and its exemptions in large part to alleviate the financial burdens that sludge management was placing on local governments and ratepayers. By prohibiting land application of Class B biosolids throughout Wahkiakum County, the ordinance essentially creates or exacerbates the very financial burdens the Legislature sought to alleviate. The ordinance frustrates the legislative purpose to alleviate those burdens.

E. Ecology's Cited Cases Support Finding the Ordinance Unconstitutional

Ritchie, *Diamond Parking*, and *Biggers* establish that a local ordinance conflicts with a statute when it thwarts the state's policy or the

Legislature's purpose. App. Br. at 17. The County attempts to distinguish *Diamond Parking* and *Biggers*, but its attempts fail. Resp'ts Br. at 43–45.

The County asserts that in *Diamond Parking*, "[t]here was no conflict to resolve because . . . the ordinance that was passed was beyond the purview of the police power." Resp'ts Br. at 45. The County is mistaken. *Diamond Parking* addressed the legality of a city ordinance prohibiting transfer of licenses without the permission of the licensing agency. *Diamond Parking*, 78 Wn.2d at 779. The Court concluded that the ordinance conflicted irreconcilably with a statute providing that all rights, privileges, and franchises are transferred to the surviving corporation upon a corporate merger. *Id.* at 781. Beginning with the principle that a city's article XI, section 11 police power ceases when the state enacts a general law on the subject, unless there is room for concurrent jurisdiction, the Court held that, "the conflict here is irreconcilable" because "the legislative purpose is necessarily thwarted." *Id.*

The County asserts that *Biggers* was not decided on grounds that the County had violated article XI, section 11 of the state constitution. Resp'ts Br. at 43–44. Again, the County is mistaken. *Biggers* addressed the legality of a rolling moratorium on dock construction imposed by the City of Bainbridge Island. In this split 4-1-4 decision, the four-justice lead

opinion concluded that the local moratorium was invalid because the City lacked statutory and constitutional authority to impose it and because it thwarted state law, in violation of article XI, section 11 of the state constitution. *Biggers*, 162 Wn.2d at 685–702. Thus, according to the lead opinion, the moratorium thwarted state law because it effectively prohibited that which state law allowed–namely, applications for dock construction. *Id.* at 698.

A four-justice dissent concluded that local governments *do* have constitutional police authority to adopt moratoria and that the City's moratorium was reasonable and not in conflict with state law. *Id.* at 712. The concurrence contributing to the plurality decision agreed with the dissent that the local governments have constitutional police power to adopt moratoria, but disagreed with the dissent regarding the validity of the City's moratorium, concluding that it was invalid because it was unreasonable, in violation of article XI, section 11 of the state constitution. *Id.* at 705–06. Because the concurring justice explicitly agreed with the reasoning of the dissent and disagreed with the reasoning of the lead opinion, the holding is simply that the moratorium violated article XI, section 11.[9]

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[9] *See W.R. Grace & Co.-Conn. v. Dep't of Revenue*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999) ("[w]here there is no majority agreement as to the rationale for a

Finally, *Ritchie* addressed the legality of a county ordinance that failed to exempt agricultural activities from permit requirements, in conflict with the state Shoreline Management Act which did exempt agricultural activities. The court held that, "[t]he two laws conflict because they reflect opposing policies," and because "[t]he ordinance thwarts the state's policy." *Ritchie*, 23 Wn. App. at 574.

These cases establish that a local ordinance conflicts with state law, in violation of article XI, section 11 of the state constitution, when it thwarts the state's policy or the legislative purpose.

F. The County Attempts to Exercise a Power That Could Not Be Conferred on All Counties in the State Without Destroying the Biosolids Program

If this Court were to hold that the County is empowered to effectively ban the land application of biosolids, it would empower all counties to do the same. This would be inconsistent with the mandate of the state biosolids law. App. Br. at 30-31.

The County argues that this is unpersuasive unless Ecology can prove that all counties would actually follow suit. Resp'ts Br. at 35–36. But Ecology's argument does not rely on whether any county actually follows suit and enacts an ordinance similar to Wahkiakum's. Ecology's argument is that, regardless of what other counties may do, a holding in

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decision, the holding of the court is the position taken by those concurring on the narrowest grounds").

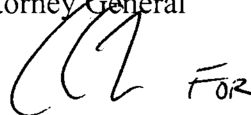
favor of Wahkiakum here would frustrate the legislative purpose behind the state biosolids law by enabling or empowering other counties to follow suit. Enabling or empowering other counties to enact a similar ordinance–whether they actually do so or not–is contrary to the legislative purpose. It would put the statutorily mandated state biosolids program at the mercy of local legislatures, essentially making the program a voluntary one that local governments may choose to follow or not. Such a result is clearly not what the Legislature intended by its mandate.

III. CONCLUSION

Because the County's ordinance thwarts state policy and the purpose of the state biosolids law, it is conflict preempted. The February 22, 2013, decision of the Cowlitz County Superior Court upholding the ordinance should be reversed.

RESPECTFULLY SUBMITTED this 22nd day of October 2013.

ROBERT W. FERGUSON
Attorney General



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NO. 44700-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellant, v. WAHKIAKUM COUNTY, a political subdivision of Washington State, Respondent.	CERTIFICATE OF SERVICE

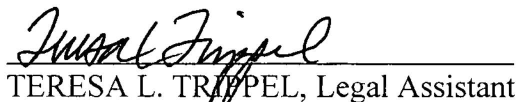
Pursuant to RCW 9A.72.085, I certify that on the 22nd day of October 2013, I caused to be served a true and correct copy of Appellant Department of Ecology's Reply Brief in the above-captioned matter upon the parties herein as indicated below:

DANIEL H. BIGELOW WAHKIAKUM COUNTY PROSECUTING ATTORNEY 64 MAIN STREET, P.O. BOX 397 CATHLAMET, WA 98612	[x] U.S. Mail [ ] By Fax [ ] By Email

the foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22 day of October 2013, at Olympia, Washington.



TERESA L. TRIPPEL, Legal Assistant

EXHIBIT “D”

Washington State Institute for Public Policy
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September 2017

I-502 Evaluation and Benefit-Cost Analysis
Second Required Report

In November 2012, Washington State voters passed Initiative 502 (I-502) which legalized limited possession and private use of marijuana by adults.[1] The law also directed the Washington State Institute for Public Policy (WSIPP) to conduct benefit-cost evaluations of the implementation of I-502 by examining outcomes related to:

- public health,
- public safety,
- substance use,
- the criminal justice system,
- economic impacts, and
- administrative costs and revenues.

WSIPP is required to produce reports for the legislature in 2015, 2017, 2022, and 2032. This report focuses on initial results of outcome analyses examining the effects of I-502 implementation on youth and adult substance use, treatment admissions for cannabis abuse, and drug-related criminal convictions.

Summary

I-502 required WSIPP to conduct a benefit-cost evaluation of implementation of the law from its enactment in 2012 through 2032. In this second required report, we present preliminary findings of outcome analyses to identify effects of I-502 on youth and adult substance use, cannabis abuse treatment admissions, and drug-related criminal convictions.

We used two main analysis strategies. We examined the effect of I-502 enactment on cannabis abuse treatment admissions, comparing Washington to similar non-legalizing states before and after I-502 enactment. We also examined how local differences in the amount of legal cannabis sales affected cannabis abuse treatment admissions, youth and adult substance use, and drug-related criminal convictions.

We found that cannabis abuse treatment admissions were not affected by I-502 enactment. We also found that the amount of legal cannabis sales generally had no effect on outcomes. One exception was that adults 21 and older in counties with more retail cannabis sales were more likely to report using cannabis in the past 30 days and to report using it heavily.

These findings represent a snapshot of our progress to date and are an intermediate step towards the ultimate benefit-cost analysis of I-502.

Suggested citation: Darnell, A.J. & Bitney, K. (2017). *I-502 evaluation and benefit-cost analysis: Second required report.* (Document Number 17-09-3201). Olympia: Washington State Institute for Public Policy.

[1] Initiative Measure No. 502.

The report is organized as follows: Section I provides background information on I-502 and our study requirements, establishing the specific portion of the overall study requirements that we address in this report. Section II describes the current status of the evolving marijuana policy context. Section III describes current research on effects of medical and non-medical cannabis legalization. Section IV details our analysis strategy. Section V describes our findings. Section VI provides a summary and notes limitations of this report.

Terminology

In this report we use the terms "cannabis" and "marijuana" interchangeably, to refer to all drug preparations of the cannabis genus of plants. We retain the terminology used in existing materials that we cite. We use the term "non-medical" in place of "recreational" to refer to cannabis consumption that is not part of an authorized treatment of a medical condition. Throughout the report, references to non-medical cannabis exclude black market cannabis.

I. Introduction

This report is part of a series of reports WSIPP will release over a 20-year period to assess the effects of I-502, as required by the initiative. The requirements for the study are shown in Exhibit 1.

The study requirements define six broad categories of outcomes to be evaluated: public health, public safety, youth and adult drug use and maladaptive use, economic impacts, criminal justice, and state and local administrative costs and revenues.

The ultimate aim of the study is a benefit-cost analysis of I-502 implementation. Our benefit-cost analysis will account for an array of monetary aspects of I-502 implementation:

- State and local revenues;
- State and local agency costs of implementing the law;
- Effects on substance use, health, traffic safety, crime, workplace safety, etc.; and
- Other economic impacts including employment and wages in the non-medical cannabis industry and ripple effects on the broader economy.

In September 2015, WSIPP released the first report in the series, *I-502 Evaluation Plan and Preliminary Report on Implementation*, in which we articulated our research plan for the overall study.[2] In brief, our research plan includes three main components: a descriptive study, a series of outcome

[2] Darnell, A.J. (2015). *I-502 evaluation plan and preliminary report on implementation.* (Doc. No. 15-09-3201). Olympia: Washington State Institute for Public Policy.

studies to identify potential effects of I-502, and a summative benefit-cost evaluation. The outcome studies will examine both the net effect of I-502 and the effect of specific features of I-502 on:

- Substance use: Youth and adult use and abuse of cannabis, alcohol, and other drugs;
- Health: Physical and mental health problems associated with substance use;
- Traffic safety: Traffic accidents and fatalities involving impaired drivers;
- Criminal justice: Arrests, convictions, and sanctions for charges involving cannabis and other drugs;
- Education: Standardized test scores, disciplinary actions, grade retention, and high school graduation; and
- Workplace safety and productivity: Accidents, injuries, and absenteeism.

The current report presents preliminary results from analyses designed to identify effects of I-502 on a subset of the above non-monetary outcomes. This is a necessary step in accomplishing the larger study aim of a benefit-cost analysis of I-502.

We must emphasize that analyses are ongoing, and the findings here reflect a snapshot of our progress to date. Results may change as implementation of the law progresses and more outcome data become available.

Study Overview

Central to our study of I-502 is the identification of causal effects of the law—changes in outcomes that can be attributed to I-502. As described in Section II of this report, I-502 had multiple components, all of which might affect outcomes.

The primary features of I-502 that may influence outcomes are changes in criminal prohibitions; the formation and growth of a regulated cannabis supply system; and required investments in substance abuse prevention, treatment, and research. These features may produce a variety of possible effects; for illustration, we describe several examples below.

As a result of I-502, limited adult possession and private use are no longer illegal. The licensed production, delivery, and sale of cannabis are also no longer illegal. As a result, cannabis users may be less likely to come into contact with the criminal justice system. The elimination of these prohibitions could lead to increased enforcement of other crimes. On the other hand, I-502 also added a new *per se* blood content limit for cannabis-impaired driving. Although cannabis-impaired driving was illegal prior to I-502, enforcement of this new aspect of the law or an increase in cannabis-impaired driving may increase demands on criminal justice resources.

In addition to changes to criminal prohibitions, I-502 also provided for the formation of a regulated cannabis supply system. The new supply system is expected to increase adult access to cannabis; expected effects on youth access are less clear. Although licensed retailers are not permitted to sell to persons under age 21, access by youth may increase if they are able to obtain legally purchased marijuana secondhand. It is also possible that youth access could decrease if black market supply of cannabis is reduced by successful competition of the legal market. The new

legal market may also produce changes in advertising, product quality, potency, price, and diversification of product types, all of which may influence the use of cannabis and subsequent outcomes.[3] The amount of legal cannabis sales may vary within the state and over time and further affect the use of cannabis and subsequent outcomes.

I-502 also required investments in substance abuse prevention, treatment, and research. Revenues collected from cannabis excise taxes, penalties, and fees are directed to public education campaigns, evidence-based prevention and treatment programming, and cannabis-related research, all of which may mitigate potential harms resulting from increased access to cannabis.

In our outcome analyses examining the effects of I-502, we can apply research strategies that focus on effects of the law as a whole, in which effects of different aspects of the law are combined and the net effect of the law can be identified. Additionally, we can apply strategies that focus on effects of specific aspects of the law, such as the amount of legal cannabis sales or the intensity of prevention programming in an area. Both of these strategies are needed for a complete understanding of effects of I-502.

In the outcome analyses described in this report, we applied two types of strategies in order to detect net effects of I-502 and the effect of a specific aspect of I-502—the amount of legal cannabis sales. We were able to complete both types of analyses to examine cannabis abuse treatment admissions. We used a between-state analysis to examine the effects of I-502 as a whole, comparing changes before and after I-502 enactment in Washington to non-legalizing states, and a within-state analysis to identify whether the amount of legal cannabis sales in different parts of Washington affects cannabis abuse treatment admissions in those areas. We also present within-state analyses on the effects of the amount of legal cannabis sales on youth and adult substance use and drug-related criminal convictions. Both strategies are described in more detail in Section IV.

Ideally, we would use both strategies to investigate effects of I-502 on each outcome. At this time, we do not have access to data that would support between-state analyses for all outcomes examined in this report. Our work is ongoing to access these data. In future reports we will report findings from new between-state analyses on the current outcome domains. We will also report between- and within-state analyses for other outcome domains, such as workplace safety, in our broader study. In future reports, we will also share findings from other aspects of our study which are ongoing, including examining the state and local costs of implementation of I-502; the impact of increased investment in prevention, treatment, and research; and the broader economic impacts of the law. In Appendix Exhibit A4 we provide an update on the status of data access efforts and other components of the overall study.

[3] Kilmer et al. (2010).

Exhibit 1

I-502 Study Requirements Contained in the
Revised Code of Washington (RCW) 69.50.550 (emphasis added)

(1) The Washington state institute for public policy shall conduct ***cost-benefit evaluations*** *of the implementation of chapter 3, Laws of 2013. A preliminary report, and recommendations to appropriate committees of the legislature, shall be made by September 1, 2015, and the first final report with recommendations by September 1, 2017. Subsequent reports shall be due September 1, 2022, and September 1, 2032.*

(2) The evaluation of the implementation of chapter 3, Laws of 2013 shall include, but not necessarily be limited to, consideration of the following factors:

(a) ***Public health****, to include but not be limited to:*

(i) Health costs associated with marijuana use;

(ii) Health costs associated with criminal prohibition of marijuana, including lack of product safety or quality control regulations and the relegation of marijuana to the same illegal market as potentially more dangerous substances; and

(iii) The impact of increased investment in the research, evaluation, education, prevention and intervention programs, practices, and campaigns identified in RCW 69.50.363 on rates of marijuana-related maladaptive substance use and diagnosis of marijuana-related substance-use disorder, substance abuse, or substance dependence, as these terms are defined in the Diagnostic and Statistical Manual of Mental Disorders;

(b) ***Public safety****, to include but not be limited to:*

(i) Public safety issues relating to marijuana use; and

(ii) Public safety issues relating to criminal prohibition of marijuana;

(c) ***Youth and adult rates*** *of the following:*

(i) Marijuana use;

(ii) Maladaptive use of marijuana; and

(iii) Diagnosis of marijuana-related substance-use disorder, substance abuse, or substance dependence, including primary, secondary, and tertiary choices of substance;

(d) ***Economic impacts*** *in the private and public sectors, including but not limited to:*

(i) Jobs creation;

(ii) Workplace safety;

(iii) Revenues; and

(iv)Taxes generated for state and local budgets;

(e) ***Criminal justice impacts****, to include but not be limited to:*

(i) Use of public resources like law enforcement officers and equipment, prosecuting attorneys and public defenders, judges and court staff, the Washington state patrol crime lab and identification and criminal history section, jails and prisons, and misdemeanant and felon supervision officers to enforce state criminal laws regarding marijuana; and

(ii) Short and long-term consequences of involvement in the criminal justice system for persons accused of crimes relating to marijuana, their families, and their communities; and

(f) ***State and local*** *agency administrative costs and revenues.*

II. Policy Context

Cannabis Policy in Washington State

Relevant policy changes in Washington State begin with medical legalization, which was effected in 1998 by the passage of voters' Initiative 692 (I-692). I-692 provided authorized patients and their designated caregivers a legal defense for charges related to the use or possession of medical cannabis (an "affirmative defense").[4]

In 2011, the legislature passed an overhaul of medical cannabis regulations.[5] The bill created a registry of medical cannabis patients and providers and directed state employees to authorize and license commercial medical cannabis businesses. Those sections of the bill were vetoed due to concerns that they would expose public employees to the risk of federal prosecution.[6] The remaining provisions of the legislation provided an affirmative defense for home cultivation and collective gardens, which were defined as cooperative grow operations among medically authorized patients, with limits placed on the number of patients and plants.

Also in 2011, liquor sales were privatized by passage of Initiative 1183 (I-1183). Effective in June 2012, the initiative removed the state controlled liquor system, allowed liquor sales by private stores, removed uniform pricing, and removed bans on quantity discounts and advertising.[7] I-1183 represents an important part of the policy context because it went into effect less than a year prior to I-502 and could potentially influence outcomes such as traffic safety.

On November 6, 2012, I-502 passed with 55.7% approval in Washington State, legalizing limited adult possession and private consumption of non-medical cannabis as well as its licensed production and sale. I-502 mandated the Washington State Liquor and Cannabis Board (LCB) to oversee the recreational market and imposed a 25% excise tax on cannabis sales at each of the three tiers in the legal supply chain: producers, processors, and retailers. I-502 designated a new budget account for cannabis revenues (the Dedicated Marijuana Account) and required expenditures from that account on a variety of activities, including substance abuse prevention and treatment, supply chain enforcement, and cannabis-related research.[8] I-502 also added a new threshold for driving under the influence of cannabis. The law became effective on December 6, 2012.

In October 2013, the LCB adopted the first set of rules regarding cannabis licenses, the application process, requirements, and reporting. License applications were accepted from November to December 2013. The LCB initially capped the number of retailer licenses at 334; there is no cap on producer or processor licenses. The first producer and processor licenses were issued in March 2014. Retailer licenses were allotted for each city and county based on estimates of cannabis demand and incorporated random selection

[4] Initiative No. 692.
[5] Engrossed Second Substitute Senate Bill 5073, Chapter 181, Laws of 2011, partial veto.
[6] https://www.sos.wa.gov/elections/initiatives/text/i692.pdf.
[7] Initiative Measure No. 1183, Chapter 2, Laws of 2012; Full text available at http://lawfilesext.leg.wa.gov/biennium/2011-12/Pdf/Initiatives/Initiatives/INITIATIVE%201183.SL.pdf.
[8] RCW 69.50.540.

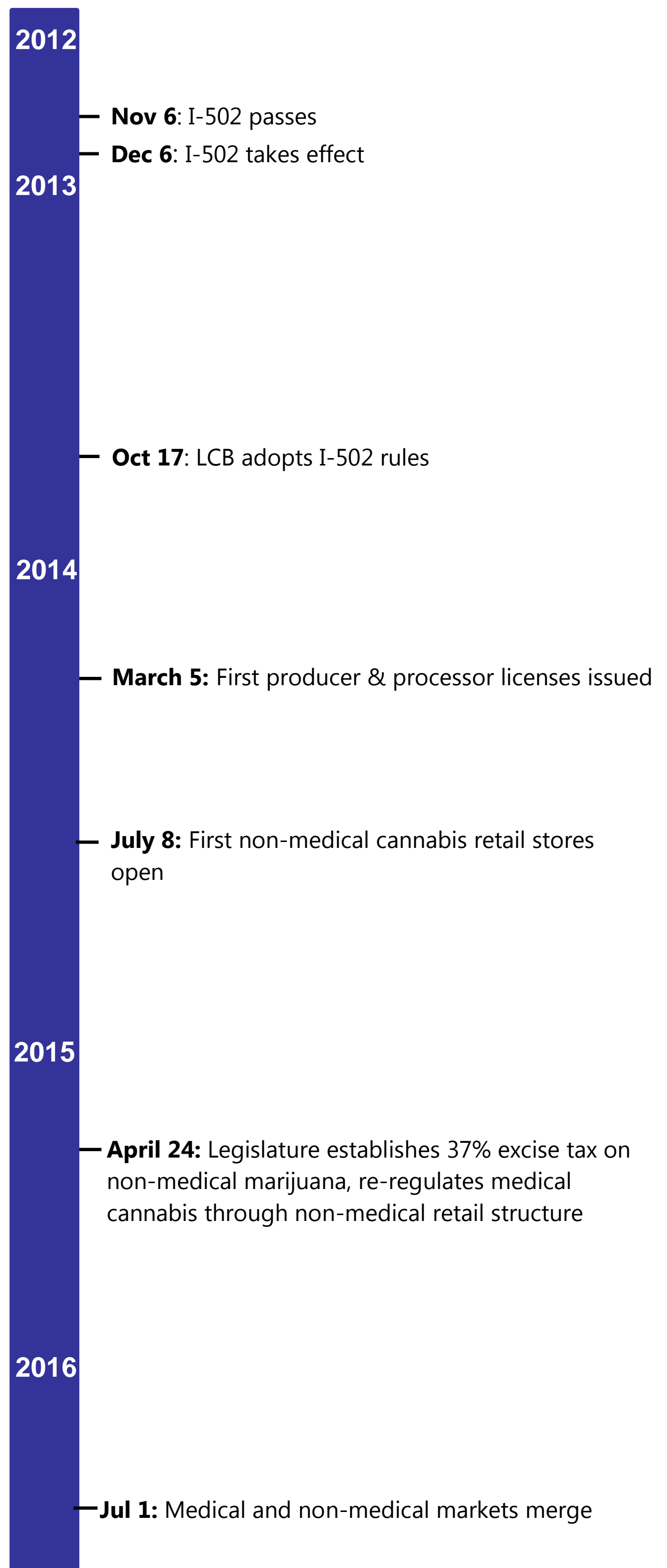
when the number of applicants exceeded the allotment. The first non-medical cannabis retail stores opened on July 8, 2014.

In 2014, the Washington State Court of Appeals declared that state law only provided an affirmative defense for medical cannabis patients and that the use and possession of medical cannabis, including collective gardens, were still illegal. The 2015 Legislature passed legislation regulating medical cannabis through the existing non-medical cannabis regulatory structure and created a voluntary registry of medical cannabis patients.[9] The legislation required businesses with a non-medical retail license to obtain a medical marijuana endorsement in order to serve medical patients. In response to expected increased demand from medical patients, the LCB opened an additional application window for retailers from October 2015 to March 2016 and raised the state cap of retail licenses from 334 to 556. The formal integration of medical and non-medical cannabis sales occurred on July 1, 2016.

The 2015 Legislature also changed the tax structure on cannabis, replacing the three-tier tax structure (i.e., the 25% tax on sales by producers, processors, and retailers) with a single 37% excise tax on retail sales.[10] The same law provided for distribution of excise tax revenues to local jurisdictions and allowed jurisdictions to reduce the required buffer zones around cannabis businesses.

Exhibit 2

I-502 Policy Timeline



[9] Second Substitute Senate Bill 5052, Chapter 70, Laws of 2015.
[10] Second Engrossed Second Substitute House Bill 2136, Chapter 4, Laws of 2015.

Local Cannabis Policy in Washington

City and county governments have enacted their own policies concerning regulation of licensed cannabis businesses. In January 2014, the Washington State Attorney General released a memo affirming that local jurisdictions may regulate and/or ban I-502-related businesses. Generally, multiple cities are located within a given county boundary; city governments can legally regulate businesses within city boundaries, and county governments can regulate businesses in unincorporated areas.[11] A recent study found that as of June 30, 2016, six of Washington's 39 counties (15%), and 54 of 142 cities (38%) with populations of 3,000 or more had passed permanent bans on legal retail cannabis sales—approximately 30% of the state's population lived in these areas.[12]

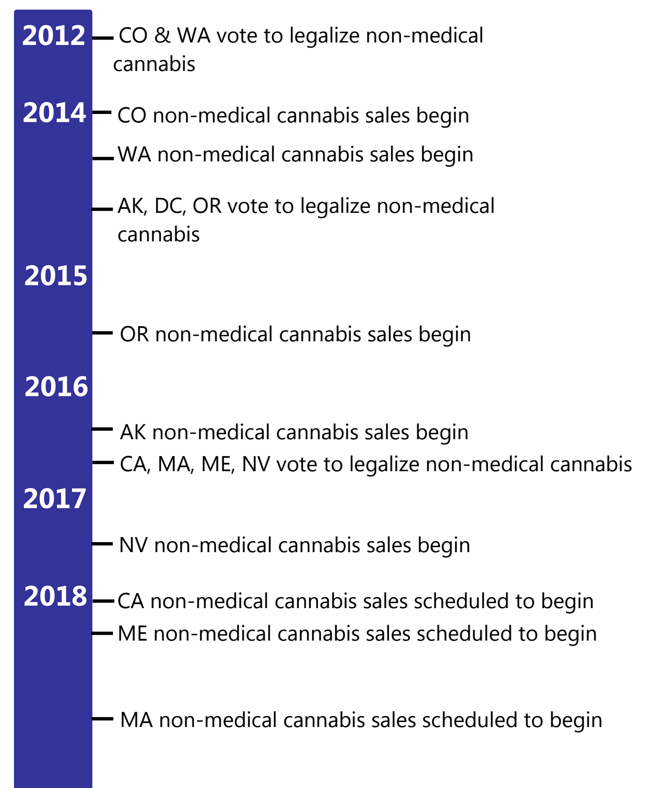
Cannabis Policy in Other States

As of June 30, 2017, 29 states (including Washington) and the District of Columbia had legalized medical cannabis. An additional 15 states allowed limited access to certain forms of cannabis extract high in cannabidiol (referred to as CBD-only laws).[13]

Eight of these states, including Washington, passed ballot initiatives to allow the sale of cannabis for non-medical purposes (Exhibit 5).[14] The District of Columbia legalized cannabis for non-medical purposes but does not allow sales. Oregon's legalization of non-medical cannabis in 2014 is of particular relevance for this study, due to its proximity and the potential impact on Washington cannabis sales to Oregon residents. Under Oregon's law, existing medical dispensaries are allowed to sell cannabis to anyone 21 and older as of October 2015, and the first dedicated non-medical retailers opened in October of 2016.

Exhibit 3

Timeline of Other States' Non-Medical Cannabis Laws



[11] RCW 70.05.030 & 70.05.035.
[12] Dilley et al. (2017).
[13] Cannabidiol (or CBD) and THC (tetrahydrocannabinol) are the two most well-known cannabinoids—chemical compounds in cannabis that act on cannabinoid receptors in the human body. Unlike THC, CBD does not have intoxicating psychoactive effects.
[14] In May 2017, the Vermont Legislature became the first state to pass a non-medical cannabis legalization bill through its legislature; however, the measure was vetoed. http://legislature.vermont.gov/assets/Documents/2018/Docs/CALENDAR/sc170621.pdf#page=1].

Implementation of the legal cannabis supply system

In this section we describe the status of the cannabis supply system created by I-502. Specifically, we describe growth in the amount of retail sales of cannabis and differences in retail sales amounts across the state, which are the subject of many of our outcome analyses.

Legal Cannabis Supply System

The three-tiered cannabis supply system consists of producers, processors, and retailers, as licensed by the LCB. Generally, producers grow cannabis, processors package and create secondary products such as extracts and edibles, and retailers sell cannabis and products for consuming cannabis to consumers.

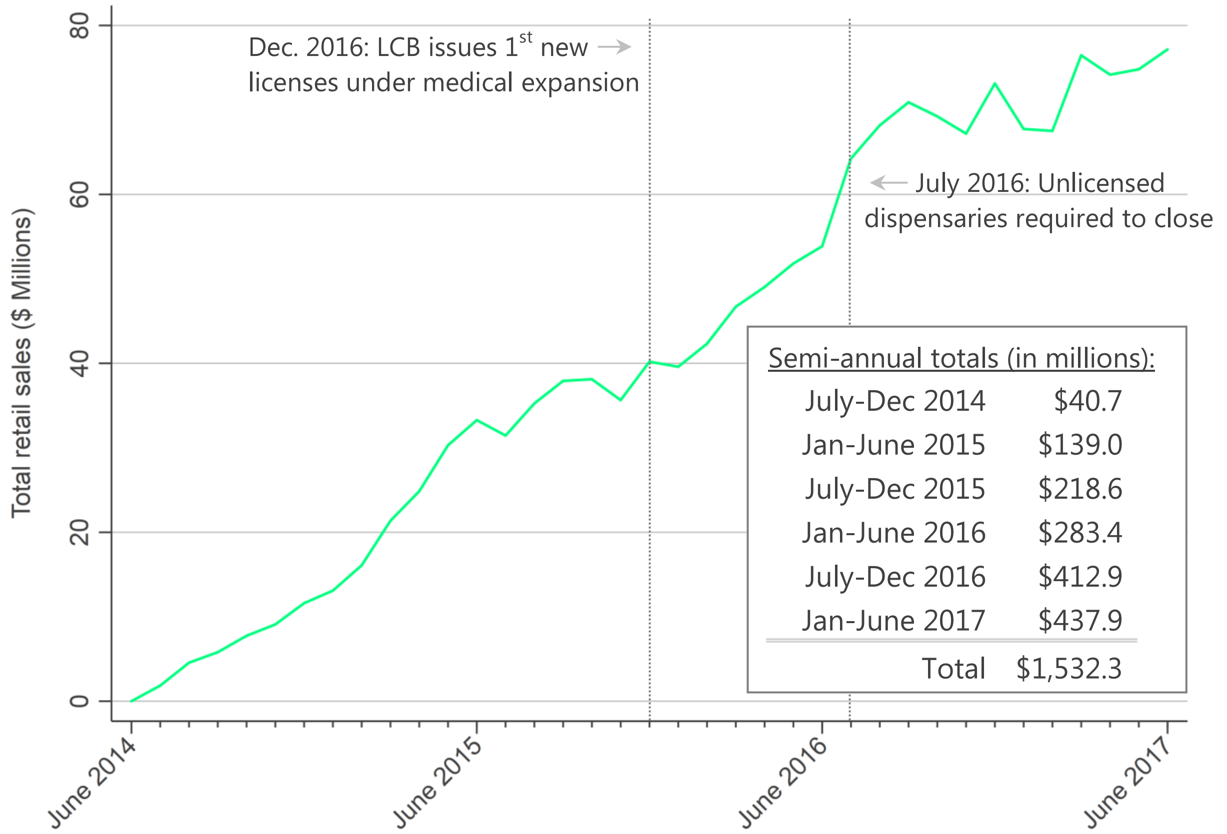
Washington's cannabis supply system is not vertically integrated—businesses holding retail licenses cannot also be involved in other parts of the supply chain, although producer and processor licenses can be held in combination. In terms of the type of license held by businesses reporting active sales in June 2017, there were 383 retailers, 36 producers, 103 processors, and 653 producer/processors.[15] The number of active retailer licenses is currently well below the cap of 556.

Retail sales. Retail sales have climbed since they began in July 2014. They began to stabilize in the second half of 2015, just prior to the beginning of the medical expansion. The medical expansion was fully implemented by July 2016, when all unlicensed dispensaries were required to close. Monthly retail sales totals are shown in Exhibit 4.

[15] More extensive descriptive analysis of businesses and employment in Washington's legal cannabis supply system is reported in Hoagland, C., Barnes, B., & Darnell, A. (2017). *Employment and wage earnings in licensed marijuana businesses* (Doc. No. 17-06-4101). Olympia: Washington State Institute for Public Policy.

Exhibit 4

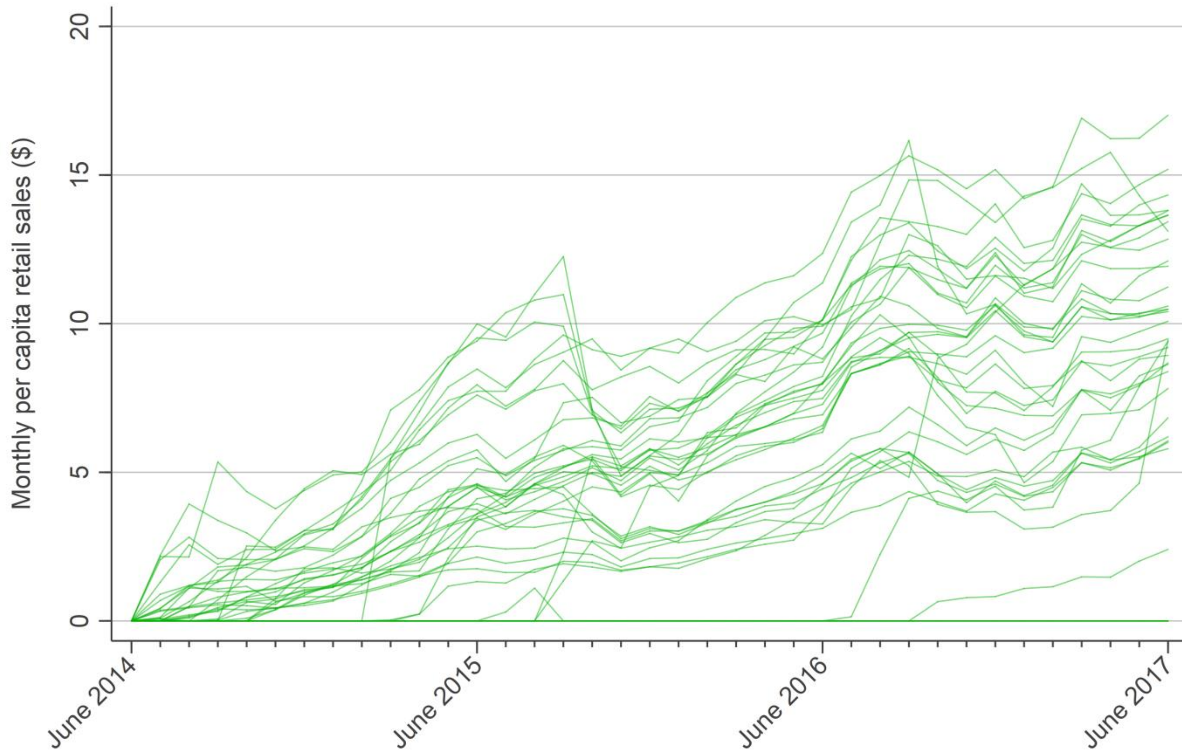
Total Monthly Retail Cannabis Sales



Source:
Washington State Liquor & Cannabis Board.

Exhibit 5

Monthly Per Capita Retail Cannabis Sales by County



Source:
Washington State Liquor & Cannabis Board sales data. County population obtained from: Washington State Office of Financial Management, Forecasting Division (2016). Small Area Demographic Estimates: County 2000-2016.

Note:
Asotin County is omitted from the figure above due to extremely high per capita sales values, which began to increase sharply in February of 2016 and had moved above $30 by July 2016.

Local variation in retail sales.

Exhibit 5 displays monthly per capita retail sales in counties in Washington State.[16] The exhibit illustrates differences in the timing of first legal sales in each county (e.g. the late starter at the bottom right of the exhibit), differences in overall sales levels, and differences in the rate of growth in sales over time. Four counties had no licensed sales through June 2017. Sales amounts and per capita rates for each county on a semi-annual basis are shown in Appendix Exhibits A1 & A2.

The amount of legal cannabis sales is the primary predictor examined in many of the outcome analyses in this report. These analyses focus on differences in sales at the county or school district level. The timing and amount of cannabis sales within Washington school districts also varies substantially (see Appendix Exhibit A3).

[16] Retail sales data are current through June 30, 2017; however, 2017 county population data are not yet available, so we could not compute per capita rates based on annual population here. Instead we used the average population from 2014 through 2016. In outcome models we computed per capita sales rates based on the available data in each analysis.

The Changing Role of the Medical Cannabis Supply System

The distinction between medical and non-medical cannabis has always been an important one for our study. In accordance with the study requirements, our focus has been on the non-medical cannabis system created by I-502. With the integration of the medical and non-medical supply systems in Washington, the medical distinction is becoming more difficult and perhaps less useful to maintain.

Prior to the incorporation of medical cannabis into the regulated system, the quasi-legal network of medical cannabis dispensaries was an important source of cannabis supply to account for in our analyses of the non-medical system. The system was not tightly regulated and there were suspicions that non-medical use was a substantial portion of this gray market. However, there are no available data sources on the number of medical cannabis dispensaries in the state or their sales prior to the integration of the medical supply system into the regulated system.

With the integration of the medical supply system into the regulated system, the number of available retail licenses was increased, and licensed retailers were given the option of obtaining a medical marijuana endorsement. The endorsement allows retailers to sell Department of Health (DOH)-compliant products to qualifying patients and designated providers.[17] Of the 383 retailers reporting active sales in June 2017, 346 (90%) held a medical endorsement. Because nearly all retailers sell both medical and non-medical cannabis, we ignore the medical endorsement distinction for the remainder of this report.

Aside from the supply system itself, it may also be possible to distinguish medical usage based on whether a product is primarily used for medical purposes, whether the people who use cannabis are medically authorized patients, or if a particular instance of consuming cannabis is done for a medical purpose.

The sales data reported thus far include all legal retail cannabis sales, which after the incorporation of the medical system, include both medical and non-medical sales. The LCB's marijuana traceability system monitors all marijuana products in the legal supply system and differentiates nine types of marijuana products. In our outcome models, for computation of per capita sales we omit four types of products that are used primarily for medical purposes: capsules, suppositories, tinctures, and topicals. These products represent a very small share of sales—in January 2017 they accounted for less than 0.1% of all legal cannabis sales.

The remaining cannabis products may be used for either medical or non-medical purposes, and prospects for distinguishing medical and non-medical use of these products are dim. Although the data are not currently available, it is possible to distinguish transactions to medically authorized consumers in the LCB traceability system.[18] However, many medical users report using cannabis for both medical and non-medical purposes,[19] and the research

[17] RCW 69.50.375.

[18] The traceability system distinguishes transactions to medically authorized consumers, but the variable reflecting this distinction is not currently provided with the traceability data available from LCB.

[19] Pacula et al. (2016).

literature on the medical uses of cannabis does not yet support a clearer distinction between "prescribed" use versus abuse, such as the distinction applied for prescription drugs. From this perspective, the notion of distinguishing medical and non-medical cannabis use in our study is seemingly impossible.

Aside from the omission of a small number of products most likely to be used exclusively for medical purposes, we do not distinguish medical and non-medical cannabis further in this report.

Other aspects of I-502

Although not the focus of the current report, there are many aspects of I-502 implementation that can be expected to influence outcomes. Enforcement activities for example, might decrease youth access to cannabis at licensed retailers or might decrease diversion of cannabis products from the legal system to the black market. Other aspects of I-502 implementation, such as the activities funded by required expenditures for substance abuse prevention and treatment, may also affect outcomes. Many of these activities are financed, in whole or in part, by cannabis-related revenues, including excise taxes, license fees, penalties, and forfeitures.

These revenues and required activities will be important in the ultimate benefit-cost evaluation of I-502. We have limited our focus in this report primarily to one specific aspect of I-502 implementation—the amount of cannabis sales in the legal supply system. We look forward to addressing other aspects of I-502 implementation in future reports. For now, it should be noted that these other aspects of I-502 implementation are not explicitly accounted for in our outcome models and thus constitute factors that may be associated with sales and outcomes, which should be kept in mind when we view findings.

In the next section we shift our attention to our outcome analyses. We begin by reviewing prior research on effects of medical cannabis laws and the much smaller number of studies on non-medical legalization, which we draw on in formulating our analysis strategy.

III. Research Context

WSIPP routinely draws on other rigorous research to conduct meta-analyses and inform our benefit-cost analyses.[20] Increases in the number of states legalizing medical or non-medical cannabis have stimulated research on effects of these laws. However, the entire body of research is still in an early stage of development and is not yet sufficient for us to conduct meta-analyses. It can still inform our research direction as we evaluate impacts in Washington.

It is also worth noting that the majority of these studies draw comparisons between states with a medical marijuana law and those without. More recently, researchers have begun to recognize the importance of differences in specific features of medical legalization from one state to the next, comparing states that have enacted more or less strict versions of legalization (e.g., allowing home cultivation or requiring a registry of authorized medical patients).[21] We are aware of two studies that attempted to identify effects of the size of the medical marijuana market.[22] These studies come closest to the methods we used in our outcome models that examine effects of the amount of legal cannabis sales.

[20] Note that the I-502 benefit-cost evaluation will look at the broad impacts of I-502 on Washington State as a whole, while WSIPP's routine approach examines the impact of an intervention on a per-participant basis. As such, the I-502 evaluation will necessarily take a different form than WSIPP's standard approach, although many of the underlying principles and methods will remain the same.

[21] Pacula et al. (2015); Choi et al. (2014); Hasin et al. (2015); Smart (2015); and Wen et al. (2015).

[22] Salomonsen-Sautel et al. (2014) focused on a policy shift that led to the proliferation of medical dispensaries; Smart (2015) examined effects of the number of patients in state medical cannabis registries.

Substance use and abuse

Youth and adult cannabis use

Youth cannabis use is one of the most frequently examined outcomes related to cannabis legalization, and findings from these studies have been mixed. Most studies found no evidence that the passage of a medical cannabis law caused an increase in use among adolescents.[23] We are aware of three studies that found evidence suggesting that youth cannabis use increased as a result of medical legalization; one of these studies failed under replication.[24]

In contrast, studies consistently suggest that adult use increases as a result of medical legalization.[25] Several studies found that these effects are limited to adults older than 26.[26]

One study found evidence of an increase in both youth and adult use in the general population associated with growth in the number of patients registered in state medical marijuana registries.[27]

We are aware of one published study examining effects of non-medical legalization on substance use, which found

[23] Anderson & Rees (2011); Harper et al. (2012); Lynne-Landsman et al. (2013); Anderson et al. (2014); Choo et al. (2014); Hasin et al. (2015); and Martins et al. (2016).

[24] Pacula et al. (2015); Stolzenberg et al. (2015); and Wen et al (2015). The findings of Stolzenberg et al. were later contradicted in a replication study—Wall et al. (2016) which found no evidence of increasing youth use. The findings of Pacula et al. were specific to medical marijuana laws providing legal protection for dispensaries and allowing for home cultivation.

[25] Anderson & Rees (2011); Hasin et al. (2017); and Wen et al. (2015).

[26] Martins et al. (2016) and Williams et al. (2017).

[27] Smart (2015).

that youth cannabis use was higher in Washington following non-medical legalization relative to comparison states.[28] Several other studies have found that attitudes favorable to cannabis use have increased following medical or non-medical cannabis legalization.[29]

Cannabis abuse treatment admissions

We found three studies that examined effects of cannabis legalization on treatment admissions for cannabis abuse in different populations, and results are not consistent. One study found that after enactment of medical legalization, cannabis abuse treatment admissions increased relative to states without medical legalization.[30] That study focused on admissions among adults who were not referred by the criminal justice system. Another study focused on cannabis abuse treatment admissions among youth and found no evidence of an effect of medical legalization.[31] Finally, the third study found that cannabis abuse treatment admissions (age not differentiated) decreased after medical cannabis legalization relative to comparison states, but the effect varied substantially depending on specific features of the medical cannabis policy (e.g., protections for dispensaries).[32]

[28] Cerda et al. (2016).
[29] Cerda et al. (2016); Keyes et al. (2016); and Schuermeyer (2014).
[30] Chu (2014).
[31] Anderson et al. (2014).
[32] Pacula et al. (2015).

Alcohol, tobacco, and other drugs

The relationship between use of cannabis and other substances, especially alcohol and tobacco, will likely be a major factor in the ultimate economic impact of the law. Researchers have noted that the potential effect of cannabis legalization on use of alcohol and tobacco, even if small, may outweigh the economic impact of increased cannabis use, due to the strong evidence of long-term health consequences of tobacco use and alcohol abuse.[33]

Regarding alcohol, research has yet to determine whether cannabis and alcohol are more likely to be used as complements or as substitutes, and in turn, what effect legalized cannabis may have on alcohol use.[34] One study found lower probability of any drinking and binge drinking and fewer drinks consumed in states after the passage of a medical marijuana law, relative to comparison states.[35] Another study found that growth in the number of medical cannabis patients was linked to a reduction in alcohol poisoning deaths.[36]

In contrast, another study found the frequency of binge drinking and the likelihood of simultaneous use of marijuana and alcohol were significantly higher following medical legalization, relative to comparison states.[37]

We are aware of only one study examining effects on tobacco use, which found a small decrease in cigarette smoking associated with medical legalization.[38]

[33] Caulkins et al. (2012).
[34] Wen et al. (2015).
[35] Anderson et al. (2012).
[36] Smart (2015).
[37] Wen et al. (2015).
[38] Choi (2016).

Research on opioids suggests favorable effects of medical legalization, including lower rates of prescription opioid overdose deaths,[39] opioid use among fatally-injured drivers age 21 to 40,[40] and hospitalizations related to prescription opioid dependence and overdose.[41] One study found that growth in medical marijuana markets was linked to a decrease in prescription opioid poisoning deaths.[42]

Another study examined the effects of medical legalization on use of other illegal drugs and found no impact on hard drug use in adolescents or adults.[43]

Crime

One study found no evidence that state medical marijuana laws caused an increase in property and violent crimes reported by the FBI but did find evidence of decreased homicide and assault associated with medical legalization.[44] Another study examining effects of non-medical legalization found evidence that non-medical legalization in Washington and Oregon may have led to a drop in rape and murder rates.[45] Regarding effects on cannabis-specific crimes, another study found that higher marijuana arrest rates among adult males were associated with medical legalization.[46]

[39] Bachhuber et al. (2015).
[40] Kim et al. (2016).
[41] Shi (2017).
[42] Smart (2015).
[43] Wen et al. (2015).

[44] Morris et al. (2014).
[45] Dragone et al. (2017).
[46] Chu (2014).

IV. Analysis Strategy

I-502 requires WSIPP to produce a benefit-cost evaluation of the law's implementation. Identifying causal effects of I-502 is necessary for that aim. However, I-502 is a multi-faceted and complex intervention. It imposed a number of different changes on the state including changes to criminal prohibitions; the creation of a regulated cannabis supply system; and mandated investments in substance abuse prevention, treatment, and research. Each aspect of I-502 may have its own effects on outcomes.

Further, the way the law was implemented in the state had clear differences by geographic region over time. For example, sales grew at varying rates in different parts of the state, which could influence outcomes differently in regions across the state. Thus, there are multiple ways to explore the potential effects of I-502, all of which are important to consider in a comprehensive assessment of the impact of I-502 on Washington.

In this report we report findings for analyses of the following outcomes:

- Youth and adult use of cannabis, alcohol, and cigarettes;
- Clinically disordered cannabis use, as indicated by substance abuse treatment admissions; and
- Convictions for drug-related criminal charges.

We use two main analysis strategies in this report. To identify effects of I-502 as a whole, we use between-state analyses to compare changes before and after I-502 enactment in Washington to changes in non-legalizing states over the same period.

We also use within-state analyses to identify effects of one aspect of I-502 implementation—the amount of legal cannabis sales.

We rely entirely on existing data sets for our outcome analyses, and the structure of these datasets in large part determines our research strategy. Outcome data sets available for multiple states provide opportunities to examine effects of the law as a whole. On the other hand, data sources only available for Washington have more limited capabilities for identifying effects of the law as a whole[47] and are better suited to identifying effects of specific aspects of the law's implementation, especially those that vary within the state.

At the time of this report, WSIPP only had access to one multi-state dataset, allowing us to conduct between-state analyses to examine the net effect of I-502 on cannabis abuse treatment admissions. The majority of data sources we currently have access to only contain data for Washington State. Thus, the majority of analyses in this report examine the effect of the amount of legal cannabis sales, applying a within-state analysis strategy.

We describe our between-state and within-state analysis strategies in more detail below.

[47] Analyses of state-level trends for a single state (e.g., time series analysis), which draw comparisons before and after implementation of the law, tend to be weaker designs for causal inference because time-related factors that may coincide with the timing of I-502 are difficult to eliminate as alternative explanations of an observed effect.

Between-State Analysis

Our analysis of the impact of I-502 on cannabis abuse treatment admissions relies on data from the Treatment Episode Data Set (TEDS-A), which is available for all U.S. states. In this analysis we examined effects of I-502 enactment in 2012, contrasting the number of admissions to treatment for cannabis abuse before and after I-502 enactment to comparable changes in other states that did not legalize non-medical cannabis (i.e., comparison states). We used the synthetic control method (SCM) for this analysis.[48]

SCM is a method of constructing a comparison group from states that have not legalized non-medical marijuana. This allows us to model what would have likely happened in Washington, had I-502 never become law. Using SCM, comparison states that are most similar to Washington before I-502 are weighted more heavily in the "synthetic" comparison group to maximize comparability to Washington. After establishing that the synthetic comparison group is similar to Washington before I-502, changes in outcomes after I-502 that are different for Washington than for the synthetic comparison group can be interpreted as effects of the law. We describe the methods for this analysis in more detail in the I-502 Technical Appendix.[49]

Due to data availability limitations, this is the only analysis in this report that is focused on identification of the effect of I-502 as a whole. We plan to analyze data from the National Survey on Drug Use and Health (NSDUH), which measures substance use among youth and adults across the country, as soon as these data become accessible.[50] We will conduct and publish additional between-state analyses in future reports, as we gain access to additional national datasets.

Within-state analyses

The majority of the analyses in this report focus on effects of the amount of legal cannabis sales on various outcomes.[51] For each outcome examined, we applied the general analysis strategy described below. Specific features of this strategy vary based on the specific outcome examined. These variations are discussed in more detail in the I-502 Technical Appendix.

In the absence of data from multiple states, analyses must draw comparisons from elsewhere—either by examining differences in outcomes in different places in Washington (which vary in I-502 implementation) or by examining changes in outcomes over time. The strongest designs take advantage of both.

Our within-state analysis strategy does both. In the previous section we discussed how the amount of legal cannabis sales varied substantially across the state and over time. We paired sales data with outcome data sources, examining the relationship between sales amounts and outcomes as they vary in

[48] Abadie & Gardeazabal (2003) and Abadie et al. (2010).
[49] Darnell, A., & Bitney, K. (2017). I-502 evaluation and benefit-cost analysis: Second required report—technical appendix. Olympia, Washington State Institute for Public Policy.

[50] We received a license for access to the restricted-use version of the NSDUH, but shortly after, access to the data was closed by the Substance Abuse and Mental Health Data Archive (SAMHDA) for administrative reasons. We are awaiting notification of when we can access the data.
[51] See the I-502 Technical Appendix for definition of sales variable in within-state outcome analyses.

different locations throughout the state and over time.

General design of within-state analyses

Our within-state outcome models belong to a category of methods referred to as fixed effects models, which are a common method for identifying effects of macro-level interventions, such as state laws, in non-experimental settings. It is the approach used in many studies of medical legalization.[52]

In the fixed effects approach, a relationship between the intervention and the outcome variable is established. For example, in our case there may be a relationship between cannabis sales and crime. Sales may be represented at the individual level, as the amount of legal cannabis sold to each person, or at some higher level such as the amount of cannabis sold in each county. A similar decision must be made about time—whether to analyze effects of sales on a daily, monthly, or yearly basis.

Even if we establish a relationship between the intervention and the outcome, we cannot assume that the intervention causes the outcome to change, without eliminating alternative possible causes. For example, if we observe that crime increases as sales increase in a particular county over time, there may be differences between counties with higher levels of sales that explain differences in crime, such as county economic conditions. There may also be changes occurring over time that cause both sales and crime to change, such as the passage of a state law affecting liquor consumption.

[52] Anderson et al. (2014); Choo et al. (2014); Harper et al. (2012); Hasin et al. (2017); Pacula et al. (2015); Smart (2015); and Wen et al. (2015).

The basic strategy of a fixed effects model is to eliminate these two sets of possibilities categorically. If our intervention variable is a county-level sales variable, a fixed effect for county is included in the model that accounts for all differences between counties that do not change over time. And, if our sales variable is measured at a monthly frequency, a fixed effect for time is included in the model to account for all differences from one month to the next that are shared by all counties.

One of the major strengths of the fixed effects strategy is that we do not need to have data sources with variables representing all the possible differences between counties—they are all accounted for at once with the specification of a county fixed effect.

While the general approach remains the same, the specific units of geography and time vary for each analysis. Characteristics of available data sources determined the units of geography and time fixed effects for each outcome analysis. Across outcome data sources, for the fixed effect for geography, we had the option of analyzing the data at county, school district, or ZIP code levels. For the fixed effect for time, options included monthly, quarterly, and annual metrics of time. The specifications we settled on for each outcome data source are shown in Exhibit 6.

For clarity, we continue this discussion using the example of a fixed effects analysis with county and month fixed effects. However, some outcome analyses are also conducted with district or state fixed effects, instead of county, and with quarter or year fixed effects, instead of month.

Exhibit 6

Analysis Characteristics by Data Source

Outcome area	Data source	Geographic unit	Time unit	Overall time period
Youth substance use	Healthy Youth Survey (HYS)	School district	Biennium	2002-2016
Adult substance use	Behavioral Risk Factors Surveillance System (BRFSS)	County	Quarter	2011-2015
Disordered cannabis use	TARGET	County	Month	2002-2016
Disordered cannabis use	Treatment Episodes Data Set	State	Year	2005-2014
Drug-related crime	Administrative Office of the Courts	County	Month/ quarter	2005-2016

Addressing County Differences that Change Over Time

Despite their strengths, fixed effects models are not a magic bullet. Fixed effects for county and month do not account for differences between counties that change over time. For example, other features of I-502 implementation, such as substance abuse prevention funded by I-502 revenues, may also influence outcomes, competing with the effects of sales in our models. If these other possible causes of changes in outcomes occur in the same counties at the same time as legal sales, our understanding of the effect of sales will be distorted. We applied several analysis techniques to address these so-called time-varying confounds.

First, in each analysis we included a set of time-varying control variables. For example in our analysis of how the amount of retail sales might drive drug-related criminal convictions, we included annual total convictions in the county to account for changes in the overall capacity of the county criminal justice system. Other time-varying control variables account for changes in demographic composition and socioeconomic conditions. The specific time-varying control variables included in each analysis are listed in the I-502 Technical Appendix.

Although we hypothesize that increases in legal cannabis sales cause outcomes to change, it is also possible that outcomes cause sales to change—for example, people who commit more crime may purchase more legal cannabis. In our outcome models, the cannabis sales variable was typically "lagged" to allow a period of time for possible effects of sales to register in the outcome. Lagging the sales variable has the effect of shifting the timing of sales and outcomes. Before lagging, observations are paired by the time they were observed (e.g., sales and outcomes measured in September) but lagging the intervention variable means we can examine the effect of sales in July or August on outcomes in September. A relationship between sales prior to outcomes has a more likely causal interpretation than a contemporaneous relationship, in which the direction of the relationship is less clear. The length of the lag was determined for each data source based on data structure and conceptual rationale.

To further address the possibility that an apparent relationship between the amount of sales and outcomes does not in fact indicate that changes in sales are causing the changes in outcomes, we also examined models in which sales was specified as a "leading" variable.[53] The opposite of a lagged version of sales, a leading version of sales would identify the relationship between future sales and past outcomes. For example, outcomes measured in September can be examined for relationship to sales in October or November. Evidence that future sales are associated with today's outcomes would suggest that outcomes affect sales, that both effects apply (effects move in both directions), or that an unknown underlying cause affects both variables.[54] Our analyses were not equipped to determine which of these possibilities is the correct one, and we take a cautious approach in avoiding causal interpretations of legal sales estimates in the presence of significant leading estimates.

In the next section we provide brief summaries of analysis methods and findings for each data source. For each analysis, additional detail on the data source, methods, and results are available in the I-502 Technical Appendix.

[53] Angrist & Pischke (2009).

[54] A leading effect could also reflect anticipatory effects—Malani & Reif (2015). For example, people may change their behavior in advance of an intervention if they know it is coming. One could argue that these anticipatory effects should be considered part of the effect of the intervention.

V. Results

In the sections that follow, we present brief summary descriptions of trends in outcomes, as well as methods and results from outcome analyses. Additional detail on trends, data sources, methods, and outcome findings are available in the I-502 Technical Appendix.

We begin with a discussion of youth and adult substance use and abuse, covering trends in use among adults and youth as well as trends in disordered cannabis use as indicated by substance abuse treatment admissions involving cannabis. We then discuss our findings of the effect of I-502 enactment on cannabis abuse treatment admissions, followed by findings on the effect of legal cannabis sales on cannabis abuse treatment admissions and substance use among youth and adults.

Following that, we discuss trends in drug-related criminal convictions and our findings of the effect of legal cannabis sales on convictions.

Substance Use and Abuse

Trends in substance use

Youth substance use and attitudes—Washington Healthy Youth Survey. Washington's Healthy Youth Survey (HYS) is administered biennially on even-numbered years to a representative sample of students in grades 6, 8, 10, and 12 in Washington schools.[55] The HYS addresses a range of risk behaviors that contribute to the health and safety of youth in Washington State. In this section, we report statewide results using the HYS census dataset for selected items concerning cannabis for years 2002 through 2016, separated by grade level.[56]

Exhibit 7 illustrates that across grades 6, 8, 10, and 12, cannabis use indicators have been stable or fallen slightly since I-502 enactment. Beliefs that cannabis is difficult to obtain and that using cannabis is harmful began a downward trend in 2006, especially among older students. Since 2010, the view that cannabis is difficult to access has been stable or increased. The downward trend in perceived harm of cannabis use stabilized from 2014 to 2016.

[55] http://www.askhys.net/.

[56] See I-502 Technical Appendix for details on the HYS census data set.

Adult substance use—Washington Behavioral Risk Factors Surveillance System.

Washington State administers the national Behavioral Risk Factor Surveillance System (BRFSS), an annual telephone survey of adults that provides epidemiological data on modifiable risk factors for chronic disease.[57]

Statewide BRFSS results concerning cannabis indicate that since the enactment of I-502, statewide cannabis use has increased among adults, whereas heavy alcohol use and cigarette use have remained stable or fallen (see Exhibit 8).

Trends in Cannabis Abuse Treatment Admissions

Substance use rising to the level of clinical disorder can be measured by substance abuse treatment admissions. As shown in Exhibit 9, Washington TARGET[58] data indicate that the number of state-funded admissions for cannabis abuse in Washington has fallen since 2008. The number of cannabis abuse admissions fell in the three years following I-502 enactment, dropping from 7,843 in 2012, to 7,374 in 2013, 6,885 in 2014, and 6,142 in 2015 (the most recent year available).[59]

Cannabis abuse treatment admissions include a subset of individuals referred to treatment due to involvement with the criminal justice system. When we isolate trends for the group of individuals who were not referred by criminal justice, cannabis abuse admissions did not begin to decline until 2011.

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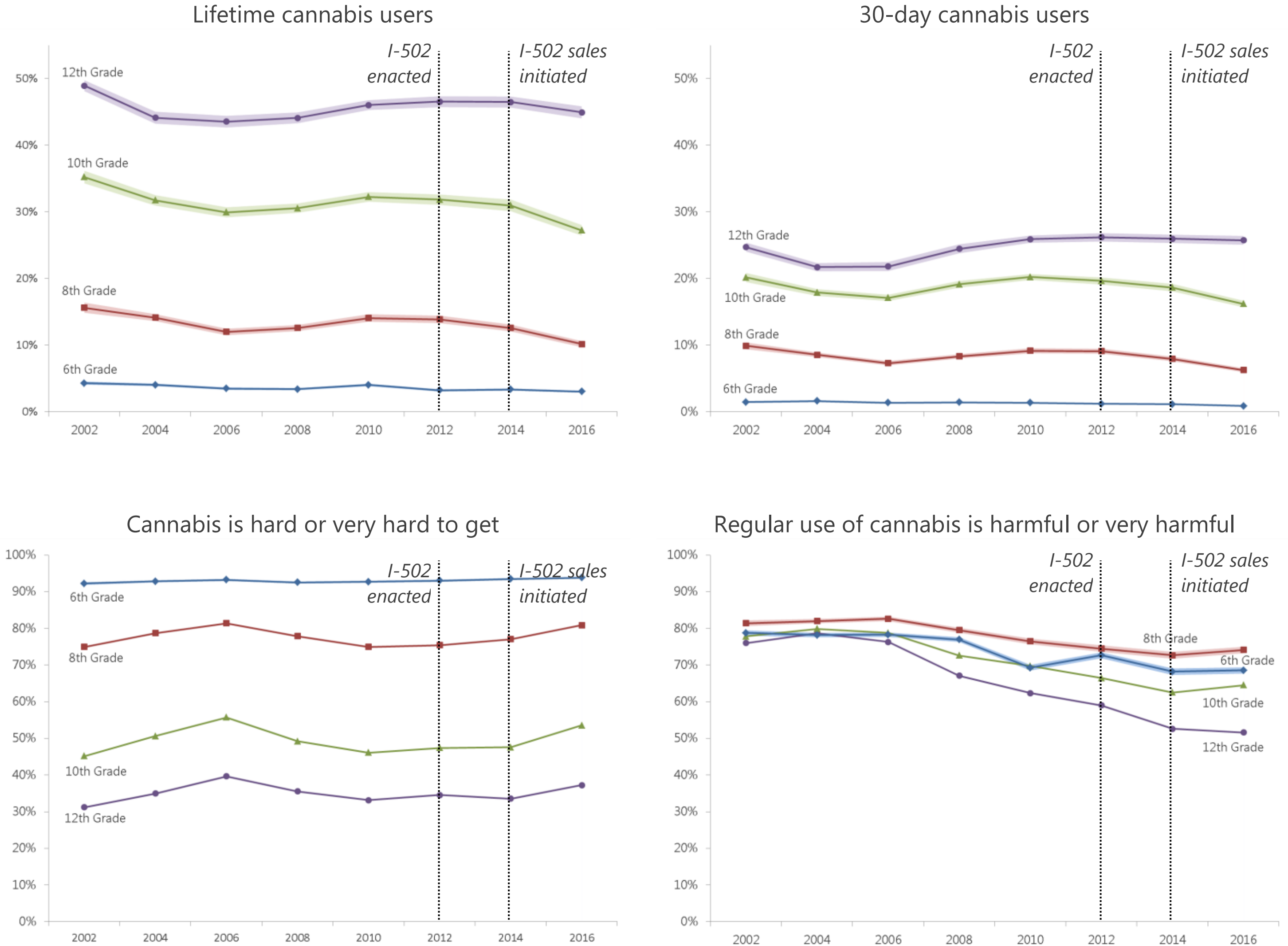
[57] Washington State Department of Health, Center for Health Statistics, Behavioral Risk Factor Surveillance System, supported in part by the Centers for Disease Control and Prevention, Cooperative Agreement U58/DP006066-01 (2015).

[58] https://www.dshs.wa.gov/bha/division-behavioral-health-and-recovery/target.

[59] Admissions for cannabis abuse defined as admissions for which cannabis was the first drug identified as a problem at intake.

Exhibit 7

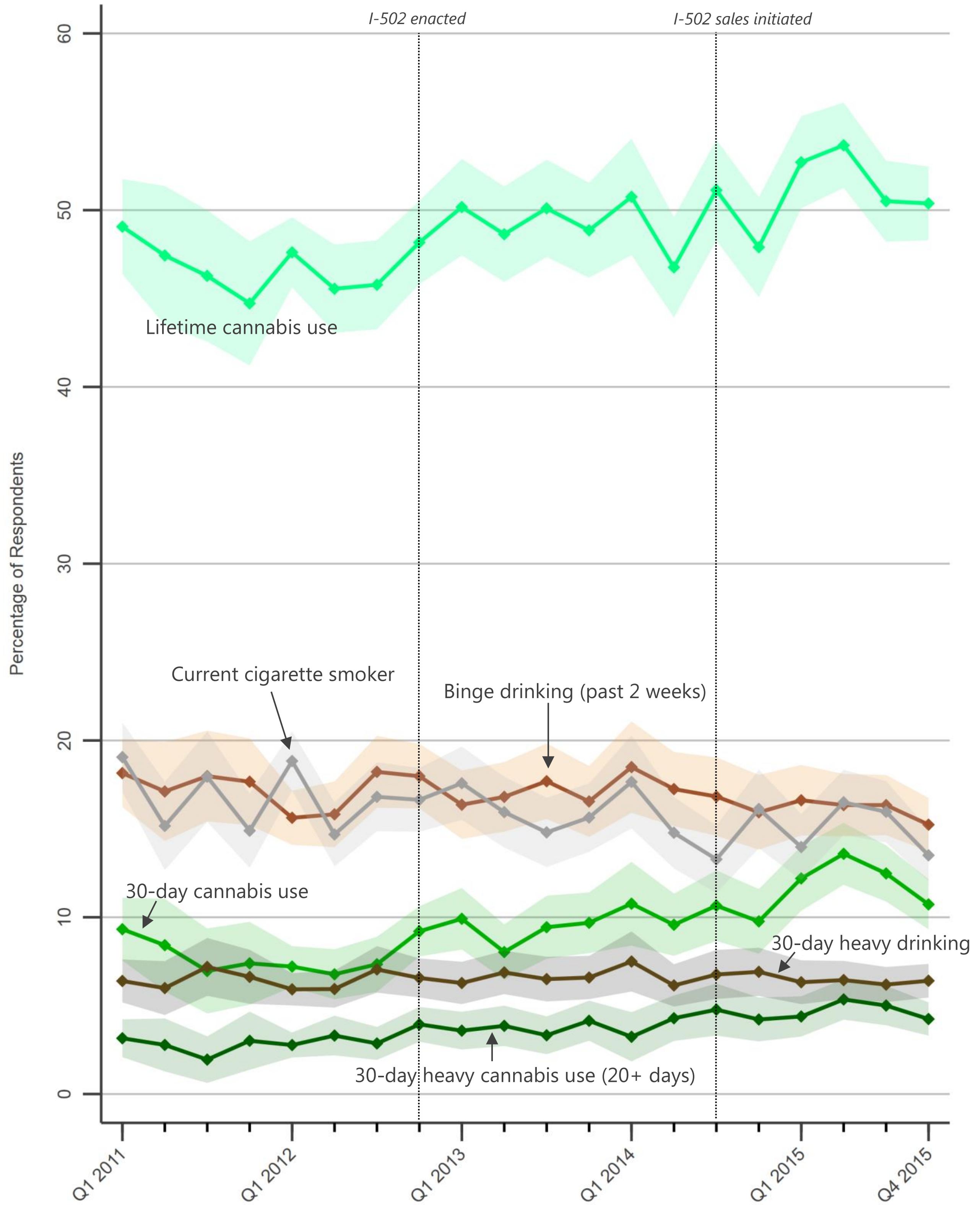
Washington Healthy Youth Survey, Selected Cannabis Items by Grade



Source:
Washington Health Youth Survey, Census Data Set.
Note:
Shaded regions represent 95% confidence intervals.

Exhibit 8

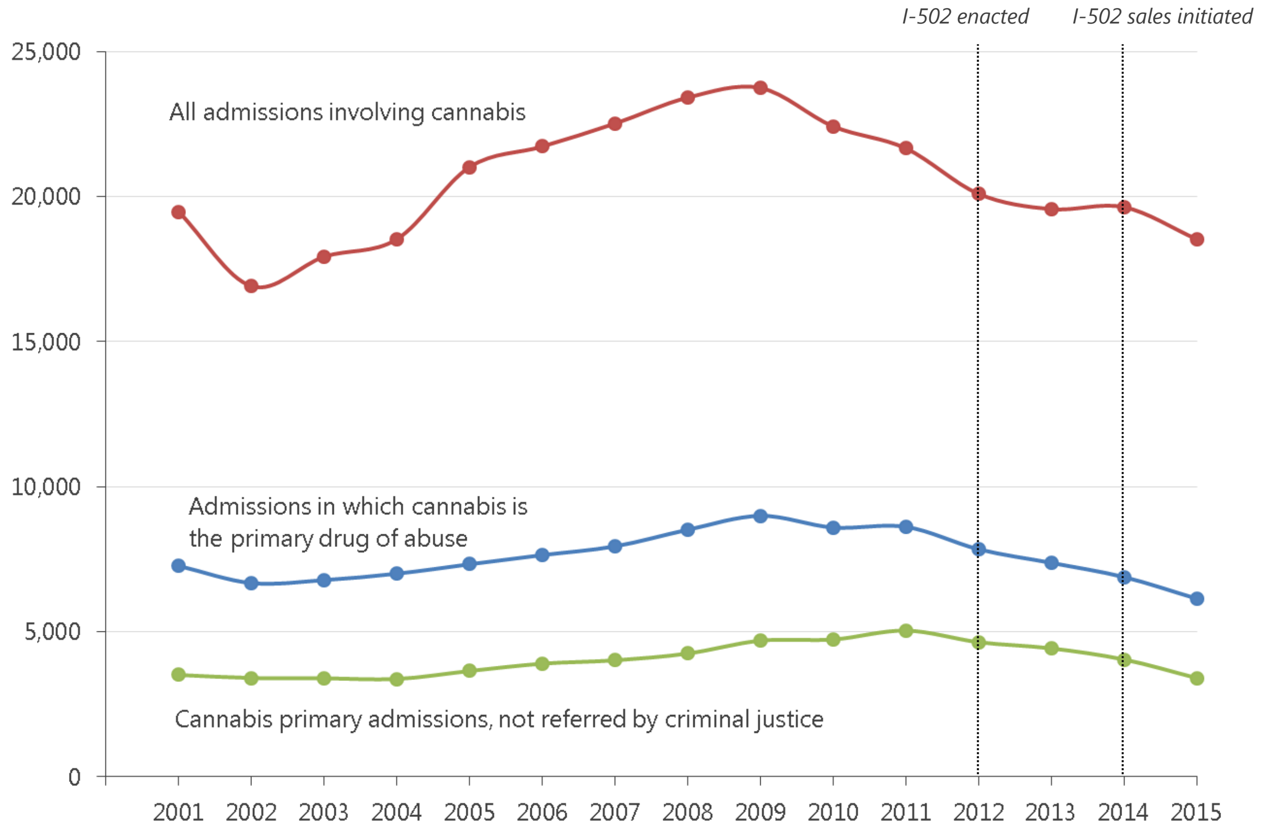
State Trends in Adult Substance Use (BRFSS), Quarterly 2011-2015



Note:
Shaded regions represent 95% confidence intervals.

Exhibit 9

State Trends in Treatment Admissions for Cannabis Abuse (TARGET), Annually 2001-2015



Summary Results of Outcome Analyses

I-502 enactment and Cannabis Abuse Treatment Admissions

Summary

The TEDS-A data set contains data for all 50 states and the District of Columbia. As such, we were able to conduct a between-state analysis in an effort to identify the effect of I-502 as a whole, upon its enactment in 2012.

Using the synthetic control method with the TEDS-A data, we identified a similar set of states that did not legalize non-medical marijuana and had rates of cannabis abuse treatment admissions similar to Washington prior to 2012. We used data from this set of states to serve as a counterfactual for Washington—our best estimate of what would have happened in Washington had I-502 not been enacted.

Findings

Our outcome models found no meaningful differences between treatment admissions for cannabis abuse in Washington and those in comparison states following I-502 enactment. That is, although admissions to substance abuse treatment for cannabis abuse fell as a percentage of all admissions in Washington in recent years, there is no evidence that the enactment of I-502 caused this change.

Detailed analytic methods and results are shown in the I-502 Technical Appendix.

Exhibit 10

Description of Data for Between-State Analysis of Cannabis Abuse Treatment Admissions

Data source	U.S. Treatment Episode Data Set—Admissions (TEDS-A)
Data contents	Census of all state-funded substance abuse treatment episodes, age 12+
Geography	50 states and the District of Columbia
Time period	2005-2014
Outcomes	Percent of admissions with cannabis as primary substance of abuse Percent of admissions involving cannabis
I-502 feature	Enactment in 2012

Per Capita Sales and Cannabis Abuse Treatment Admissions

Summary

In addition to our between-state analysis of the effect of I-502 on cannabis abuse treatment admissions, we used the TARGET data system to further focus our analysis on effects of one specific feature of I-502—the amount of retail cannabis sales in a county. We examined how differences in the amount of legal cannabis sales in each county might affect cannabis abuse treatment admissions for persons residing in the county.

The design of the analysis accounts for a range of alternative possible causes of changes in substance abuse treatment admissions, including the following:

- All differences between counties that do not change over time, such as differences in county unemployment rates that remain consistent across time;
- All changes over time that are shared by all counties, such as a national trend in unemployment rates that affects all counties;
- Some, but not all, county differences that change over time, such as demographic shifts unique to a county; and
- The possibility that differences in treatment admissions actually cause differences in cannabis sales, rather than sales causing changes in treatment admissions.

Findings

Our outcome models that examined the effect of the amount of legal cannabis sales on the number of cannabis abuse treatment admissions in each county produced no evidence that the level of sales had an effect on admissions.

Detailed analytic methods and results are shown in the I-502 Technical Appendix.

Exhibit 11

Description of Data for Within-State Analysis of Cannabis Abuse Treatment Admissions

Data source	TARGET data system (Treatment and Assessment Report Generation Tool)
Data contents	Census of all state-funded substance abuse treatment admissions
Geography	Washington counties
Time period	2002-2016
Outcomes	Count of admissions with cannabis as primary substance of abuse Count of admissions involving cannabis
I-502 feature	Per capita legal cannabis sales

Per Capita Sales and Youth Substance Use

Summary

Our analysis of the HYS does not address effects of cannabis legalization as a whole but instead focuses on the effect of one specific feature of I-502—the amount of retail cannabis sales in an area. We examined how differences in the amount of legal cannabis sales in each school district affect youth substance use behavior and attitudes in the district.

The design of the analysis accounts for a range of alternative possible causes of youth substance use, including the following:

- All differences between school districts that do not change over time, such as differences in high school completion rates that remain consistent across time; and
- All changes over time that are shared by all districts, such as a trend in high school completion rates that is common across districts.

Findings

We found no evidence of effects of the amount of legal cannabis sales on indicators of youth cannabis use in grades 8, 10, and 12. Among the other outcomes examined, which included use of alcohol and tobacco and attitudes about cannabis use, there were two statistically significant findings ($p < 0.05$), both among 8th graders:

- 8th graders in districts with higher per capita legal cannabis sales were significantly less likely to report smoking cigarettes.
- 8th graders in districts with higher per capita legal cannabis sales were significantly less likely to report the belief that one would get caught by the police if they used cannabis.

Analytic methods for the HYS were limited by certain characteristics of the available data, so results of these analyses are considered particularly preliminary. The strength of conclusions regarding causal effects of the law can be improved when more current data on sales and control variables are available.

Detailed analytic methods and results are shown in the I-502 Technical Appendix.

Exhibit 12

Description of Data for Within-State Analysis of Youth Substance Use

Data source	Washington Healthy Youth Survey (HYS)
Data contents	Substance abuse behavior and attitudes for Washington public school students in grade 8, 10, & 12
Geography	Washington public school districts
Time period	Even-numbered years 2002-2016
Outcomes	Lifetime cannabis use, 30-day cannabis use and heavy use, 30-day alcohol use and binge drinking, cigarette use, and attitudes about cannabis use
I-502 feature	Per capita legal cannabis sales

Per Capita Sales and Adult Substance Use

Summary

Our analysis of the BRFSS does not address effects of cannabis legalization as a whole but instead focuses on the effect of one specific feature of I-502—the amount of retail cannabis sales in an area. We examined how differences in the amount of legal cannabis sales in each county affect adult substance use in the county.

The design of the analysis accounts for a range of alternative possible causes of adult substance use, including the following:

- All differences between counties that do not change over time, such as differences in county unemployment rates that remain consistent across time;
- All changes over time that are shared by all counties, such as a national trend in unemployment rates that affects all counties;
- Some, but not all, county differences that change over time, such as demographic shifts unique to a county; and
- The possibility that differences in adult substance use actually cause differences in cannabis sales, rather than sales causing changes in substance use.

Findings

We found no evidence that greater levels of legal cannabis sales caused increases in overall adult cannabis use. Several analyses of the effect of sales among subgroups of the BRFSS sample did produce statistically significant findings ($p < 0.05$).

Among respondents 21 and older, those living in counties with higher levels of legal cannabis sales were significantly more likely to report any cannabis use in the past 30 days and heavy cannabis use (defined as use on 20 or more of the past 30 days).

Among respondents under age 21, those living in counties with higher sales were significantly less likely to report use of cannabis in the past 30 days, but the likelihood of heavy use was unaffected. The subgroup analyses by age were somewhat sensitive to model specification.

We also found that among cigarette smokers, respondents living in counties with higher levels of legal cannabis sales were significantly less likely to report using cannabis in the past 30 days.

Detailed analytic methods and results are shown in the I-502 Technical Appendix.

Exhibit 13

Description of Data for Within-State Analysis of Adult Substance Use

Data source	Washington Behavioral Risk Factors Surveillance System (BRFSS)
Data contents	Substance use for a representative sample of Washington adults (age 18+) in telephone households
Geography	Washington counties
Time period	2011-2015
Outcomes	Lifetime cannabis use, 30-day cannabis use and heavy use, 30-day heavy drinking and binge drinking, and cigarette use
I-502 feature	Per capita legal cannabis sales

Per Capita Sales and Drug-related Criminal Convictions

Trends

We used data from Washington's Administrative Office of the Courts to identify trends in drug-related criminal convictions over time. Among offenders 21 and older, misdemeanor cannabis possession convictions began a sharp decline in 2012, dropping from 297 convictions in January 2012, to 0 by January 2013, the first month following enactment of I-502 (Exhibit 14).

Among offenders under 21, for whom prohibitions did not change under I-502, misdemeanor cannabis possession convictions began to decline in 2012, dropping from 1,015 convictions in the first three months of 2012, to 722 in the first quarter of 2013, the first quarter following enactment of I-502 (Exhibit 15).

Exhibit 14

Adult Convicted Charge Counts

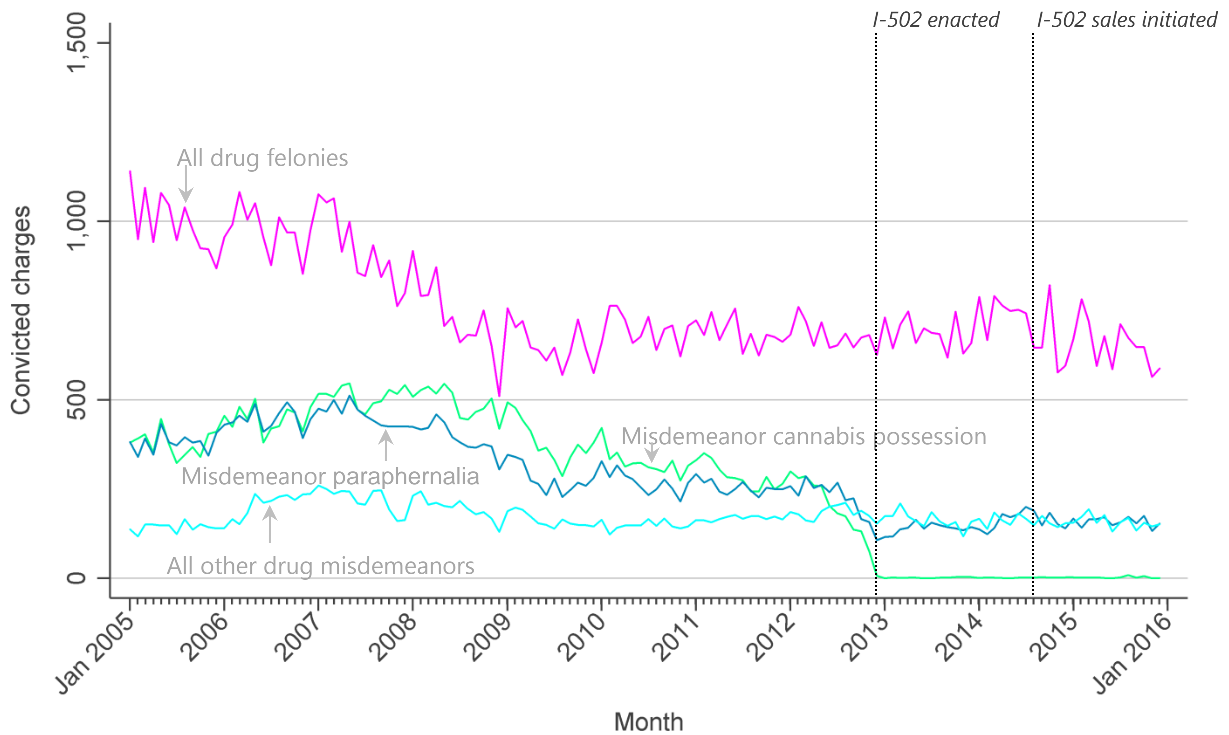
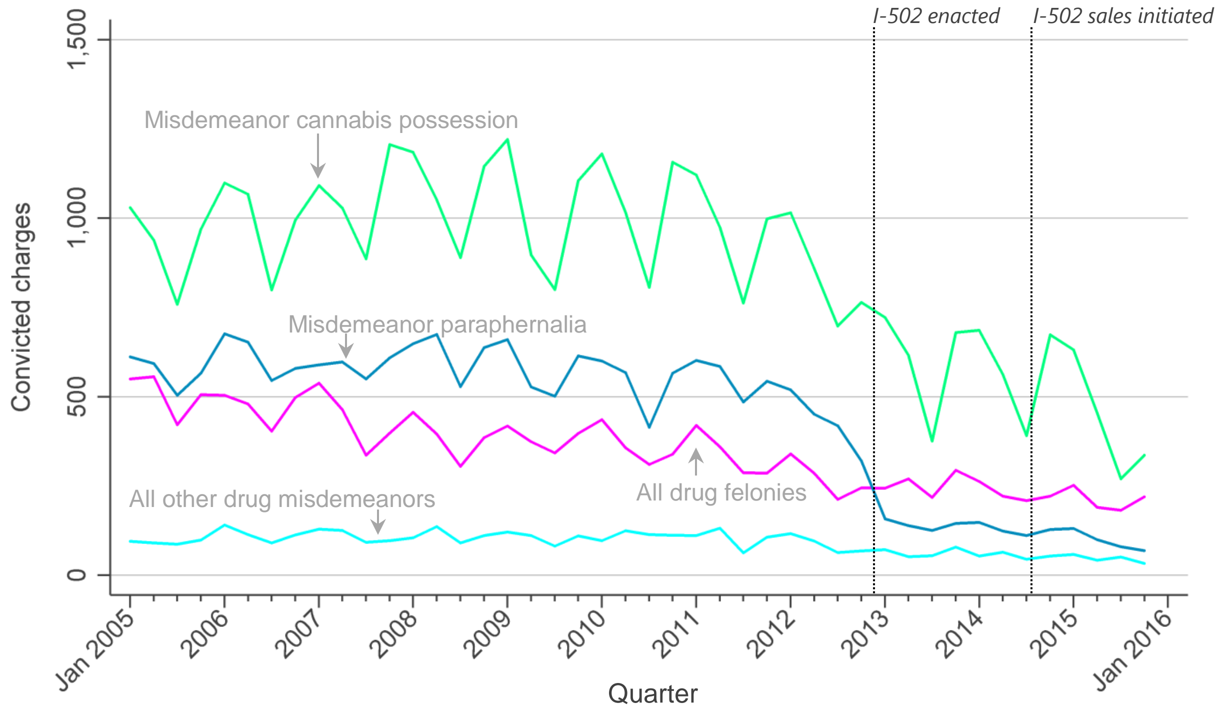


Exhibit 15

Under 21 Convicted Charge Counts



Outcome Analysis of Drug-Related Convictions

Summary

Our analysis of drug convictions does not address effects of cannabis legalization as a whole but instead focuses on the effect of one specific feature of I-502—the amount of retail cannabis sales in an area. We examined how differences in the amount of legal cannabis sales in each county affect the number of drug-related convictions in the county.

The design of the analysis accounts for a range of alternative possible causes of drug-related convictions, including the following:

- All differences between counties that do not change over time, such as differences in county unemployment rates that remain consistent across time;
- All changes over time that are shared by all counties, such as a national trend in unemployment rates that affects all counties;
- Some, but not all, county differences that change over time, such as demographic shifts unique to a county; and
- The possibility that differences in criminal convictions actually cause differences in cannabis sales, rather than sales causing changes in crime.

Findings

Outcome models examining effects of legal cannabis sales on drug-related convictions in each county produced no evidence of effects of retail cannabis sales on any of the drug-related charge categories.

Detailed analytic methods and results are shown in the I-502 Technical Appendix.

Exhibit 16

Description of Data for Within-State Analysis of Drug-Related Criminal Convictions

Data source	Administrative Office of the Courts
Data contents	Census of all convicted drug-related misdemeanor and felony charges
Geography	Washington counties
Time period	2005-2016
Outcomes	Convictions for drug-related misdemeanors (marijuana possession, paraphernalia, DUI, negligent driving, and all other drug-related misdemeanors) and felonies (DUI and all other drug-related felonies)
I-502 feature	Per capita legal cannabis sales

VI. Conclusions

Summary of findings

Our outcome analyses were designed to identify causal effects of I-502. However, I-502 is a multi-faceted law that may affect outcomes through a variety of mechanisms including changes to criminal prohibitions; the creation of a regulated cannabis supply system; and investments in substance abuse prevention, treatment, and research.

The findings we present in this report are only one portion of a larger body of work designed to address multiple aspects of the law.

In these initial investigations, we found no evidence that I-502 enactment, on the whole, affected cannabis abuse treatment admissions. Further, within Washington State, we found no evidence that the amount of legal cannabis sales affected cannabis abuse treatment admissions.

The bulk of outcome analyses in this report used the within-state approach to focus on identifying effects of the amount of legal cannabis sales. We found no evidence that the amount of legal cannabis sales affected youth substance use or attitudes about cannabis or drug-related criminal convictions.

We did find evidence that higher levels of retail cannabis sales affected adult cannabis use in certain subgroups of the population. BRFSS respondents 21 and older who lived in counties with higher levels of retail cannabis sales were more likely to report using cannabis in the past 30 days and heavy use of cannabis in the past 30 days.

We also found two effects that are difficult to interpret. Among the portion of the population aged 18 to 21, BRFSS respondents living in counties with higher sales were less likely to report using cannabis in the past 30 days, in some analyses. It may be that legal cannabis sales have made cannabis more difficult to access by persons below the legal age, for instance, by reducing black market supply through competition.

We also found that in the portion of the BRFSS sample who smoked cigarettes, respondents living in counties with higher levels of legal cannabis sales were less likely to report past-month cannabis use. It is particularly difficult to explain why increased sales would lead to lower cannabis use among cigarette smokers.

We look forward to updating these results with additional data to see if these effects persist.

Limitations

The main limitation of our outcome analyses is that there may be other differences between intervention units that change over time at the same time as the intervention and that also influence outcomes. For example, in between-state analyses other events that occur in Washington and not in comparison states coinciding with I-502 enactment, such as the enactment of private liquor sales roughly six months prior, could influence outcomes at the same time that I-502 does, distorting our understanding of the effect of I-502.

Similarly, in within-state analyses, a factor such as substance abuse prevention activities that are funded by revenues from legal cannabis sales could coincide with legal cannabis sales. If these prevention activities tend to occur in the same times and places as legal cannabis sales, and they also influence outcomes, they could distort our understanding of the effect of legal cannabis sales.

Within-state analyses examining effects of the amount of legal cannabis sales do not address the question of whether cannabis use, or any other outcome, has changed as a result of I-502 enactment. Trend data concerning adult substance use indicates that cannabis use among adults has increased in recent years. We have not yet addressed the question of whether these trends are caused by I-502. We look forward to updating our results with findings from additional between-state analyses as we gain access to additional multi-state data sources.

It should also be noted that we conducted a large number of analyses (described more fully in the I-502 Technical Appendix). By the logic of statistical significance testing, with each analysis we accept a 5% chance of identifying an estimate as significant when there really is no effect. Because of the large number of analyses we conducted, we could expect to find the number of significant estimates we did strictly by chance variation alone.

Whether or not our evidence of null effects of I-502 enactment and legal cannabis sales is convincing is a slightly different question. There are several possible reasons for findings of null effects. One possible reasons is that there truly are no effects.

Null effects can also be found when there is an effect but our sample size is too small to identify it or there is not enough variation in sales within our state to detect an effect. For example, if legal cannabis sales began at the same time in all counties and grew at the same rate, we would be unable to identify an effect of the amount of legal sales using the within-state analysis strategy. In Washington, there was variation in patterns of sales between counties over time; it is unknown if this variation is sufficient to detect potential effects of sales.

Overall, these analyses should be considered preliminary. The most current outcome data available reflect the first two years of legal cannabis sales, and the supply system is still growing. In upcoming reports we will update these analyses as more current data become available and report findings from new analyses to address other of our study requirements.

Our study is ultimately required to produce a benefit-cost analysis of I-502. Identification of causal effects of the law on outcomes is a necessary step towards that goal. In future reports we will report additional findings from outcome analyses as well as findings from other aspects of our overall benefit-cost evaluation.

References

Abadie, A., Diamond, A., & Hainmueller, J. (2010). Synthetic control methods for comparative case studies: Estimating the effect of California's Tobacco Control Program. *Journal of the American Statistical Association*, *105*(490), 493–505.

Abadie, A., & Gardeazabal, J. (2003). The economic costs of conflict: A case study of the Basque Country. *The American Economic Review*, *93*(1), 113–132.

Anderson, D.M., Hansen, B., & Rees, D.I. (2012). Medical marijuana laws, traffic fatalities, and alcohol consumption. *The Journal of Law and Economics*, *56*(2), 333–369.

Anderson, D.M., Hansen, B., & Rees, D.I. (2014). Medical marijuana laws and teen marijuana use. *American Law and Economics Review*, *17*(2), 495–528.

Anderson, D.M., & Rees, D.I. (2011). Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption.

Bachhuber, M.A., Saloner, B., Cunningham, C.O., & Barry, C.L. (2014). Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010. *JAMA Internal Medicine*, *174*(10), 1668.

Caulkins, J.P., Kilmer, B., & Kleiman, M.A.R. (2012). *Marijuana Legalization: What Everyone Needs to Know*. New York: Oxford University Press.

Cerdá, M., Wall, M., Feng, T., Keyes, K.M., Sarvet, A., . . . Hasin, D.S. (2017). Association of state recreational marijuana laws with adolescent marijuana use. *JAMA Pediatrics*, *171*(2), 142.

Choi, A., Dave, D., & Sabia, J.J. (2016). *Smoke gets in your eyes: Medical marijuana laws and tobacco use*. National Bureau of Economic Research.

Choo, E.K., Benz, M., Zaller, N., Warren, O., Rising, K.L., & McConnell, K.J. (2014). The impact of state medical marijuana legislation on adolescent marijuana use. *Journal of Adolescent Health*, *55*(2), 160–166.

Chu, Y.-W.L. (2014). The effects of medical marijuana laws on illegal marijuana use. *Journal of Health Economics*, *38*, 43–61.

Colorado Department of Public Health & Environment. (2017). Monitoring health concerns related to marijuana in Colorado: 2016.

Dilley, J.A., Hitchcock, L., McGroder, N., Greto, L.A., & Richardson, S.M. (2017). Community-level policy responses to state marijuana legalization in Washington State. *International Journal of Drug Policy*, *42*, 102–108.

Dragone, D., Prarolo, G., Vanin, P., & Zanella, G. (2017). Crime and the legalization of recreational marijuana.

Harper, S., Strumpf, E.C., & Kaufman, J.S. (2012). Do medical marijuana laws increase marijuana use? Replication study and extension. *Annals of Epidemiology*, *22*(3), 207–212.

Hasin, D.S., Sarvet, A.L., Cerdá, M., Keyes, K.M., Stohl, M., Galea, S., & Wall, M.M. (2017). US adult illicit cannabis use, cannabis use disorder, and medical marijuana laws: 1991-1992 to 2012-2013. *JAMA Psychiatry*, *74*(6), 579.

Hasin, D.S., Wall, M., Keyes, K.M., Cerdá, M., Schulenberg, J., O'Malley, P.M., . . . Feng, T. (2015). Medical marijuana laws and adolescent marijuana use in the USA from 1991 to 2014: results from annual, repeated cross-sectional surveys. *The Lancet Psychiatry*, *2*(7), 601–608.

Keyes, K.M., Wall, M., Cerdá, M., Schulenberg, J., O'Malley, P.M., Galea, S., . . . Hasin, D.S. (2016). How does state marijuana policy affect US youth? Medical marijuana laws, marijuana use and perceived harmfulness: 1991-2014: MML and attitudes. *Addiction*, *111*(12), 2187–2195.

Kilmer, B., Caulkins, J.P., Pacula, R.L., MacCoun, R.J., & Reuter, P.H. (2010). *Altered State? Assessing how marijuana legalization in California could influence marijuana consumption and public budgets.* Santa Monica, CA: RAND Corporation.

Kim, J. H., Santaella-Tenorio, J., Mauro, C., Wrobel, J., Cerdà, M., Keyes, K. M., . . . Li, G. (2016). State medical marijuana laws and the prevalence of opioids detected among fatally injured drivers. *American Journal of Public Health*, *106*(11), 2032–2037.

Lynne-Landsman, S.D., Livingston, M.D., & Wagenaar, A.C. (2013). Effects of state medical marijuana laws on adolescent marijuana use. *American Journal of Public Health*, *103*(8), 1500–1506.

Malani, A., & Reif, J. (2015). Interpreting pre-trends as anticipation: Impact on estimated treatment effects from tort reform. *Journal of Public Economics, 124*, 1-17.

Martins, S.S., Mauro, C.M., Santaella-Tenorio, J., Kim, J.H., Cerda, M., Keyes, K.M., . . . Wall, M. (2016). State-level medical marijuana laws, marijuana use and perceived availability of marijuana among the general U.S. population. *Drug and Alcohol Dependence*, *169*, 26–32.

Morris, R.G., TenEyck, M., Barnes, J.C., & Kovandzic, T.V. (2014). The effect of medical marijuana laws on crime evidence from state panel data, 1990-2006. *PLoS ONE*, *9*(3), e92816.

National Academies of Sciences, Engineering, and Medicine. (2017). *The health effects of cannabis and cannabinoids: The current state of evidence and recommendations for research*. Washington, D.C.: National Academies Press.

Pacula, R.L., Powell, D., Heaton, P., & Sevigny, E.L. (2015). Assessing the effects of medical marijuana laws on marijuana use: the devil is in the details. *Journal of Policy Analysis and Management*, *34*(1), 7–31.

Salomonsen-Sautel, S., Min, S.-J., Sakai, J.T., Thurstone, C., & Hopfer, C. (2014). Trends in fatal motor vehicle crashes before and after marijuana commercialization in Colorado. *Drug and Alcohol Dependence*, *140*, 137–144.

Santaella-Tenorio, J., Mauro, C.M., Wall, M.M., Kim, J.H., Cerdá, M., Keyes, K.M., . . . Martins, S.S. (2017). US traffic fatalities, 1985–2014, and their relationship to medical marijuana laws. *American Journal of Public Health*, *107*(2), 336–342.

Schuermeyer, J., Salomonsen-Sautel, S., Price, R.K., Balan, S., Thurstone, C., Min, S.-J., & Sakai, J.T. (2014). Temporal trends in marijuana attitudes, availability and use in Colorado compared to non-medical marijuana states: 2003–11. *Drug and Alcohol Dependence*, *140*, 145–155.

Shi, Y. (2017). Medical marijuana policies and hospitalizations related to marijuana and opioid pain reliever. *Drug and Alcohol Dependence*, *173*, 144–150.

Smart, R. (2015). The kids aren't alright but older adults are just fine: Effects of medical marijuana market growth on substance use and abuse. *Browser Download This Paper*.

Stolzenberg, L., D'Alessio, S.J., & Dariano, D. (2016). The effect of medical cannabis laws on juvenile cannabis use. *International Journal of Drug Policy*, *27*, 82–88.

Wall, M.M., Mauro, C., Hasin, D.S., Keyes, K.M., Cerda, M., Martins, S.S., & Feng, T. (2016). The effect of medical cannabis laws on juvenile cannabis use. *International Journal of Drug Policy*, *27*, 82–88.

Wen, H., Hockenberry, J.M., & Cummings, J.R. (2015). The effect of medical marijuana laws on adolescent and adult use of marijuana, alcohol, and other substances. *Journal of Health Economics*, *42*, 64–80.

Williams, A.R., Santaella-Tenorio, J., Mauro, C.M., Levin, F.R., & Martins, S.S. (2017). Loose regulation of medical marijuana programs associated with higher rates of adult marijuana use but not cannabis use disorder: MMLs: Marijuana Use & Cannabis Use Disorder. *Addiction*.

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We truly could not have completed this work without the countless inputs and contributions from all of these people.

Exhibit A1
Semi-Annual Retail Cannabis Sales Totals, by County

	2014		2015		2016		2017
County	**1st half**	**2nd half**	**1st half**	**2nd half**	**1st half**	**2nd half**	**1st half**
Adams	$0	$0	$0	$0	$0	$378,975	$713,356
Asotin	$0	$0	$78,390	$401,931	$1,988,574	$3,775,827	$4,121,539
Benton	$0	$1,144,012	$1,696,360	$2,034,014	$2,936,180	$6,595,001	$8,279,841
Chelan	$0	$147,714	$1,244,365	$2,293,107	$2,508,655	$3,684,383	$3,765,110
Clallam	$0	$90,704	$1,309,700	$2,075,734	$3,141,466	$5,195,848	$5,475,861
Clark	$0	$6,175,592	$18,556,670	$23,878,865	$22,240,827	$27,949,164	$28,902,019
Columbia	$0	$0	$0	$0	$0	$0	$0
Cowlitz	$0	$1,108,480	$3,475,182	$4,546,725	$5,449,413	$7,186,783	$7,665,828
Douglas	$0	$697,342	$816,454	$755,303	$941,832	$1,231,718	$1,290,971
Ferry	$0	$0	$0	$130,537	$287,263	$396,395	$350,544
Franklin	$0	$0	$0	$123,213	$0	$0	$0
Garfield	$0	$0	$0	$0	$0	$0	$0
Grant	$0	$240,323	$1,085,377	$1,390,630	$2,324,847	$3,635,736	$4,179,944
Grays Harbor	$0	$95,965	$884,464	$2,436,274	$3,887,351	$5,511,267	$5,853,110
Island	$0	$115,190	$1,069,845	$2,503,568	$3,226,453	$4,273,093	$4,390,246
Jefferson	$0	$397,967	$1,132,938	$1,494,072	$1,671,963	$2,455,975	$2,586,412
King	$0	$8,893,834	$39,272,602	$64,710,476	$86,700,143	$122,885,382	$125,884,200
Kitsap	$0	$955,998	$3,980,099	$7,854,783	$9,822,177	$13,869,388	$15,375,423
Kittitas	$0	$319,081	$1,055,339	$1,656,437	$2,260,308	$3,012,473	$3,212,532

County	2014		2015		2016		2017
	1st half	2nd half	1st half	2nd half	1st half	2nd half	1st half
Klickitat	$0	$467,266	$883,970	$1,061,061	$1,140,547	$1,611,472	$1,367,743
Lewis	$0	$0	$208,480	$785,043	$1,261,229	$2,287,319	$2,538,551
Lincoln	$0	$0	$0	$0	$0	$0	$0
Mason	$0	$0	$365,731	$1,753,630	$2,091,755	$3,139,902	$3,129,568
Okanogan	$0	$219,391	$398,342	$848,429	$953,596	$1,272,983	$1,359,395
Pacific	$0	$33,090	$314,974	$440,163	$402,909	$915,732	$1,657,566
Pend Oreille	$0	$0	$0	$0	$0	$29,876	$127,503
Pierce	$0	$3,935,665	$12,488,780	$20,471,415	$28,766,492	$47,747,924	$51,329,640
San Juan	$0	$40,677	$210,430	$321,379	$336,354	$449,383	$447,780
Skagit	$0	$868,171	$3,535,551	$4,752,515	$6,143,135	$8,488,439	$9,046,885
Skamania	$0	$0	$351,594	$533,908	$455,757	$546,663	$444,624
Snohomish	$0	$4,909,716	$12,542,107	$21,003,774	$28,859,784	$43,238,955	$45,957,454
Spokane	$0	$4,653,768	$17,446,709	$25,734,152	$31,927,547	$43,992,835	$46,565,263
Stevens	$0	$133,870	$862,388	$1,004,739	$974,569	$1,295,697	$1,341,659
Thurston	$0	$1,064,428	$4,823,474	$7,969,899	$11,422,594	$19,087,934	$21,023,049
Wahkiakum	$0	$0	$0	$0	$0	$0	$0
Walla Walla	$0	$0	$0	$667,299	$2,465,360	$3,140,589	$3,130,690
Whatcom	$0	$2,849,676	$5,155,812	$7,317,131	$10,010,255	$13,822,842	$14,603,922
Whitman	$0	$380,502	$1,637,167	$2,526,428	$2,758,200	$3,805,843	$4,132,042
Yakima	$0	$713,015	$2,095,888	$3,119,103	$3,994,846	$5,967,333	$7,626,912

Source:
Washington State Liquor & Cannabis Board.

Exhibit A2

Semi-Annual Per Capita Retail Cannabis Sales, by County

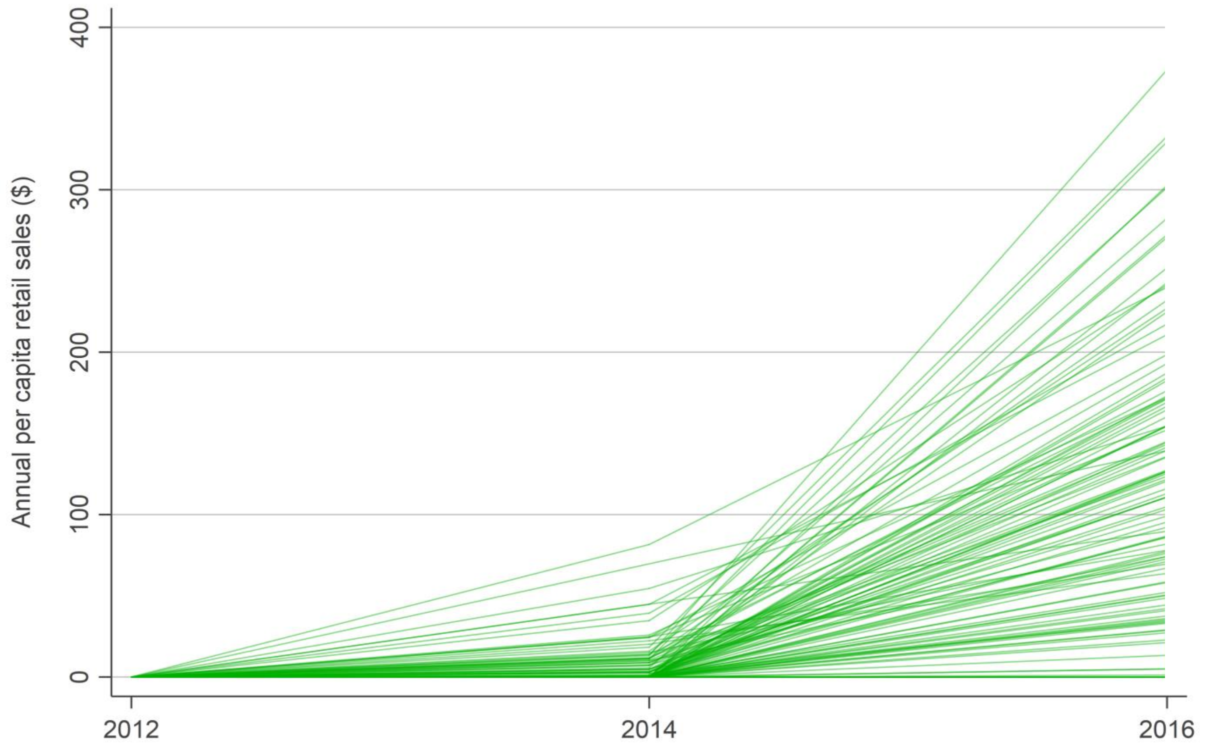
County	Average population 2014-2016	2014 1st half	2014 2nd half	2015 1st half	2015 2nd half	2016 1st half	2016 2nd half	2017 1st half
Adams	19,446	$0	$0	$0	$0	$0	$19	$37
Asotin	22,051	$0	$0	$4	$18	$90	$171	$187
Benton	188,857	$0	$6	$9	$11	$16	$35	$44
Chelan	75,206	$0	$2	$17	$30	$33	$49	$50
Clallam	72,910	$0	$1	$18	$28	$43	$71	$75
Clark	453,341	$0	$14	$41	$53	$49	$62	$64
Columbia	4,072	$0	$0	$0	$0	$0	$0	$0
Cowlitz	104,370	$0	$11	$33	$44	$52	$69	$73
Douglas	40,207	$0	$17	$20	$19	$23	$31	$32
Ferry	7,695	$0	$0	$0	$17	$37	$52	$46
Franklin	87,614	$0	$0	$0	$1	$0	$0	$0
Garfield	2,232	$0	$0	$0	$0	$0	$0	$0
Grant	93,961	$0	$3	$12	$15	$25	$39	$44
Grays Harbor	73,041	$0	$1	$12	$33	$53	$75	$80
Island	81,359	$0	$1	$13	$31	$40	$53	$54
Jefferson	30,921	$0	$13	$37	$48	$54	$79	$84
King	2,065,018	$0	$4	$19	$31	$42	$60	$61
Kitsap	259,380	$0	$4	$15	$30	$38	$53	$59
Kittitas	42,944	$0	$7	$25	$39	$53	$70	$75
Klickitat	21,071	$0	$22	$42	$50	$54	$76	$65
Lewis	76,668	$0	$0	$3	$10	$16	$30	$33
Lincoln	10,685	$0	$0	$0	$0	$0	$0	$0
Mason	62,201	$0	$0	$6	$28	$34	$50	$50
Okanogan	41,774	$0	$5	$10	$20	$23	$30	$33

County	Average population 2014-2016	2014 1st half	2014 2nd half	2015 1st half	2015 2nd half	2016 1st half	2016 2nd half	2017 1st half
Pacific	21,174	$0	$2	$15	$21	$19	$43	$78
Pend Oreille	13,253	$0	$0	$0	$0	$0	$2	$10
Pierce	833,691	$0	$5	$15	$25	$35	$57	$62
San Juan	16,216	$0	$3	$13	$20	$21	$28	$28
Skagit	121,006	$0	$7	$29	$39	$51	$70	$75
Skamania	11,444	$0	$0	$31	$47	$40	$48	$39
Snohomish	759,759	$0	$6	$17	$28	$38	$57	$60
Spokane	489,083	$0	$10	$36	$53	$65	$90	$95
Stevens	44,028	$0	$3	$20	$23	$22	$29	$30
Thurston	268,684	$0	$4	$18	$30	$43	$71	$78
Wahkiakum	3,995	$0	$0	$0	$0	$0	$0	$0
Walla Walla	60,568	$0	$0	$0	$11	$41	$52	$52
Whatcom	210,360	$0	$14	$25	$35	$48	$66	$69
Whitman	47,348	$0	$8	$35	$53	$58	$80	$87
Yakima	250,066	$0	$3	$8	$12	$16	$24	$30

Source:
Washington State Liquor & Cannabis Board. Average population source from Washington State Office of Financial Management, Forecasting Division (2016). Small Area Demographic Estimates: County 2000-2016.

Exhibit A3

Annual Per Capita Retail Cannabis Sales, by School District



Source:

Sales data source from Washington State Liquor & Cannabis Board; sales data shown for Health Youth Survey years (even-numbered years); Population data source from U.S. Census Bureau, Small Area Income and Poverty Estimates. (2017). School District Data 1995, 1997, 1999-2015. Retrieved from: https://www.census.gov/did/www/saipe/data/schools/; these data were only current through 2015 so we used the average of 2014 and 2015 population to compute per capita sales rates.

Exhibit A4

Inventory of the Status of our Work on all Study Components

Study component I-502 implementation	Data source	Status
I-502 business locations and sales	LCB	Analysis ongoing
LCB enforcement activity	LCB	Analysis ongoing
Prevention, treatment, and research	Descriptive information on DSHS, DOH, and university expenditure of cannabis funding	To be included in future reports
Washington State Patrol (WSP) laboratory testing of controlled substances and DUI enforcement	WSP	To be obtained
State agency implementation costs	Individual state agencies	Assessment of state agency costs of I-502 implementation is underway
Local implementation costs	Survey data collection of city and county government costs of regulating cannabis businesses completed	Initial survey completed; to be included in future reports; plans for assessment of other local implementation costs to be determined
Local policy data	Seattle and King County Public Health Department	Analysis ongoing
State and local cannabis revenues	OFM & DOR	Analysis ongoing
Substance use and abuse		
Adult substance use	Behavioral Risk Factor Surveillance System (BRFSS)	Analyzed in this report, current through 2015; 2016 data received Aug. 2017
Youth substance use	Healthy Youth Survey (HYS)	Analyzed in this report, current through 2016; 2018 data anticipated Spring 2019

Substance use in a college-age sample	Young Adult Survey	We will explore the prospect of analyzing
Youth and adult substance use	National Survey of Drug Use and Health (NSDUH)	License for access to restricted-use data approved by US Substance Abuse and Mental Health Services Administration; awaiting notification of when we can access the data;
Physical and mental health associated with drug use		
Prenatal cannabis use	Pregnancy Risk Assessment Monitoring System (PRAMS)	To be obtained
Health service utilization involving cannabis use	Drug Abuse Warning Network (DAWN)	To be obtained
	Emergency Department Information Exchange (EDIE)	To be obtained
	Provider One (P1)	To be obtained
	Seattle-King County Syndromic Surveillance System (SSS)	To be obtained
	Comprehensive Hospital Abstract Reporting System (CHARS)	To be obtained
Substance abuse treatment admissions involving cannabis	Treatment and Assessment Report Generation Tool (TARGET)	Analyzed in this report current through 2016; the TARGET data system has been decommissioned and will be replaced by a new system that is not yet available;
Substance abuse treatment admissions involving cannabis	Treatment Episode Data Set (TEDS-A)	Analyzed in this report current through 2014; 2015 data anticipated by fall 2017
Public safety		
Fatal accidents involving cannabis	Washington FARS with linked toxicology data from Washington Traffic Safety Commission	Data received current through 2015. Analysis ongoing
Non-fatal accidents	All crash data from Washington Department of Transportation	To be obtained

Criminal justice		
Filed and convicted charges	Criminal History Database (CHD)	Analyzed in this report current through 2015; data are updated quarterly
Arrests	National Incident Based Reporting System (NIBRS) & WSP Washington State Identification System (WASIS)	Data received; Analysis ongoing
Sentencing, incarceration, and supervision	Washington sentencing and jail and prison data	Data received; Analysis ongoing
Education		
Attendance, discipline, grade retention, graduation	Comprehensive Education Data and Research System (CEDARS)	To be obtained
Workplace safety & productivity		
Workplace safety	Census of Fatal Occupational Injuries (CFOI)	To be obtained
	Survey of Occupational Injuries and Illnesses (SOII)	To be obtained
Economic impact		
Employment and wages in the legal cannabis industry	Unemployment Insurance data from Employment Security Department	Analyzed in separate WSIPP report current through 2016*
Indirect and induced economic impact	Possible economic impact modeling using REMI or IMPLAN	Plan to be determined

Note:
* Hoagland, C, Barnes, B., & Darnell, A. (2017). *Employment and wage earnings in licensed marijuana businesses* (Doc. No. 17-06-4101). Olympia: Washington State Institute for Public Policy.

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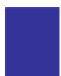

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EXHIBIT “E”

HHS Public Access

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Community-level policy responses to state marijuana legalization in Washington State

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Abstract

Background—Washington State (WA) legalized a recreational marijuana market -- including growing, processing and retail sales -- through voter initiative 502 in November 2012. Legalized recreational marijuana retail sales began in July 2014.

In response to state legalization of recreational marijuana, some cities and counties within the state have passed local ordinances that either further regulated marijuana markets, or banned them completely.

The purpose of this study is to describe local-level marijuana regulations on recreational retail sales within the context of a state that had legalized a recreational marijuana market.

Methods—Marijuana-related ordinances were collected from all 142 cities in the state with more than 3,000 residents and from all 39 counties. Policies that were in place as of June 30, 2016 - two years after the state's recreational market opening - to regulate recreational marijuana retail sales within communities were systematically coded.

Results—A total of 125 cities and 30 counties had passed local ordinances to address recreational marijuana retail sales. Multiple communities implemented retail market bans, including some temporary bans (moratoria) while studying whether to pursue other policy options. As of June 30, 2016, 30% of the state population lived in places that had temporarily or permanently banned retail sales. Communities most frequently enacted zoning policies explicitly regulating where marijuana businesses could be established. Other policies included in ordinances placed limits on business hours and distance requirements (buffers) between marijuana businesses and youth-related land use types or other sensitive areas.

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Conflict of Interest

The authors have no conflicts of interest to declare.

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Conclusions—State legalization does not necessarily result in uniform community environments that regulate recreational marijuana markets. Local ordinances vary among communities within Washington following statewide legalization. Further study is needed to describe how such local policies affect variation in public health and social outcomes.

Keywords

Cannabis; Marijuana Legalization; Public Health Policy

Background

Washington State was one of the first two states in the United States (U.S.) to legalize a retail non-medical (also called "recreational") marijuana market, including growing, processing and sales, and decriminalization of individual possession of small amounts of product, through voter initiative 502 (I-502) in November 2012. Possession or use by individuals under age 21, or by adults in amounts greater than specified by the law, driving under the influence of marijuana, home growing for recreational use, and use of marijuana in public remain illegal.

The state was also one of the first to decriminalize possession of limited amounts of marijuana for medical purposes in 1998 (Washington State voter initiative 692); however, there was no state regulatory system to oversee the activity of collectives, medical marijuana authorizers or patients. Industry interpretation of the state's Medical Cannabis Law (ESSB 5073) that was passed in 2011, as well as a partial gubernatorial veto, resulted in hundreds of collective gardens with medical marijuana sales (also sometimes called "dispensaries") operating in Washington as storefronts for personal access without oversight.

Washington's Liquor and Cannabis Board (LCB) agency developed rules for licensing and oversight of recreational marijuana growers, processors and retailers. The LCB determined a maximum number of marijuana retail sales licenses that would be allowed in each city or county area, based on projected demand and with an original statewide maximum of 334 licenses. Recreational marijuana retail sales markets opened beginning in July 2014. Evolving state regulation of the recreational marijuana market was also associated with development of a stronger statewide system to regulate the previously loose medical market. The newly regulated medical market opened in July 2016, integrated within the recreational market system, and with sales of medical marijuana products allowed in recreational marijuana retail stores that have a medical marijuana endorsement.

In response to state legalization of recreational marijuana (and increased regulation of the previously loose legal medical market), some local government entities pursued policies through passage of local municipal ordinances that banned or further regulated marijuana businesses. In fact, local governments in the U.S. should be expected to have some control over and play a role in regulation of marijuana market activities. For example, one common local government function is land use regulation. Typically, local governments establish "zones" to regulate the types of activities that are allowed in given land areas, and allowable densities of activities. Local governments define specific zone types (e.g., residential, industrial, park), classify their geographic areas by zone type, and approve or disapprove

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proposed activities for those areas based on the zoning, sometimes outright, and sometimes through implied restrictions by limiting land use activity. Additional conditions may also be imposed when a land use is allowed in a particular zone. Therefore, local governments could use zoning to control where and how marijuana businesses can be established (sited), by making it potentially more difficult for those businesses to open. It is possible that a state could preempt this type of traditional local regulatory activity by pre-establishing siting requirements or prohibiting siting of a particular use in specific land use zones.

Washington's land area is divided into 39 contiguous counties with county governments. Typically, multiple cities are located within counties. Article XI, Section 11 of the State of Washington's Constitution authorizes any city, county, town or township to make and enforce within its limit all such local police, sanitation or other regulations as are not in conflict with state general laws. Generally, city governments have legal authority to regulate businesses and other activity through zoning within their boundaries, as well as other activities where explicitly granted the authority by the legislature (Revised Code of Washington [RCW] 70.05.030). County governments have authority to regulate businesses and other activity through zoning in the unincorporated areas (e.g., county areas that are not included in any city boundary) (RCW 70.05.035). Also, county-based public health authorities (e.g., Boards of Health or Health Commissions) have authority to regulate county-wide – including within city boundaries – for designated public health activities (for example, inspection of food service establishments) and county governments can regulate other activities where specifically granted authority by the legislature (RCW 70.05.060). Thus, both county and city governments may have a role to play in the regulation of marijuana businesses under zoning, public health and broad police powers delegated to them by the legislature, as long as their regulation is not in conflict with state law.

A state law preempts the field and makes a local ordinance invalid if the statute or regulation expressly states its intent to preempt the entire field (subject) of the regulation, or if such intent can be implied from the law. This means that local cities and counties cannot pass or enforce ordinances that provide additional regulations on that subject. The ability of local entities to regulate recreational marijuana (e.g., the degree of "field preemption") was not explicitly described in the Washington State I-502, and has required clarification. In January 2014, the Washington State Attorney General issued an opinion that the state law passed by voters in 2012 did not preempt Washington's local governments from banning or regulating local marijuana businesses (Ferguson, 2014). As the state continues to add regulatory requirements, there may be questions of implied preemption of the field for aspects of marijuana regulation, or whether local government ordinances conflict with state law, but for now, the Attorney General's opinion stands, leaving much flexibility to local governments.

There are many potential models for regulating marijuana markets. As authors of a recent study analyzing U.S. state laws that legalized medical marijuana (n=20) noted, "legalization" does not result in a uniform legal environment and there are many variations demonstrated in how states have regulated medical marijuana (Pacula, Hunt, Boustead, 2014). In other words, "marijuana legalization" should not be considered as a dichotomous condition, but rather a continuum of possibilities for the availability and acceptability of marijuana. Communities within states that have legalized recreational marijuana may

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similarly have multiple options for regulation when those local entities have authority to regulate marijuana business activity to some degree. As a result, implementation of marijuana legalization may vary from community to community within the state.

Local entities may be motivated to regulate marijuana based on several factors. First, although 55.7% of Washington State voters passed I-502 statewide, the majority of voters in 19 of Washington's 39 counties did not pass the measure, with up to 62% in those counties voting against it (Washington Secretary of State, 2012). Therefore, policymakers in areas of the state that did not pass the measure might wish to more restrictively control the marijuana market based on the preferences of their citizens. Second, legalization of marijuana for recreational use is very new, and the impacts on public health are unknown, but lessons from regulation of alcohol and tobacco suggest that public health – including preventing use among youth, minimizing harms to adult users – is better protected by policies that are often local in nature, such as restricting time, place and manner of operations, limiting youth access, and restricting advertising (Pacula, Kilmer, Wagenaar, Chaloupka, Caulkins, 2014). Communities that are concerned about mitigating potential negative public health impacts of a recreational marijuana market might wish to take a conservative approach, and support more restrictive policies as the markets open. Finally, Washington's previously loosely regulated but legal medical market could have influenced local decisions on recreational marijuana: many communities saw an explosive growth of dispensaries unlicensed by the state in the two years following recreational marijuana legalization but prior to the recreational market opening, which could have motivated community interest in limiting marijuana-related business activities.

The purpose of this study is to describe local marijuana policy actions within the context of a "legalized recreational marijuana" state environment in Washington State, and to assess the proportion of the state's population that is covered by different regulatory environments at a time period two years after the opening of the market. The term "policy" can refer to laws, rules or procedures that regulate recreational marijuana business activity; this study focuses on describing city or county ordinances as a key type of policy at the local level.

Methods

A framework for assessing the content of local ordinances ("policy surveillance") was developed based on an initial marijuana policy coding project that was funded in Washington State by the Robert Wood Johnson Foundation Public Health Law Research Program (informed by public health interventions for alcohol and tobacco), review of the National Institute on Alcohol Abuse and Alcoholism's Alcohol Policy Information System (NIAAA APIS, 2016), and based on knowledge of ordinances passed or under consideration by local entities in multiple states that have legalized recreational marijuana. Table 1 describes relevant Washington State regulations around recreational marijuana sales and local authority (or potential authority) for enacting ordinances.

Marijuana-related ordinances were collected for all Washington State cities with 3,000 or more residents (142 cities), and all counties (39). Policies for federal lands and lands controlled by federally-recognized Tribes in Washington State were not included.

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Ordinances were identified through a search of the online Municipal Research and Services Center database of Washington's municipal policies (MRSC, 2016). Search terms used were "cannabis" and "marijuana." Ordinances were initially collected during 2013–2014 as part of a previous study, and searches for the current study were initiated quarterly beginning in January 2016.

After collection, local entity ordinances were reviewed using a systematic content analysis. A codebook of specific policy elements to record was developed by the study team.* To support cross-jurisdictional comparisons, each entity's local zoning categories were reviewed and then assigned into seven broad categories: residential single family and residential multi-family; mixed use; urban commercial; office park/business park; light industrial/manufacturing and heavy industrial/manufacturing; rural; and agricultural. A total of 509 questions were included in the final codebook, largely organized by specific allowable marijuana business activities by zone (e.g., how specific activities were regulated, in each of up to seven zones). For this report, only ordinances that specifically regulate recreational marijuana retail sales are included; policies that address only medical marijuana, or only growing or processing activities are excluded.

Policy information was recorded using LawAtlas[SM] policy software, a policy surveillance system which links to geopolitical boundaries (Public Health Law Research, 2016). When no ordinances were identified for a city or county, this was also recorded. Inter-rater reliability testing was conducted to assure quality of coding, with all policies double-coded during initial entry and discrepancies discussed, particularly to revise and clarify codebook questions as needed. At least half of policies were double-coded after the codebook was finalized.

Policies were typically coded as binary ("present" or "absent") in a local jurisdiction, with associated dates when the ordinance went into effect, and when they expired (for temporary policies or policies that were subsequently repealed and replaced with updated ordinances). For this report, we specifically examined whether the following policies had been passed via ordinance by local entities and were in effect on June 30, 2016:

- Actions to regulate or restrict retail marijuana sales
  - Permanent bans on recreational marijuana retail sales
  - Temporary bans on recreational marijuana retail sales (also known as moratoria)
  - Zoning- or siting-based restrictions on where recreational marijuana retail sales could be located
  - Caps on the number of licensed recreational marijuana retailers allowed in the geography
- Actions for local oversight of recreational marijuana retail sales activities
  - Requirement for a marijuana-specific local business license

*A copy of the codebook, protocol and interactive map are available at http://www.kingcounty.gov/depts/health/data/law-atlas.aspx

  - Requirement for a general local business license
- Time, place and manner regulations on recreational marijuana retail sales
  - Buffers required for placement of marijuana businesses at least a given distance away from designated areas or other specific land use types, in addition to state requirements
  - Restricted hours of operation
  - Bans on home delivery of recreational marijuana products (although this is currently prohibited by Washington state law)
- Public messaging requirements
  - Restrictions on recreational marijuana advertising
  - Requirements for public health messaging about marijuana

The total population of city and unincorporated county areas was obtained using Census 2010 data. The exact population of cities and unincorporated county areas that had implemented specific policies, divided by the total population in the cities and unincorporated county areas where policies were assessed, was used to calculate the percent of the population covered.

Finally, we used visual inspection to note counties where there were discordant policies that allowed or banned the retail sale of recreational marijuana: either the county allowed sales but one or more cities within had banned sales, or the county banned sales but cities within the county allowed sales.

Results

A total of 125 cities and 30 counties had passed ordinances that addressed marijuana. A summary of the numbers of policies in effect on June 30, 2016, by city or county entity, and the estimated percent of the total population covered by each policy are presented in Table 2. None of the county policies identified in our study during this period were passed with powers of public health authority; all county policies reported in this study were related to land use and business licensing and therefore apply only to unincorporated areas of the counties.

Actions to restrict retail marijuana sales

A total of 60 entities had passed permanent bans (38% of cities in our study and 15% of all counties), and an additional 7 (2% of cities and 10% of counties) had passed temporary bans on recreational marijuana retail sales. The most common regulatory activity was zoning: 83 entities applied zoning to restrict marijuana market activity (45% of cities and 49% of counties). Ten cities (7% of cities) had established caps on the number of recreational marijuana retail businesses that could be sited in their jurisdiction; however, only six of those caps were less than the LCB-determined maximum number of licenses allowed in their jurisdiction. Three additional cities had also established moratoria on *new* recreational

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marijuana retail sales businesses, although they had already allowed some businesses to be established (data not shown).

Actions for local oversight of recreational marijuana sales activities

A total of 37 cities (26% of cities) and no counties were requiring a local business license for recreational marijuana retail sales. Most required a regular local business license (n=32), but 5 cities (including the City of Seattle, the most populous city in Washington State) had established a marijuana-specific local business license.

Time, place and manner regulations

Washington state law addresses location of recreational marijuana retail sales by requiring that licenses not be issued if the proposed business is within 1,000 feet of an elementary or secondary school or playground. We did not find any local entities that had passed ordinances increasing this minimum buffer requirement.

The state also establishes a default 1,000 foot buffer between recreational marijuana retail stores and other delineated entities serving youth (see listing under Group B buffers in Table 1). Local entities can add to this list of youth-related sites. A total of 10 entities (8 cities and 2 counties) had added youth-related sites requiring a buffer. Additional sites defined included land dedicated for future use as schools and parks, property abutting a street designated as a “school walk route”, and public trails and trail access points.

Fifteen entities (9% of cities and 5% of counties) had established additional buffer requirements for other types of land uses not specifically related to youth activities. These included residential zones, churches and religious facilities, government complexes (such as City Hall), correctional facilities, and substance abuse treatment facilities.

Recent modification of Washington State law allows local governments to reduce Group B buffers to a minimum of 100 feet. Seven cities had reduced the state’s default 1,000 foot buffer distance. Several of them had reduced buffers specifically in highly dense downtown areas only, or for specific youth-serving sites in the Group B list, or when a new youth-related site was proposed within the buffer after the recreational marijuana retail sales business permit had been issued. Most had reduced buffers to 500 feet, but two had reduced at least some buffers to the minimum of 100 feet.

Fifteen entities (14 cities and 1 county) had established restrictions on hours of operation. Three had acted to ban home delivery of recreational marijuana products, although this is currently illegal in the state.

Public messaging

Seven cities included restrictions on recreational marijuana advertising in their local policies; although only three of those established clearly more restrictive sign laws than the state law including limiting the location of advertising (particularly restricting off-site signage). No cities or counties had local policies requiring public health information to be posted or provided by recreational marijuana retailers.

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No action

A total of 26 of the 181 Washington State local government entities did not pass policies to address recreational marijuana (12% of cities and 23% of counties).

Discordant county and city policies on recreational marijuana retail sales

Among Washington State's 39 counties there were 30 that had at least one city within the county that was included in this study (cities with a population of 3,000 or more). Of those 30 counties, the majority (n=20) had discordant policies: 9 counties with a temporary or permanent ban on recreational marijuana retail sales in place for the unincorporated county land area had at least one included city that was allowing retail sales; and 11 counties with no ban in place for the unincorporated county area had at least one city within the county that had banned sales. Of the 10 counties that did not have discordant policies, nine allowed sales throughout and one had banned sales throughout.

Discussion

Most communities in Washington State have acted to regulate recreational marijuana retail sales by municipal or county ordinance following statewide legalization, resulting in a relatively diverse set of policies at the community level within the state. Only 17 cities in our study and 9 counties, encompassing 4% of the population, did not take some form of local policy action.

Continued shifts and developments in state regulatory systems and state law may have influenced local governments to adopt policies that better address their community interests in regulating marijuana. In particular, the rapid growth of a mostly unregulated medical marijuana market near the same time as the recreational market was opening may have contributed to community perceptions that restrictions were needed to limit the number of marijuana businesses in the community, without distinguishing between medical sales and recreational retail sales. Given the integration of medical marijuana sales within recreational retail markets starting in July 2016, current policies that were originally intended to restrict recreational marijuana markets specifically may also now be restricting access to medical marijuana. Longer-term monitoring of community policies will show whether communities are willing to loosen restrictions on marijuana businesses to change access to either recreational or medical marijuana, following the application of controls on the formerly unregulated medical marijuana market.

State law authorizes the Washington Liquor and Cannabis Board (LCB) to regulate marijuana retailers. The LCB has allotted a specific maximum number of recreational marijuana retail sales licenses for jurisdictions, acting as a de facto concentration limit at the jurisdiction level. In December 2015, in preparation for increased demand expected as a result of integrating the previously unregulated medical marijuana market, the LCB increased the statewide allocation (and specific local allocations) by 222 licenses statewide. We found a small number (n=10) of cities that passed ordinances setting caps on the total number of marijuana retail sales licenses that can be sited within their jurisdictions, some of which matched the LCB's new number of allocated licenses for their community. It is

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unknown whether these communities set caps anticipating a future where the LCB will further increase allocations. In other states where local jurisdiction maximum license allocations are not established by the state, local entities wishing to slow the growth of recreational marijuana retail sales access may more aggressively enact caps on retail sales licenses.

As another example of evolving marijuana laws in the state, Washington recently began allowing local governments to reduce required buffers between marijuana businesses and some specific sites that had been listed in the initial I-502 (youth-oriented sites described in Table 1 as "Group B"). This reduction was allowed because in densely populated areas there were limited spaces available to establish marijuana business locations while providing the required 1,000-foot minimum buffer from listed sites. The change in law allows communities to reduce the buffer between marijuana businesses and youth-related land uses in Group B to a minimum of 100 feet, while maintaining the default 1,000 foot requirement in state law should local governments not act to change the buffer. Several large cities with dense urban areas (including Seattle, with a population of more than 600,000 and Tacoma, with a population of nearly 200,000) have passed ordinances to exercise this new authority. Smaller local jurisdictions may have chosen to reduce the youth land use buffer to allow for wider distribution of retail sales establishments in their area.

Some jurisdictions are also choosing to create buffers from other types of land uses, including substance abuse treatment centers, perhaps with the intention of supporting people who are working to reduce substance dependence. However, we did not find any entities that had increased the buffer distance minimum requirement from schools and playgrounds (1,000 foot minimum, described in Table 1 as "Group A").

The reduction of minimum buffer distances is an example of the state relaxing restrictions on recreational marijuana markets. Perhaps anticipating that the state may relax other provisions in current law, three communities have enacted specific local policies that ban home delivery of recreational marijuana, even though that is currently illegal in state law. In fact, proposals to change state law to allow legal home delivery are expected in 2017 (Liu, 2016), although it is unclear at this time if local entities would have authority to regulate further.

Evidence from alcohol and tobacco fields indicates that limiting advertising and other pro-use marketing activities, and increasing price, may be very effective for preventing youth initiation (Pacula, Kilmer, Wagenaar, Chaloupka, Caulkins, 2014). There was little policy effort identified in these communities to restrict marijuana advertising, and none to counter pro-marijuana advertising with public health messages. However, communities may be wary of proposing to limit advertising out of concern for legal challenges related to constitutional protection of free speech (First Amendment protections) in the U.S. While increasing price (such as through local taxes) is an effective prevention strategy, local communities in Washington State do not have ability to apply marijuana-specific local taxes. Communities in other states that legalize marijuana sales and do not preempt local taxation may move to do so.

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We found a relatively large number of counties (n=20 of 30 counties that had at least one city with a population of 3,000 or more) with discordant recreational marijuana retail sales policies – temporary or permanent bans on sales vs. allowing sales - between the county and cities within the county. When counties enact ordinances addressing recreational marijuana retail sales, for the most part these policies apply only in the unincorporated areas of that county, where the county serves as the "local government" for those areas. In other words, a county ban does not automatically extend a ban to all cities within that county's jurisdiction. The exception would be public health policies, where counties generally have authority, and policies are applied within cities. None of the county policies in this study were passed as public health policies that would apply countywide. It is possible that county-based local boards of health could exert their authority to establish some local policies if they were for the specific purpose of protecting the lives and health of people within their jurisdiction, such as restricting recreational marijuana use clubs. These would be applied county-wide.

Our study has multiple limitations. We did not assess the presence of policies in cities with fewer than 3,000 residents; however, the total population of the 138 small municipalities not included in our assessment was about 138,000 (2% of the state population). Thus, we may have underestimated the presence of regulations in Washington State, but only a small percentage of the state population would be excluded. Generalizing findings to the state as a whole may still be reasonable.

About one-third of the state's land is controlled by the federal government (e.g., U.S. Forest Services, National Parks Services) which remains aligned with the federal policy that marijuana is illegal, but there are few permanent residents in these areas, so only a small percentage of the state population would be excluded. Last, about 5% of Washington's land is controlled by 29 individual Federally-recognized American Indian Tribes, which are sovereign nations and not subject to the Washington State marijuana law change. Although some Tribes have begun to develop marijuana policies and compacts with the State of Washington, these were not included within the local policy assessment reported here.

Another limitation of our focus on ordinances alone is that agencies within cities and counties (such as a parks department, city attorney or a land use agency) could establish policies other than ordinances that specify regulatory actions, interpret or augment higher level policy (such as a city council or legislative policy requirement); these would not appear in our findings. For example, the city of Seattle's elected prosecuting attorney publicly announced a departmental policy of non-enforcement of marijuana possession offenses prior to the state's decriminalization of marijuana. (Heffter 2010) Some local entities may also require a conditional use permit process and through their land use permitting agency require businesses to address issues such as odors, which could effectively limit operations.

Further, regulatory approaches that influence business activities for recreational marijuana retail sales may not be specifically directed toward retail marijuana businesses. Where local jurisdictions did not enact specific zoning (siting) ordinances addressing recreational marijuana retailers, they may nevertheless act to regulate marijuana retail sales within their existing zoning schema, applying the same zoning requirements to marijuana retail as to any other type of retail. Therefore, silence in zoning codes does not mean that there are not siting

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restrictions that would equally apply to recreational marijuana retail sales as to other similar businesses.

Currently, there is no evidence base to fully predict the effectiveness of local policy actions for moderating the potential negative consequences of marijuana legalization. Evidence from tobacco and alcohol prevention fields has shown that specific policies, such as regulating density and pro-use marketing are effective in reducing public health concerns such as youth initiation, overconsumption and dependence (Pacula, Kilmer, Wagenaar, Chaloupka, Caulkins, 2014). Studying local-level policies (e.g., ordinances), and associated health outcomes, allows for substantially more ability to study variations and effectiveness of regulatory implementation in comparison to studies conducted only at the state level in the few states that have legalized recreational marijuana sales. In fact, to the extent that a state allows local control of the regulatory environment, and has a high proportion of local entities that do so, study of state-level policies and outcomes alone may misclassify the actual regulatory environment for much of a state's population. This would bias findings of such studies. In June 2016, two years after the opening of a recreational marijuana market in Washington State, about 30% of the state population lived in communities where recreational marijuana retail sales were not allowed – either due to permanent bans on retail sales or temporary bans (moratoria). This is a clear example of how a "legalized state" does not necessarily translate into consistently easy access to marijuana markets in all communities. Continued policy surveillance, allowing monitoring of local policy implementation, will increase understanding of how legalization is being implemented. Further, identification of communities where policies correlate with mitigating any negative impacts could contribute to "best practices" for marijuana system regulations and policies that protect public health.

Conclusions

Two years after the opening of a "legalized marijuana market" in Washington State, community-level regulations on recreational marijuana retail sales vary substantially. About one-third of the state's residents live in communities where recreational marijuana sales are prohibited, and most communities that allow sales have implemented some restrictions on operations. Further study is needed to understand how such local policies affect variation in public health and social outcomes.

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References

Ferguson, B. [last accessed 12/8/16] Whether statewide initiative establishing system for licensing marijuana producers, processors, and retailers preempts local ordinances. Washington State Office of the Attorney General. 2014 Jan 16. Retrieved from http://www.atg.wa.gov/ago-opinions/whether-statewide-initiative-establishing-system-licensing-marijuana-producers

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Heffter, E. [last accessed 12/8/16] Seattle's new city attorney to dismiss cases of pot possession. Seattle Times. 2010 Jan 15. Retrieved from http://www.seattletimes.com/seattle-news/seattles-new-city-attorney-to-dismiss-cases-of-pot-possession/

Liu, J. [last accessed 12/8/16] Cannabis delivery bill in Washington State. University of Washington Cannabis Law & Policy Project Blog. 2016 Jan 31. https://blogs.uw.edu/clpp/2016/01/13/cannabis-delivery-bill-in-washington-state/

Municipal Research and Services Center (MRSC). [last accessed 7/13/16] 2016. http://mrsc.org/Home.aspx

National Institute on Alcohol Abuse and Alcoholism (NIAAA). [last accessed 7/13/16] Alcohol Policy Information System (APIS). 2016. https://alcoholpolicy.niaaa.nih.gov/APIS_Policy_Topics.html

Pacula RL, Hunt P, Boustead A. Words can be deceiving: A review of variation among legally effective medical marijuana laws in the United States. J Drug Policy Anal. 2014; 7(1):1–19. [PubMed: 25657828]

Pacula RL, Kilmer B, Wagenaar A, Chaloupka R, Caulkins J. Developing public health regulations for marijuana: Lessons from alcohol and tobacco. Am J Public Health. 2014; 104(6):1021–1028. [PubMed: 24825201]

[last accessed 7/13/16] Public Health Law Research (PHLR), a national program of the Robert Wood Johnson Foundation. LawAtlas Policy Surveillance Portal. 2016. http://lawatlas.org/

Washington Secretary of State. [last accessed 7/14/16] Initiative Measure No. 502 – County Results November 06, 2012. General Election Results. Nov 27. 2012 Available at http://results.vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana_ByCounty.html

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Highlights

- After state legalization, some cities and counties passed their own marijuana policies.
- In spite of being in a “legalized” state, 30% of people live in places where retail sales are banned.
- State legalization may not result in uniform community-level legal environments.
- Assessing community-level variations in ordinances with a policy surveillance system, and associated health outcomes, may inform marijuana policy “best practices.”

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Table 1

Washington State Retail Marijuana Regulatory Framework – State and Local Authority

	State Regulations*	Local Authority to Enact Other Regulations+
Regulate/restrict retail marijuana sales		
Retail sales outlets allowed	Retail marijuana licenses issued by the state, with sales beginning July 1, 2014	May permanently ban or enact temporary bans (moratoria)
Zoning/siting-based Restrictions	State prohibits licensing retail sales in residential zones	May restrict to specific zones (e.g., not allowing in mixed residential/commercial zones)
Limitations on numbers of retailers	State determines maximum retailers allowed within each city and county (initially a state total of 334, expanded to 556 in December 2015 as part of Washington's Cannabis Patient Protection Act to integrate medical and retail markets).	May set more conservative caps on the number allowed to operate
Oversight of marijuana sales		
Licensing	Marijuana retail sales license must be obtained from State Liquor and Cannabis Board (LCB); violation of license terms or regulations can result in penalties or license suspension/revocation	May require a marijuana-specific or general local business license
Time, place, manner regulations on retail sales		
Group A: Buffer** from elementary or secondary schools; playgrounds	1,000 foot minimum required (RCW 69.50.331, WAC 314-55-050)	Additional buffer distance could potentially be imposed
Group B: Buffer** from other specific youth-serving uses – specifically defined as recreation centers or facilities, child care centers, public parks, public transit centers, library, or game arcades	State sets the default minimum buffer of 1,000 feet (RCW 69.50.331, WAC 314-55-050)	As of July 1, 2015, local entities may act to reduce the default buffer to as little as 100 foot minimum for these locations (RCW 69.50.331(8)(b))
Buffer from other uses (youth-specific or non-youth)	State does not list additional requirements for buffers	May require minimum buffers from other specific locations (e.g., substance abuse treatment centers)
Hours of operation	Maximum hours of operation are 8 am-midnight, 7 days per week	May further restrict day or time of operation
Home delivery	Home delivery of retail sales is currently banned by state law, but multiple legislative proposals to allow it have been proposed, and another is expected in 2017 (Liu, 2016)	Currently unclear if a state law change would preempt local actions to restrict delivery.
Public messaging requirements for retail sales		
Advertising	WA law limits to one sign on windows/outside of retailer that is visible to public, up to 1600 sq- inch in size. No ads may be placed <1000 ft from perimeter of Group A or Group B youth facilities; on or in public transit or transit shelters, or publicly owned property. Giveaways, coupons and distribution of branded merchandise are prohibited. Content of ads should not promote over-consumption, and must include one of four specified warnings. (WAC 314-55-155)	Currently, degree of local authority to act is unclear.
Public health messaging at retail sites	No current requirements.	May act to require public health messaging at point of sale

RCW: Revised Code of Washington – compilation of all permanent laws in force within the state (enacted by the Legislature, or by a voter initiative process).

WAC: Washington Administrative Code – regulations of executive branch agencies of the state.

[+] This column includes areas where local governments are regulating or may try to regulate, though in some cases it is unclear if these laws may be challenged under state preemption principles and whether those challenges would be successful.

[*] Primary statutes for recreational marijuana are codified in chapter 69.50 RCW.

[**] State-defined buffers are measured as the shortest straight line between the property line of the potential location to the property line of the grounds of the entities listed.

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Table 2

Local Entity Policies to Regulate Recreational Marijuana Businesses, June 30, 2016

Local Entity Policy Enacted and in effect as of June 30, 2016	Number of Cities with Policy (total 142)	Number of Counties with Policy (total 39)	% of Population Covered by Policy*
Actions to restrict retail marijuana sales			
Permanent ban on retail sales	54	6	28%
Temporary ban (moratorium) on retail sales	3	4	2%
Zoning restrictions on retail sales	64	19	65%
Caps on number of licensed retailers in jurisdiction (may be in addition to other actions above)	10	0	9%
Actions for local oversight of marijuana sales activities			
Required a marijuana-specific business license	5	0	11%
Required a regular business license	32	0	15%
Time, place, manner regulations			
Increased buffer requirement from Group A sites (schools, playgrounds)	0	0	0%
Reduced buffer requirement from Group B youth sites (see Table 1)	7	0	16%
Additional buffers required from specific youth-related sites (in addition to Group A and Group B)	8	2	7%
Additional buffers required from specific non-youth sites	13	2	10%
Restricted hours of operation	14	1	13%
Banned home delivery	3	0	9%
Public messaging			
Restrictions on marijuana advertising	7	0	7%
Requirements for public health messages	0	0	0%
No policy actions			
No policies identified	17	9	4%

* sum of 2010 population in all included cities and unincorporated county areas, divided by the total population in those areas (6.586 million)

LAW OFFICE OF MARK D. NELSON

April 16, 2018 - 10:39 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	47068-3
Appellate Court Case Title:	Emerald Enterprises and John Larson, Appellants v. Clark County, Respondent
Superior Court Case Number:	14-2-00951-9

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Comments:

This Petition was originally filed on 4/12/18; the appendix did not attach to our original filing. I spoke with Jocelyn at the Supreme Court Clerk's office and she instructed me to refile it electronically with Division II and she would replace the 4/12/18 filing with this one and ensure it gets marked as "timely"

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