

# **Arizona's Proposition 207 in Practice: Impacts of Marijuana Legalization on Public Safety and Workload for Criminal Justice System Actors**

## ***A Model for Lawmakers Looking To Legalize***

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*Marijuana-related initiatives in Arizona (and nationwide) demonstrate a progression from informal social acceptance to formal legalization after decades of prohibition. In Arizona, medical marijuana use was legalized in 2010 followed by the legalization of adult recreational marijuana use in 2020. Prior to Arizona's legalization proponents argued that public safety would improve and resources would be freed, allowing those resources to be re-allocated to focus on addressing serious and violent crime. On the other hand, opponents claimed, in part, that legalization would result in a direct correlation with a rise in crime. What few considered was the need for carefully crafted legislation that allowed criminal justice actors to effectively and efficiently implement it.*

*This Article presents original findings from a closed-door stakeholder workshop from March 2023 conducted with key criminal justice actors in Arizona. The Article lays out lessons learned from legalization in Arizona, both in relation to the impact on professions and public safety, and presents a series of findings. These findings demonstrate a significant need for*

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*carefully crafted legislation and reveal gaps for necessary additional research and funding.*

*After discussing legalization’s impacts on public safety and key Arizona stakeholders’ professions—gathered viewpoints of the actors it most impacted—this Article goes on to provide guidance for lawmakers looking to legalize medical or adult recreational marijuana use by taking a close look at two Arizona Proposition 207 statutes to serve as models for where careful statutory crafting can lead to implementation success.*

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## INTRODUCTION

Drug enforcement has been a critical feature of the criminal justice system for decades, with marijuana prohibition and criminalization occurring as early as the 1930s. While the 1950s ushered in the first federally imposed mandatory minimums for marijuana possession,<sup>1</sup> a decade later, social acceptance of marijuana use became increasingly prevalent. Backed by the Executive Branch, presidentially commissioned studies supported the distinction between marijuana and other narcotics.<sup>2</sup> These studies and social changes led Congress to remove many of the previously codified mandatory minimums for possession of marijuana for personal use in the early 1970s.<sup>3</sup>

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1. Boggs Act of 1951, 82 Con. Ch. 666, 65 Stat. 767 (1951) (“amend[ing] the penalty provisions applicable to persons convicted of violating certain narcotic laws, and for other purposes”).

2. The Shafer Commission was appointed by President Richard Nixon in 1970 to study the effects of marijuana on society. The commission issued a report on its findings in 1972 that called for the decriminalization of marijuana possession in the United States. See NAT’L COMM’N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING (1972); Fred P. Graham, *National Commission To Propose Legal Private Use of Marijuana*, N.Y. TIMES (Feb. 13, 1972), <https://www.nytimes.com/1972/02/13/archives/national-commission-to-propose-legal-private-use-of-marijuana.html> [<https://perma.cc/R9B6-L6HX>].

3. Stephen Siff, *The Illegalization of Marijuana: A Brief History, Origins: Current Events in Historical Perspective*, ORIGINS (May 2014), <https://origins.osu.edu/article/illegalization->

This did not remain the case, as in the late 1970s and 1980s, with a push from parent activist groups and the Reagan administration, marijuana criminalization became the norm at both the state and the federal level.

Following decades of strict prohibition, however, the last twenty years have brought significant loosening of marijuana laws, with thirty-eight states (plus the District of Columbia) legalizing medical marijuana and twenty-two states (plus the District of Columbia) legalizing cannabis for adult recreational use. This major policy shift and its impact on public safety and health has become a topic of significant interest in academic, advocacy, and policy circles alike. Proponents argue that legalization would improve public safety, in part because it would allow police to focus on more serious crimes,<sup>4</sup> decrease jail population, and lessen the disproportionate incarceration of minorities.<sup>5</sup> On the other hand, opponents assert that legalization would result in increased crime,<sup>6</sup> take away tools from law enforcement, and increase marijuana consumption among youth.

With the widespread passage of marijuana legalization laws, a number of studies have attempted to shed light on the impact marijuana legalization has had on public safety and public health. Consistent with other complex areas of law and research, the evidence of the type of impact continues to be mixed, with more recent work showing that marijuana legalization has a variety of benefits with regard to public safety.<sup>7</sup> While the number of quantitative studies focusing on crime rates and other measures of criminal justice involvement continues to grow, relatively little qualitative work has been done to both assess and understand the perceptions of different criminal justice system actors on the impact of marijuana legalization.

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marijuana-brief-history?language\_content\_entity=en [https://perma.cc/2GZY-W647] (“[D]uring the early and middle 1970s, there was a growing consensus that criminal punishments for pot were contrary to the public interest; and medical and legal authorities were disputing the logic of harsh anti-marijuana laws.”).

4. David A. Makin et al., *Marijuana Legalization and Crime Clearance Rates: Testing Proponent Assertions in Colorado and Washington State*, 22 POLICE Q. 31, 32 (2019); Guangzhen Wu et al., *Effects of Recreational Marijuana Legalization on Clearance Rates for Violent Crimes: Evidence from Oregon*, 100 INT’L. J. OF DRUG POL’Y 103528 (2022).

5. Duane Stanton et al., *The Effect of Marijuana Legalization on Jail Populations in Washington State*, 100 PRISON J. 510, 510 (2020).

6. Edwin Meese III & Charles Stimson, *The Case Against Legalizing Marijuana in California*, PHILA. INQUIRER (Oct. 3, 2010), [https://www.inquirer.com/philly/opinion/currents/20101003\\_The\\_case\\_against\\_legalizing\\_marijuana\\_in\\_California.html](https://www.inquirer.com/philly/opinion/currents/20101003_The_case_against_legalizing_marijuana_in_California.html) [https://perma.cc/CUN9-TYFC].

7. MARIA M. ORSINI, DRUG ENF’T AND POL’Y CTR., THE OHIO STATE UNIV., EFFECTS OF DRUG POLICY LIBERALIZATION ON PUBLIC SAFETY: A REVIEW OF THE LITERATURE 2 (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4294150](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294150) [https://perma.cc/E8TN-K47V].

To fill that gap, the Academy for Justice at the Sandra Day O'Connor College of Law at Arizona State University and the Drug Enforcement and Policy Center at Moritz College of Law, The Ohio State University, convened a stakeholder workshop with representatives primarily from Arizona's judiciary, its law enforcement, prosecutors, and defense attorneys to collect information about their views of how marijuana legalization in Arizona has impacted their day-to-day work and public safety.

Part I of this Article provides background information on Arizona marijuana legalization and its accompanying provisions in respect to criminal record sealing and resentencing. Part II describes the workshop methodology. Part III presents our findings from the workshop. Finally, Part IV considers two of Proposition 207's statutes that have resulted in difficult implementation. These statutes serve as a cautionary example for lawmakers in other states looking to legalize marijuana. The concluding analysis demonstrates that with careful crafting—tracking statutes to previous criminal codes and using precise language—effective and efficient marijuana legalization and implementation are achievable.

## I. BACKGROUND: ARIZONA MARIJUANA LEGALIZATION

Arizona's first marijuana-related initiative followed the Controlled Substances Act's ("CSA") passage by more than fifteen years. In 1996, Arizona voters approved a ballot measure legalizing medical use of marijuana.<sup>8</sup> Shortly thereafter, Arizona's legislature added research and prescription requirements, ultimately rendering that ballot measure symbolic without any tangible impact.<sup>9</sup> In 2002, Arizona made another attempt to legalize medical marijuana which failed after garnering only 42.7% of the vote.<sup>10</sup> Eight years later, in 2010, marijuana for medical use was legalized with Proposition 203's passage,<sup>11</sup> and the first legal marijuana sales to qualifying patients commenced in 2012. In 2016, Proposition 205 gave

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8. Daniel G. Orenstein, *Voter Madness? Voter Intent and the Arizona Medical Marijuana Act*, 47 ARIZ. ST. L.J. 391, 393 (2015) (citing Michael D. Moberly & Charitie L. Hartsig, *The Arizona Medical Marijuana Act: A Pot Hole for Employers?*, 5 PHX. L. REV. 415, 426 (2012)).

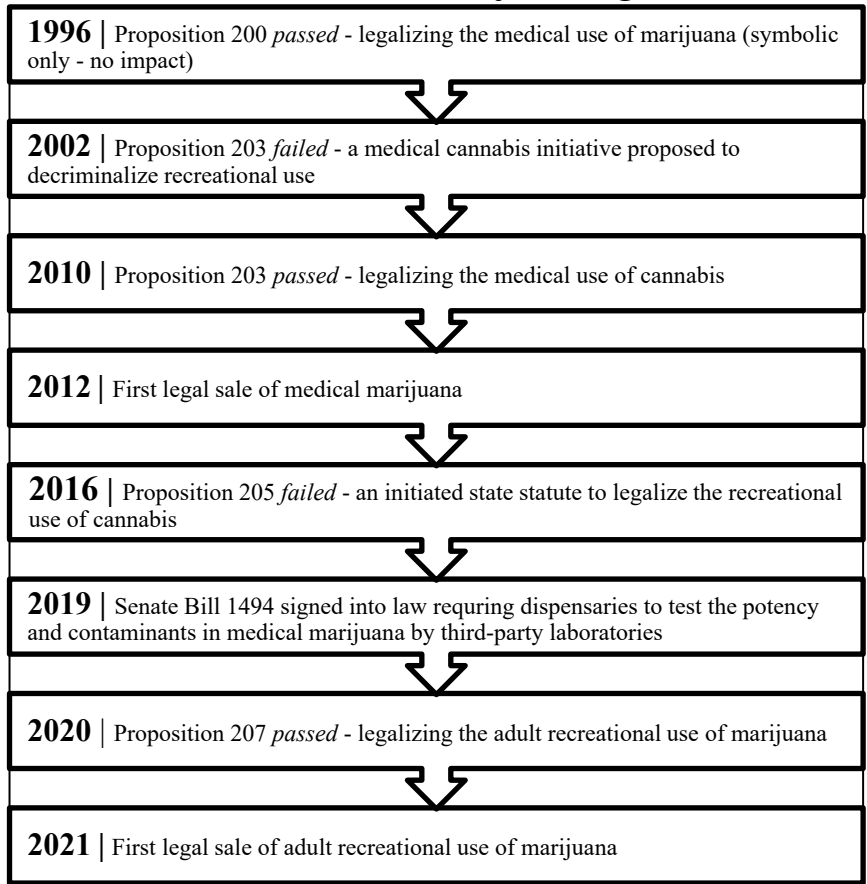
9. *Id.*

10. *Arizona Proposition 203, Decriminalization of Marijuana Initiative (2002)*, BALLOTPEdia, [https://ballotpedia.org/Arizona\\_Proposition\\_203,\\_Decriminalization\\_of\\_Marijuana\\_Initiative\\_\(2002\)](https://ballotpedia.org/Arizona_Proposition_203,_Decriminalization_of_Marijuana_Initiative_(2002)) [<https://perma.cc/WL3X-CFQ2>].

11. *Timeline of Marijuana-Related Initiatives in Arizona*, AZ COURTS [hereinafter *Initiative Timeline*], <https://www.azcourts.gov/prop207/Timeline> [<https://perma.cc/N49N-WU8T>].

Arizona voters a first chance to legalize adult recreational use, but the proposition was narrowly defeated with 51.3% of voters opposed.<sup>12</sup> Only four years later, in 2020, Proposition 207 was approved by 60% of the vote, legalizing adult recreational marijuana use and authorizing the establishment of a legal marijuana industry for recreational users.<sup>13</sup> This section will discuss the background behind marijuana legalization in Arizona and provide details about where it stands today.

**Chart 1 – Timeline of Arizona Marijuana Legalization**



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12. *Id.*

13. *Id.*

14. *Id.*; *Arizona Marijuana Laws*, ARIZ. CANNABIS INFO., <https://arizonastatecannabis.org/laws> [https://perma.cc/RL8W-DQGT].

*A. Medical Marijuana: Proposition 203*

***On November 2, 2010, voters approved Proposition 203—the Arizona Medical Marijuana Act (“AMMA”).***<sup>15</sup>

Prior to the vote on Proposition 203, many proponents shared personal and compelling stories about how medical marijuana provided relief from a variety of conditions including cancer, multiple sclerosis, and HIV/AIDS.<sup>16</sup> They asserted that Proposition 203's passage would relieve their pain and suffering and thus, improve their quality of life.<sup>17</sup> Importantly, they reminded voters and legislators that Proposition 203's passage would protect seriously ill patients from the very real consequences of arrest and imprisonment for using medical marijuana, and relieve them of the stigma for using an illegal substance.<sup>18</sup>

Opponents of Proposition 203 claimed that recreational marijuana users may attempt to skirt the system to obtain a marijuana registration card by claiming to suffer from “severe or chronic pain.”<sup>19</sup> They further asserted that Proposition 203 was analogous to laws in California and Montana, where marijuana ended up in the hands of drug abusers and where traffic fatalities and highway deaths have skyrocketed since legalization.<sup>20</sup> Opponents further claimed that legalizing medical marijuana would increase teenage marijuana use and would result in negative impacts on learning, school work, and later job performance.<sup>21</sup>

Proposition 203 narrowly passed with just 50.13% of the 841,348 votes cast,<sup>22</sup> making Arizona the fourteenth state to legalize medical use of marijuana.<sup>23</sup> The AMMA was codified in Arizona Revised Statutes (“A.R.S.”) Title 36, Chapter 28.1.<sup>24</sup> The administrative rules governing the Arizona Medical Marijuana program are found in the Arizona Administrative

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15. *Arizona Proposition 203, Medical Marijuana Initiative (2010)*, BALLOTPEdia, [https://ballotpedia.org/Arizona\\_Proposition\\_203,\\_Medicinal\\_Marijuana\\_Initiative\\_\(2010\)](https://ballotpedia.org/Arizona_Proposition_203,_Medicinal_Marijuana_Initiative_(2010)) [<https://perma.cc/5QCE-XLZC>].

16. ARIZ. SEC'Y OF STATE'S OFF., *BALLOT PROPOSITIONS AND JUDICIAL PERFORMANCE REVIEW PUBLICITY PAMPHLET 84* (2010).

17. *Id.*

18. *Id.*

19. *Id.* at 85.

20. *Id.*

21. *Id.*

22. *Arizona Proposition 203, Medical Marijuana Initiative (2010)*, *supra* note 15.

23. ARIZ. DEP'T OF HEALTH SERVS., *ARIZONA MARIJUANA PROGRAM MARCH 2023 MONTHLY REPORT 1* (2023), <https://www.azdhs.gov/documents/licensing/medical-marijuana/reports/2023/mm-mar23.pdf> [<https://perma.cc/QZ54-LW2P>].

24. ARIZ. REV. STAT. ANN. §§ 36-2801 to -2822 (2023).

Code (“A.A.C.”) Title 9, Chapter 17;<sup>25</sup> the Arizona Department of Health Services (“ADHS”) is the licensing and issuing authority for the Medical Marijuana Program.<sup>26</sup>

### 1. What Did Proposition 203 Legalize?

Under Arizona’s Medical Marijuana Program, a “qualifying patient” is defined as “a person who has been diagnosed by a physician as having a debilitating medical condition.”<sup>27</sup> There is no age limit to be a qualifying patient; however, a patient under eighteen years of age must have a designated caregiver.<sup>28</sup> Additionally, the custodial parent or legal guardian responsible for healthcare decisions for a qualifying patient must apply for a medical marijuana card on their behalf.<sup>29</sup>

In its most recent version, the AMMA allows patients to possess up to 2.5 ounces of marijuana for treatment of certain qualifying conditions with a doctor's recommendation.<sup>30</sup> Qualifying patients or their caregivers can purchase medical marijuana only from a licensed “nonprofit medical marijuana dispensary,”<sup>31</sup> and they may not directly, or through the patient’s designated caregiver, obtain more than 2.5 ounces of marijuana from registered nonprofit medical marijuana dispensaries in any fourteen-day period.<sup>32</sup>

The AMMA also allows for marijuana cultivation by qualifying patients or caregivers if a registered nonprofit medical marijuana dispensary is not operating within twenty-five miles of the qualifying patient’s home.<sup>33</sup> “Cultivate” and “cultivation” refer to the propagation, breeding, growing, preparing, and packaging of marijuana.<sup>34</sup>

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25. ARIZ. ADMIN. CODE §§ R9-17-101 to -409 (2023).

26. ARIZ. DEP’T OF HEALTH SERVS., *supra* note 23.

27. ARIZ. REV. STAT. ANN. § 36-2801(15) (2023).

28. ARIZ. ADMIN. CODE § R9-17-202(A) (2023).

29. *Id.* § R9-17-202(G).

30. *Initiative Timeline*, *supra* note 11.

31. ARIZ. REV. STAT. ANN. § 36-2801(12); *Bureau of Marijuana Licensing*, ARIZ. DEP’T OF HEALTH SERVS., <https://www.azdhs.gov/licensing/marijuana/> [<https://perma.cc/J4BA-JRHY>].

32. ARIZ. REV. STAT. ANN. § 36-2816(A) (2023).

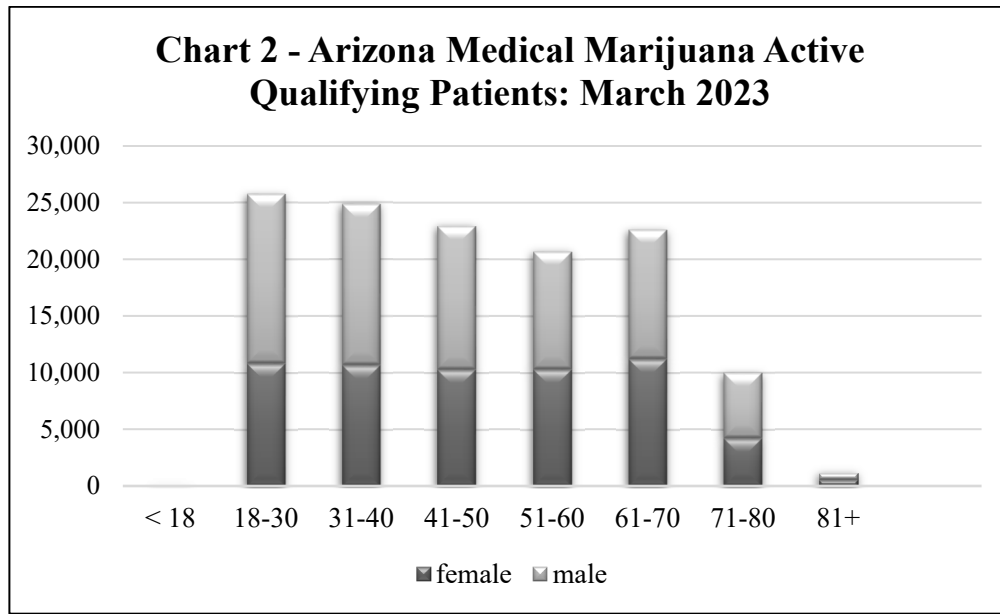
33. § 36-2804.02(A)(3)(f).

34. § 36-2850(5).



## 2. Where We Are Today

As of April 1, 2023, there were a total of 137 medical marijuana dispensaries in Arizona<sup>35</sup> and 151,334 active Arizona marijuana cardholders including qualifying patients, designated caregivers, dispensary agents, facility agents, and lab agents.<sup>36</sup> Qualifying patients make up the lion's share of Arizona's cardholders, totaling 127,892.<sup>37</sup> The age demographics of medical cardholders show that the 18-30 (25,725) group is the largest followed by ages 31-40 (24,816).<sup>38</sup> The qualifying health condition for over 94% of qualifying patients was chronic pain (120,340).<sup>39</sup> Chart 2 below shows the breakdown of qualifying patients as of March 2023.



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35. ARIZ. DEP'T OF HEALTH SERVS., *supra* note 23, at 5.

36. *Id.* at 1.

37. *Id.*

38. *Id.*

39. *Id.* at 2.

40. *Id.* at 1.

*B. Adult Recreational Use of Marijuana: Proposition 207*

***On September 26, 2019, the Arizona Dispensaries Association filed a voter ballot initiative for the Smart and Safe Arizona Act (“SASAA”)<sup>41</sup> which appeared on the November 2020 ballot as Proposition 207.<sup>42</sup>***

Proponents of Proposition 207 cited a failed War on Drugs and asserted that marijuana is safest when it is sold in a taxed, tested, and regulated environment, rather than on a street corner.<sup>43</sup> Proponents further argued that Proposition 207 struck a balance between allowing adults to legally possess and consume small amounts of marijuana in private while strictly regulating production in order to protect Arizona citizens.<sup>44</sup> Proposition 207’s drafters included an expungement provision for those who were previously convicted of low-level marijuana charges to remove the collateral consequences of marijuana convictions on basic needs, such as housing and employment.<sup>45</sup> Finally, proponents claimed that the significant tax revenue from legal sales under Proposition 207 would go directly to public health agencies, first responders, and the community.<sup>46</sup>

Proposition 207’s opponents argued that passage would lead to increases in emergency room visits, infants born substance-exposed, impaired drivers, and death and injury from DUI crashes.<sup>47</sup> The single largest opposition centered around legalization’s potential impact on youth. Opponents loudly claimed that marijuana legalization—even with age restrictions—would skyrocket youth use and consequently result in detrimental changes to their brains, impairing their ability to reason and memorize.<sup>48</sup>

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41. DARRYL TATTRIE, APPLICATION FOR SERIAL NUMBER / INITIATIVE PETITION / A.R.S. § 19-111, at 1 (2019), [https://web.archive.org/web/20221022182749/https://apps.arizona.vote/info/assets/18/0/Ballot Measures/I-23-2020.pdf](https://web.archive.org/web/20221022182749/https://apps.arizona.vote/info/assets/18/0/Ballot%20Measures/I-23-2020.pdf) [<https://perma.cc/9XMF-JAKF>]; *The Current State of Cannabis Legalization: Arizona*, PLAIN JANE (Dec. 28, 2021), <https://plainjane.com/blog/the-current-state-of-cannabis-legalization-arizona-the-journey-to-adult-use-legalization/> [<https://perma.cc/J82L-LTSA>].

42. *Arizona Proposition 207: Marijuana Legalization Initiative*, AZ COURTS, <https://www.azcourts.gov/prop207> [<https://perma.cc/BY6D-B63A>].

43. KATIE HOBBS, ARIZ. SEC. OF STATE, ARIZONA 2020 GENERAL ELECTION PUBLICITY PAMPHLET 79 (2020), <https://apps.azsos.gov/election/2010/info/PubPamphlet/english/e-book.pdf> [<https://perma.cc/H8MT-6EJ3>].

44. *Id.* at 80.

45. *Id.* at 81.

46. *Id.* at 83.

47. *Id.* at 84.

48. *Id.* at 85–86.

Despite this vocal opposition, 60.03% of 3,258,898 Arizona voters passed Proposition 207 on November 3, 2020, legalizing adult recreational use of marijuana, enacting a tax on marijuana sales, and requiring ADHS to develop rules to regulate marijuana businesses.<sup>49</sup> Proposition 207 also ushered in remedies for some of the harms of marijuana prohibition by allowing the expungement of certain convictions, creating a Justice Reinvestment Fund, and reserving a percentage of licenses for those who have been disproportionately impacted by prohibition.<sup>50</sup>

### 1. What Did Proposition 207 Legalize?

Under Proposition 207, adults twenty-one years of age or older can possess and use marijuana, marijuana concentrate, and marijuana plants, and can also possess paraphernalia to use and cultivate marijuana.<sup>51</sup> Individuals over the age of twenty-one can legally possess up to one ounce of marijuana for personal use, of which not more than five grams can be in the form of marijuana concentrate, and possess and use marijuana paraphernalia for “cultivation, manufacture, processing or consumption of marijuana.”<sup>52</sup>

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49. *Arizona Proposition 207: Marijuana Legalization Initiative, Overview of Marijuana Legalization Initiative*, AZ COURTS [hereinafter *Arizona Proposition 207 Overview*], <https://www.azcourts.gov/prop207/Overview> [<https://perma.cc/2EA9-DWEE>]

50. *Arizona Proposition 207, Marijuana Legalization Initiative (2020)*, BALLOTEDIA, [hereinafter *Arizona Proposition 207 Initiative*] [https://ballotpedia.org/Arizona\\_Proposition\\_207,\\_Marijuana\\_Legalization\\_Initiative\\_\(2020\)#:~: text=Proposition%20207%20was%20designed%20to,or%20less%20of%20marijuana%20conce ntrate](https://ballotpedia.org/Arizona_Proposition_207,_Marijuana_Legalization_Initiative_(2020)#:~:text=Proposition%20207%20was%20designed%20to,or%20less%20of%20marijuana%20conce ntrate) [<https://perma.cc/DB3Q-N3AZ>].

51. ARIZ. REV. STAT. ANN. §§ 36-2850, -2852 (2023).

52. *Id.* § 36-2851(5); *id.* § 36-2852(A)(1)–(5). There are, however, still offenses and penalties for possession and use of marijuana. For example, use of marijuana in a public place or open space is not allowed and is classified as a petty offense. *Id.* § 36-2853(C). Possession for personal use of more than one ounce, but less than two and one-half ounces of marijuana is a petty offense punishable by a maximum fine of \$300. *Id.* § 36-2853(A); *Arizona Marijuana Limitations*, ARIZ. CANNABIS INFO., <https://arizonastatecannabis.org/limitations> [<https://perma.cc/99F6-B2NV>]. Possession for personal use of two and one-half ounces to two pounds of marijuana is a Class 6 felony, punishable by up to two years imprisonment, and a maximum fine of \$150,000. § 13-3405(B)(1); Gaxiola & Litwak Law Group, *Consequences of a Possession of a Controlled Substance Charge in Arizona*, CRIM. L. AZ (Sept. 12, 2019), <https://www.criminallawaz.com/consequences-of-a-possession-of-a-controlled-substance-charge-in-arizona/> [<https://perma.cc/CN6E-7V6H>]. Possession for personal use of two to four pounds of marijuana is a Class 5 felony, punishable by up to two and one-half years imprisonment, and a maximum fine of \$150,000. § 13-3405(B)(2); Gaxiola & Litwak Law Group, *supra*. Possession for personal use of more than four pounds of marijuana is a Class 4 felony, punishable by up to three and three-fourths years imprisonment, and a maximum fine of \$150,000. § 13-3405(B)(3); Gaxiola & Litwak Law Group, *supra*.

Additionally, Proposition 207 allows adults aged twenty-one and older to purchase marijuana from a licensed marijuana establishment.<sup>53</sup> A marijuana establishment is defined as an entity which is licensed by the ADHS to operate a single retail location at which the licensee may sell marijuana to adults.<sup>54</sup> Marijuana establishments must follow the SASAA and the rules of the Adult-Use Marijuana Program in A.A.C. Title 9, Chapter 18. As of April 1, 2023, there were a total of 169 marijuana establishments in Arizona.<sup>55</sup>

Proposition 207 also permits marijuana cultivation by adults for personal use.<sup>56</sup> Those over twenty-one may now cultivate up to six marijuana plants for non-commercial purposes in a private residence, or up to twelve plants in a single residence where two or more adults reside.<sup>57</sup> Cultivation must occur in an enclosed area at the residence and be equipped with a lock or other security device that prevents access to minors.<sup>58</sup> Proposition 207's passage also allows transfer of marijuana between adults of up to one ounce of marijuana or up to six marijuana plants, as long as there is no remuneration and the transfer is not advertised or promoted to the public.<sup>59</sup>

Proposition 207 explicitly prohibits marijuana consumption while operating or riding in the passenger compartment of any motorized form of transport<sup>60</sup> and prohibits operating any motorized form of transport while impaired to even the slightest degree by marijuana.<sup>61</sup>

## 2. Where We Are Today

The taxable sales and gross revenue from adult recreational use marijuana legalization are key components of the impact of Proposition 207. These findings are discussed below in Section III.A. It is important to note that Proposition 207's passage and implementation coincided with the beginning of the pandemic. Accordingly, many of the statistics and data that could potentially provide a rich snapshot have been heavily influenced by the pandemic – making them of questionable utility at best.

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53. ARIZ. REV. STAT. ANN. §§ 36-2850 to -2852 (2023).

54. § 36-2850(21).

55. ARIZ. DEP'T OF HEALTH SERVS., *supra* note 23.

56. ARIZ. REV. STAT. ANN. § 36-2852.

57. § 36-2852(A)(2).

58. § 36-2852(A)(2)(b)–(c).

59. § 36-2852(A)(3)–(4).

60. § 36-2851(8)(b).

61. § 36-2851(3).

C. *Arizona Department of Health Services Licensing and Regulations*

Proposition 203 designated ADHS as the licensing and issuing authority for the Medical Marijuana Program.<sup>62</sup> Likewise, Proposition 207 required that ADHS develop rules to regulate adult marijuana businesses.<sup>63</sup> ADHS is now “responsible for licensing and regulating marijuana, marijuana retail sales, marijuana cultivation, and testing facilities.”<sup>64</sup> ADHS has broad discretion to determine what kind of marijuana products can be sold, including their potency, and how they can be advertised.<sup>65</sup> As part of licensing and regulation, businesses that sell marijuana or marijuana products must have a transaction privilege tax (“TPT”) license and a Marijuana Excise Tax (“MET”) registration number.<sup>66</sup> Proof of licensing with ADHS is required to obtain a MET number.<sup>67</sup>

Since the beginning of adult-use market operation in 2021, the number of licensed establishments, operating facilities, and labs has grown steadily as shown in Chart 3 below.

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62. *Proposition 203*, ARIZ. SEC’Y STATE, [https://apps.azsos.gov/election/2010/info/PubPamphlet/Sun\\_Sounds/english/prop203.htm](https://apps.azsos.gov/election/2010/info/PubPamphlet/Sun_Sounds/english/prop203.htm) [https://perma.cc/Y6XB-SEF9].

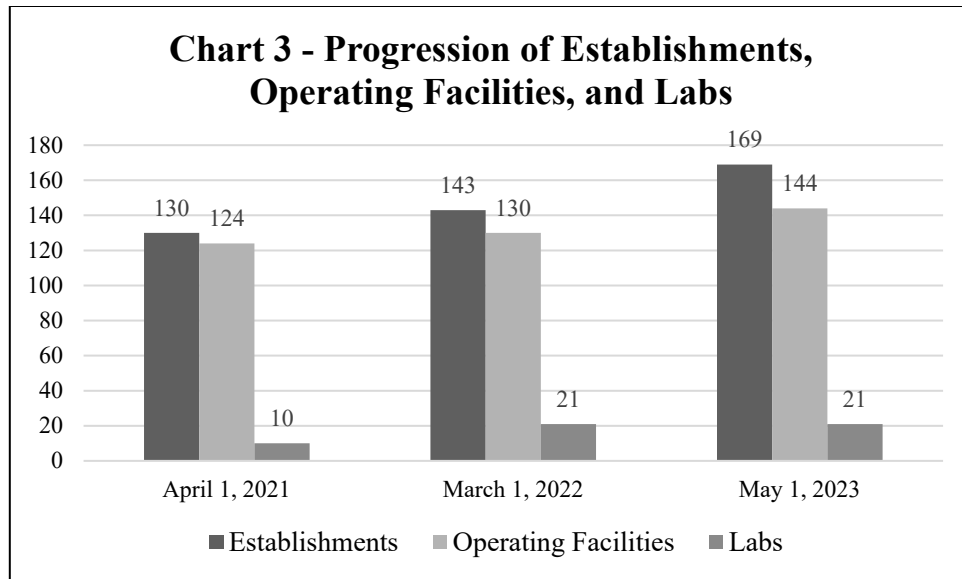
63. *Arizona Proposition 207 Overview*, *supra* note 49.

64. *Adult Use Marijuana*, ARIZ. DEP’T OF REVENUE, <https://azdor.gov/transaction-privilege-tax/adult-use-marijuana> [https://perma.cc/K28B-KW3F].

65. *Bureau of Marijuana Licensing*, ARIZ. DEP’T OF REVENUE, <https://www.azdhs.gov/licensing/marijuana/> [https://perma.cc/6EZL-3FRL].

66. *Id.*

67. *Id.*



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Proposition 207 further required that ADHS create a Social Equity Ownership Program designed to “promote the ownership and operation of marijuana establishments and marijuana testing facilities by individuals from communities disproportionately impacted by the enforcement of previous marijuana laws.”<sup>69</sup> The twenty-six adult-use marijuana establishment licenses available to the Social Equity Ownership Program applicants were allocated on April 8, 2022,<sup>70</sup> totaling 15% of all marijuana establishments as of May 1, 2023.

68. *Arizona Marijuana Program March 2021 Monthly Report*, ARIZ. DEP’T OF HEALTH SERVS. (Mar. 2021), <https://www.azdhs.gov/documents/licensing/medical-marijuana/reports/2021/mm-march21.pdf> [<https://perma.cc/HN98-XZJQ>]; *Arizona Marijuana Program February 2022 Monthly Report*, ARIZ. DEP’T OF HEALTH SERVS. (Feb. 2022), <https://www.azdhs.gov/documents/licensing/medical-marijuana/reports/2022/mm-feb22.pdf> [<https://perma.cc/HAT6-9V36>]; *Arizona Marijuana Program April 2023 Monthly Report*, ARIZ. DEP’T OF HEALTH SERVS. (Apr. 2023), <https://www.azdhs.gov/documents/licensing/medical-marijuana/reports/2023/mm-apr23.pdf> [<https://perma.cc/B62G-NS5A>]. Adult-use establishments were not legal before November 30, 2020, however there is an absence of reported data to distinguish new establishments from existing medical marijuana businesses that obtained the recreational use permissions between November 2020 and the first available data in March 2021. See sources cited *supra*.

69. *Social Equity Campaign*, ARIZ. DEP’T OF HEALTH SERVS., <https://www.azdhs.gov/licensing/marijuana/social-equity/index.php#about> [<https://perma.cc/L2FE-GGFR>].

70. *Social Equity Allocation, Social Equity Campaign*, ARIZ. DEP’T OF HEALTH SERVS., <https://www.azdhs.gov/licensing/marijuana/social-equity/index.php#allocation> [<https://perma.cc/PGH3-C264>].

Additionally, ADHS releases monthly reports relating to the Arizona Marijuana Program. These reports include data on active medical marijuana cardholders including their characteristics, age range, qualifying health condition, county of residence, and more.<sup>71</sup> The reports also provide transaction data from the sale of medical marijuana dispensaries and accurate counts of the number of marijuana establishments, operating facilities, and labs.<sup>72</sup>

#### *D. Fiscal Impact*

##### 1. Medical Marijuana

State law requires the Joint Legislative Budget Committee (“JLBC”) prepare a summary of the fiscal impact of certain ballot measures. According to the JBLC, Proposition 203 was “projected to cost the state Department of Health Services \$600,000 to operate in the first year and \$1.5 million in the second year.”<sup>73</sup> “Once fully established in the third year, the projected cost was \$3.1 million.”<sup>74</sup> “Proposition 203 required this cost to be funded from application and renewal fees, civil penalties, and private donations.”<sup>75</sup> At this point, costs are still speculative and have not been adequately reported.

The passage of Proposition 203 resulted in significant tax revenue. The Arizona transaction privilege tax (“TPT”) is a tax imposed “on a vendor for the advantage of doing business in the state.”<sup>76</sup> The TPT is currently imposed on sixteen separate business classifications, including the retail classification, which is taxed at a rate of 5.6 percent.<sup>77</sup> A 2011 Attorney General opinion determined that the proceeds of medical marijuana sales are taxable under the retail classification of TPT.<sup>78</sup> Prior to January 2021, medical marijuana was reported as part of the retail category and therefore total tax revenue data for medical marijuana since its inception are not available. After January 2021, medical

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71. See ARIZ. DEP’T OF HEALTH SERVS., *supra* note 23.

72. *Id.*

73. ARIZ. SEC’Y OF STATE’S OFF., *supra* note 16, at 84.

74. *Id.*

75. *Id.*

76. *Transaction Privilege Tax*, ARIZ. DEP’T OF REVENUE, <https://azdor.gov/transaction-privilege-tax-tpt> [<https://perma.cc/ACU7-LNS7>].

77. JOINT LEGIS. BUDGET COMM., 2022 TAX HANDBOOK 1 (2022), <https://www.azjlb.gov/revenues/22taxbk.pdf> [<https://perma.cc/T8ND-U7JL>].

78. *Transaction Privilege Tax Upon Medical Marijuana Sales*, ARIZ. ATT’Y GEN. (July 7, 2011), <https://www.azag.gov/opinions/i11-004-r11-001> [<https://perma.cc/GG54-BDQ9>].

marijuana tax revenue has been reported separately. Available numbers from FY 2021 and 2022 show that medical marijuana generated over \$297.8 million in net taxable sales in FY 2021 and \$723.1 million in net taxable sales in FY 2022 as a result of the imposed TPT.<sup>79</sup> Since Proposition 203's passage in 2010, taxes on medical marijuana have generated significant revenue.

Additionally, revenue from the Medical Marijuana Fund has since been used to supplement State spending in multiple areas, such as public health and education.<sup>80</sup> In order to operate the Medical Marijuana program, ADHS charges application fees to cardholders and dispensaries.<sup>81</sup> This revenue, once adjusted by the cost of the program's implementation, is collected in the Medical Marijuana Fund.<sup>82</sup> In FY 2020 the fund had revenues totaling \$41,002,100 compared to spending of \$17,225,800.<sup>83</sup>

Proposition 207 included a one-time transfer of \$45 million from the Medical Marijuana Fund.<sup>84</sup> Of this \$45 million, \$19 million was transferred for use in public health services, \$15 million was deposited in the Arizona Teachers Academy Fund, \$10 million was distributed for grants directed at reducing impaired driving, and \$1 million was deposited in the Smart and Safe Arizona Fund.<sup>85</sup> Moreover, Laws 2021, Chapter 398, required multiple additional transfers from the Medical Marijuana Fund including \$5 million for county public health departments, \$4 million for medical student loans and loan repayment programs, \$2.5 million for suicide prevention, and \$2 million for mental health research.<sup>86</sup>

## 2. Adult Recreational Use of Marijuana

According to the JLBC Fiscal Analysis, anticipated fiscal costs from Proposition 207 included costs associated with "increased emergency room visits, hospitalizations, and substance abuse treatment."<sup>87</sup> The JLBC Fiscal

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79. ARIZ. DEP'T OF REVENUE, ANNUAL REPORT FY 2022 23 (2022), [https://azdor.gov/sites/default/files/2023-03/REPORTS\\_ANNUAL\\_2022\\_ASSETS\\_fy22\\_annual\\_report.pdf](https://azdor.gov/sites/default/files/2023-03/REPORTS_ANNUAL_2022_ASSETS_fy22_annual_report.pdf) [https://perma.cc/8SVU-R6DF].

80. JOINT LEGIS. BUDGET COMM., STATE OF ARIZONA APPROPRIATIONS REPORT FY 2022 229 (2021), <https://azjlbc.gov/22AR/FY2022AppropRpt.pdf> [https://perma.cc/M382-8CG2].

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. KATIE HOBBS, *supra* note 43, at 77–78.



Analysis also speculated cost savings resulting from the passage of Proposition 207 relating to “reduced arrests, prosecutions, and punishment of marijuana offenses.”<sup>88</sup> There is no current data available to the public to confirm the exact amount of these projected costs and no updated figures from the JLBC.

Proposition 207's passage also led to taxation on sales of marijuana in licensed establishments. Proposition 207 imposed a 16.0% excise tax on the sale of adult-use recreational marijuana and recreational marijuana products beginning in January 2021.<sup>89</sup> Adult-use marijuana generated over \$195.2 million in net taxable sales in fiscal year 2021 and \$747.4 million in net taxable sales in fiscal year 2022.<sup>90</sup> As a result, the recreational use marijuana excise tax (“MET”) produced gross revenue of \$32.9 million in FY 2021 and \$132.8 million in gross revenue in FY 2022.<sup>91</sup>

Money collected by the excise tax is deposited into the Smart and Safe Arizona Fund (“SSAF”).<sup>92</sup> SSAF monies are first used to pay administrative costs<sup>93</sup> and the remainder is distributed as follows: 33% to community college districts for workforce development programs, job training, career and technical education, and science, math, and engineering programs;<sup>94</sup> 31.4% to municipal police, fire, and sheriff's departments;<sup>95</sup> 25.4% to the Arizona highway user revenue fund;<sup>96</sup> 10% to the Justice Reinvestment Fund for public and behavioral health, restorative justice, anti-recidivism, substance abuse intervention, and workforce development programs;<sup>97</sup> and 0.2% to the Arizona Attorney General for statutory enforcement.<sup>98</sup>

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88. *Id.* at 78.

89. ARIZ. REV. STAT. ANN. § 42-5452 (2023).

90. ARIZ. DEP'T OF REVENUE, *supra* note 79, at 23.

91. *Id.* at 17.

92. ARIZ. REV. STAT. ANN. § 36-2856 (2023); *see also* § 42-5452(E).

93. § 36-2856(B)(1)–(5).

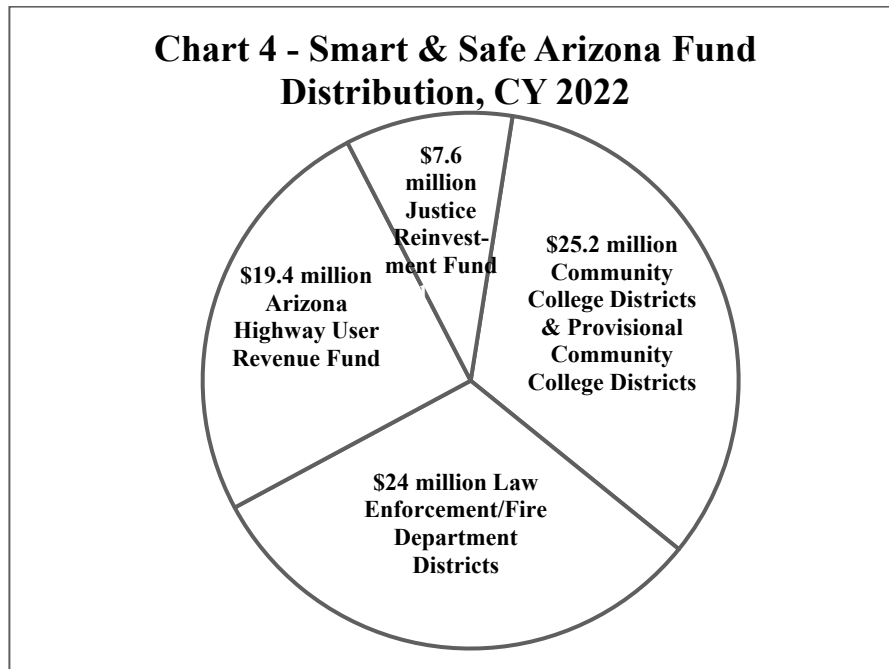
94. § 36-2856(D)(1).

95. § 36-2856(D)(2).

96. § 36-2856(D)(3).

97. § 36-2856(D)(4); § 36-2863 (2023).

98. § 36-2856.

**Chart 4. Smart & Safe Arizona Fund, CY 2022<sup>99</sup>**

Since February 2021, the Phoenix Police Department has received \$12 million from Proposition 207's marijuana excise tax and the Phoenix Fire Department has received \$7 million.<sup>100</sup> The Maricopa County Community College District ("MCCCD") has received \$48 million since 2021 through the marijuana excise tax as a result of the passage of Proposition 207.<sup>101</sup>

#### *E. Expungement, Record Sealing, and Resentencing*

This section will include a discussion of expungement, record sealing, and resentencing provisions following the legalization of marijuana in Arizona. Beginning July 12, 2021, courts and criminal justice agencies were required,

99. See OFF. OF THE STATE TREASURER ARIZ., PROP 207 REPORT, DECEMBER 2022 DISTRIBUTIONS, [https://www.aztreasury.gov/\\_files/ugd/8bb536\\_5b2952c690be43ac8a8dbb09e6ab8a49.pdf](https://www.aztreasury.gov/_files/ugd/8bb536_5b2952c690be43ac8a8dbb09e6ab8a49.pdf) [<https://perma.cc/Z2GF-HUUZ>]. Fund distribution percentages were rounded to the nearest tenth and do not equal 100%.

100. Alaina Kwan, *Legal Marijuana Generates Over \$255 Million in Tax Revenue for Arizona*, AZ FAM. (Apr. 20, 2023, 8:58 AM), <https://www.azfamily.com/2023/04/20/legal-marijuana-generates-over-255-million-tax-revenue-arizona/> [<https://perma.cc/8VRF-MCLV>].

101. *Id.*

upon petition, to expunge arrests, charges, and convictions for certain marijuana possession, consumption, transportation, and cultivation offenses.<sup>102</sup> Proposition 207's expungement provision—codified at A.R.S. § 36-2862—applies retroactively to offenses prior to passage.<sup>103</sup> Eligible petitioners include those who have been convicted of offenses for (1) “Possessing, consuming or transporting *two and one-half ounces or less* of marijuana, of which not more than twelve and one-half grams was in the form of marijuana concentrate”; (2) “Possessing, transporting, cultivating or processing *not more than six marijuana plants* at the individual's primary residence for personal use”; or (3) “Possessing, using or transporting *paraphernalia* related to the cultivation, manufacture, processing or consumption of marijuana.”<sup>104</sup> Most recently, on May 30, 2023, the Arizona Court of Appeals Division One concluded that A.R.S. § 36-2862 “authorizes expungement of **sale-related** marijuana offenses when they otherwise satisfy the statute's eligibility requirements.”<sup>105</sup>

Proposition 207 delineated both who can petition for expungement and what appellate remedies exist.<sup>106</sup> Despite the statutory provisions, the Arizona Court of Appeals had to clarify both the appellate rights of the State when a petition is granted over objection and what the court's duty is to ensure eligibility is established. In *State v. Santillanes*, the State objected to Santillanes's expungement petition, stating that he was ineligible as the amount of marijuana possessed was well over the 2.5 ounce expungement criteria.<sup>107</sup> The Court of Appeals granted discretionary review, noting that

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102. ARIZ. REV. STAT. ANN. § 36-2862 (2023) (allowing broad relief by petition, but none automatically).

103. § 36-2862.

104. § 36-2862(A)(1)–(3) (emphasis added).

105. *State v. Sorensen*, 531 P.3d 378, 382 (Ariz. Ct. App. 2023). Sorensen was charged with marijuana for sale, a Class 4 felony, for possessing 18 grams, about two-thirds of an ounce, and pled to an amended count of solicitation to commit possession of marijuana for sale, a Class 6 undesignated felony. *Id.* at 380. Sorensen's offense was designated a Class 1 misdemeanor in 2016 following the termination of his probation. *Id.* Following the passage of Proposition 207, the State petitioned to expunge Sorensen's arrest conviction. *Id.* The trial court denied the petition, concluding that § 36-2862(A)(1) bars expungement for sale-related marijuana offenses. *Id.* at 380. Sorensen's appeal followed.

106. § 36-2862(B)(1)–(C)(1).

107. *State v. Santillanes*, 522 P.3d 691, 694 (Ariz. Ct. App. 2022). The State submitted a copy of the original police report that alleged that though Santillanes's initial charge was possession over four pounds, officers actually located a total of 10.1 pounds of marijuana. *Id.* at 697. Interestingly, Santillanes's original charges, as reflected on the charging document, included possession of more than four pounds of marijuana, but he pled to an offense without a specified possession amount. *Id.* at 694.

though the State does not have a statutory or constitutional appellate right for expungement petitions, this was a novel question of law and the trial court abused its discretion by failing to hold an evidentiary hearing when the State raised a “genuine dispute of fact,” in violation of A.R.S. § 36-2862(2) and (3).<sup>108</sup>

As codified in A.R.S. § 36-2852, Proposition 207 placed the burden on the prosecution to establish that a petitioner does not qualify for expungement by a clear and convincing evidence standard.<sup>109</sup> *State v. Ibarra* reinforced this burden, clarifying that requiring a petitioner to produce evidence of eligibility shifts the explicit statutory burden placed on the State to produce evidence of ineligibility.<sup>110</sup> There was nothing in the court’s record—including the charging documents which merely stated “to wit, Cannabis Oil” and “to wit, Cartridge”—that specified any weight threshold.<sup>111</sup>

When an expungement petition is granted, any conviction and sentence must be vacated;<sup>112</sup> the court’s case file and law enforcement records must be sealed and no longer made available to the public;<sup>113</sup> any fines or court debt still owed on the marijuana charge will be waived; any existing warrant(s) on the charge will be quashed;<sup>114</sup> the offense cannot be used as a prior conviction;<sup>115</sup> and the petitioner’s civil rights will be restored as to the expunged marijuana-related charges.<sup>116</sup>

Fines or costs already paid on expunged charges are not refunded, and similarly, any fines or costs still owed on other charges may require a new payment plan.<sup>117</sup> Additionally, multiple defendants in the same case must file individual petitions for expungement.<sup>118</sup> Lastly, voter registration is not automatic with expungement and the individual will need to re-register online.<sup>119</sup> To close the loop on expungements, when an expunged marijuana conviction was used to enhance a sentence for another charge(s), arterial

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108. *Id.* at 698.

109. ARIZ. REV. STAT. ANN. § 36-2862(3) (2023).

110. *State v. Ibarra*, 522 P.3d 1111, 1115–16 (Ariz. Ct. App. 2022).

111. *Id.* at 1115 ¶12.

112. ARIZ. REV. STAT. ANN. § 36-2862(C)(1)(a).

113. *Id.* § 36-2862(C)(1)(e).

114. *Marijuana Expungements*, JUST. CTS. OF MARICOPA CNTY., <https://justicecourts.maricopa.gov/case-types/marijuana-expungements/> [https://perma.cc/PS4V-U45J].

115. ARIZ. REV. STAT. ANN. § 36-2862(D).

116. *Id.* § 36-2862(C)(1)(c).

117. *Marijuana Expungements*, *supra* note 114.

118. *Id.*

119. *Id.*

courts must resentence the petitioner.<sup>120</sup> This may require allowing either the petitioner or the State to withdraw from a plea agreement and reinstate all charges that were dismissed pursuant to the plea.<sup>121</sup>

It is important to note that the passage and implementation of Proposition 207 coincided with the beginning of the COVID-19 pandemic. Accordingly, many of the stats and data that may otherwise provide a rich snapshot have been heavily affected by the pandemic, making them of limited utility. In terms of expungements, 20,802 criminal expungement petitions have been filed in Maricopa County Superior Court (Arizona's largest state court) between July 1, 2021, through March 31, 2023.<sup>122</sup> Prosecutors filed 82% (17,119) of those petitions, while the remaining 18% were filed pro per, as a stipulation, or other.<sup>123</sup> Of the total criminal expungement petitions filed since July 1, 2021, 97% (20,181) were granted.<sup>124</sup>

## II. WORKSHOP METHODOLOGY

In March 2023, the Academy for Justice at the Sandra Day O'Connor College of Law at Arizona State University and the Drug Enforcement and Policy Center at Moritz College of Law, The Ohio State University convened a two-hour stakeholder workshop at the Sandra Day O'Connor College of Law. Participating stakeholders included two presiding judges from the State of Arizona, three law enforcement representatives from two Arizona cities, one misdemeanor-level and one felony-level prosecutor from Arizona, two elected prosecutors from a state with no marijuana legalization, one Arizona municipal-level defense attorney, and two Arizona felony-level defense attorneys. Participants were assured anonymity to ensure a robust and open dialogue. Accordingly, participating actors' anonymity is maintained in this article.

Participants were asked about three main topic areas: impact of marijuana legalization on their profession, impact of marijuana legalization on public safety, and advice they would give to other states embarking on marijuana legalization. For the first two topics, each participant was given paper and five to ten minutes to write their answers to the following questions:

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120. *See* State v. Williams, 524 P.3d 1172, 1177 (Ariz. Ct. App. 2023).

121. *See id.*

122. Spreadsheet, Superior Ct. of Ariz. for Maricopa Cnty., CR Prop 207 Through March 2023 Summary Only (May 16, 2023) (on file with author).

123. *See id.*

124. *See id.*

**Topic 1 – Impact on Your Profession**

(a) How has marijuana legalization affected the way you, or your colleagues, do their jobs? For instance, are there specific processes that had to change in response to legalization?

- (Alternative for people who come from states that did not legalize: In your opinions, how would legalization affect the way you or your colleagues do your jobs?)

(b) Has marijuana legalization made any aspects of your job more **difficult**? In what ways? Please be specific.

- (Alternative question for those from state that have not legalized: In your opinions, would marijuana legalization make any aspects of your job more difficult? In what ways?)

(c) Has marijuana legalization made any aspects of your job **easier**? In what ways? Please be specific.

- (Alternative question for those from state that have not legalized: In your opinions, would marijuana legalization make any aspects of your job easier? In what ways?)

**Topic 2 – Impact on Public Safety**

(a) In your opinion, has marijuana legalization had a positive/negative/neutral impact on public safety? Be as specific in your response as you can.

- (Alternative question for those from state that have not legalized: In your opinions, would marijuana legalization have positive/negative/no effect of public safety? Please be specific.)

(b) Do you think legalization has changed types of criminal behaviors that you are now more likely to see in your practice—*e.g.*, is there less drunk driving, but more drugged driving; are robberies of marijuana facilities now more common (and other robberies less common)? Are there any metrics that you have always tracked—or that you started tracking since legalization—that you think provides a barometer for how legalization might be impacting public safety?

After each participant had a chance to record their answers on paper, each individual was asked to speak to the given question on hand. All responses were recorded and later transcribed.

For the third topic, the following questions were asked:

**Topic 3 – Advice to Others**

(a) Are there aspects of legalization—*e.g.*, particular regulations, the development of marijuana businesses—that you think can and should be reformed or improved to advance public safety?

(b) Given that marijuana legalization continues to spread throughout the country, do you have any advice for your counterparts that might be facing legalization in the upcoming years?

Because of insufficient time, participants did not write their answers, but rather discussed them openly in a round robin fashion. Again, all responses were recorded and later transcribed.

III. IMPACT ON PROFESSION AND PUBLIC SAFETY

The stakeholder workshop collected key information from criminal justice actors in terms of how their work has been impacted by drug policy reforms, particularly the legalization of marijuana. The workshop produced three primary findings: (1) poorly drafted legislative language can lead to implementation challenges, (2) concrete scientific consensus on marijuana impairment is needed, and (3) workload and type of work were impacted across stakeholders following the legalization of marijuana.

*A. Main Findings*

1. Poorly drafted legislative language can lead to implementation challenges.

**Main Finding 1** | *Poorly drafted legislative language without detailed understanding of the current systems in place and accompanying laws has presented implementation issues as well as unintended consequences.*

Most states allow for two mechanisms for legislative change—a traditional legislative process and a ballot initiative—which allows voters to express their preferences directly at the ballot box. Since California's legalization of medical marijuana, both mechanisms have been used with similar frequency in respect to marijuana legalization, with thirty-three states using ballot initiatives and twenty-nine states using the legislative process to enact some form of marijuana legalization. While ballot initiatives allow for

a more direct form of democracy, a noted downside is that the initiative's language may not always align with current laws and processes. This misalignment can result in implementation challenges and unintended consequences that are difficult, and sometimes impossible to correct via regular legislative process.<sup>125</sup> In the words of one of our participants:

The problem is, our statute was written by people not in the criminal justice system, so it's a terribly written statute. It's requiring us to do a lot of things that we probably shouldn't have had to do. And there are people who are using it in a way it's not intended, and we can't fix it because it was a voter-initiative . . . we can't do a legislative fix . . .<sup>126</sup>

As discussed above, A.R.S. § 36-2862 details the expungement provisions of Proposition 207.<sup>127</sup> Though record expungement in marijuana legalization efforts has become relatively common, Arizona's statutory language created arguably foreseeable implementation challenges and unintended consequences for the court actors who participated in our workshop: (1) difficulty identifying eligible applicants; (2) the inability to expunge only marijuana offenses resulting in sealing of non-marijuana offenses/cases; and (3) the ensuing difficulty of accessing sealed non-marijuana records.

One category of marijuana offenses eligible for expungement includes: “[p]ossessing, consuming, or transporting two and one-half ounces or less of marijuana, of which not more than twelve and one-half grams was in the form of marijuana concentrate.”<sup>128</sup> Before November 2020, it was illegal to possess any amount of marijuana without a medical marijuana card under the AMMA.<sup>129</sup> Because weight was not an element of the offense below two pounds, charging documents rarely noted the actual amount of marijuana that formed the basis of conviction. As one prosecutor noted:

[U]nder previous law in Arizona, possession under two pounds was a class 6 felony. And so, we would file the weight of under two pounds and we didn't have to prove the weight of it. And now the

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125. See JANA HRDINOVA & DEXTER RIDGWAY, DRUG ENF'T & POL'Y CTR., FROM MEDICAL TO RECREATIONAL MARIJUANA: LESSONS FOR STATES IN TRANSITION 11 (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3724373](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724373) [<https://perma.cc/6NWT-W5JE>].

126. Anonymous Stakeholder Panel Response Held by Ashley Oddo, Shannon Johanni, & Jana Hrdinova (Mar. 2023) [hereinafter Panel Response].

127. *Arizona Proposition 207 Initiative*, *supra* note 50.

128. *Id.*

129. ARIZ. REV. STAT. ANN. § 36-2802 (2023).



new statute says two and a half ounces or under can be expunged, [but] it doesn't track the old statute.<sup>130</sup>

According to the participating workshop stakeholders, prosecutors and courts were left spending an enormous amount of time and resources in locating and reviewing original police case records. This administratively burdensome process rarely yielded helpful results. Despite efforts to determine the actual amount possessed, in some cases it was impossible. Prosecutors and judges were put in the position to either risk denying expungement to an eligible petitioner or granting expungement to an ineligible petitioner. In the words of one participant:

Your charging documents didn't cite a weight, and often the probable cause statements didn't cite a weight. So, you had simple possession cases that were marijuana, but the expungements are only eligible at a certain weight. But, ten years later, there is no evidence as to what that weight was. And I think the county attorney's office has taken a liberal approach to say we're going to expunge where there is no evidence to show otherwise. But one of the big wrestles right at the beginning was, whose burden is this? Who's going to try to figure out [and] dig up the historical record?<sup>131</sup>

Additionally, according to workshop participants, some courts' case management systems do not allow for expungement of one charge in a multiple count case or one individual from a co-defendant case:

In our case management system, there is a single criminal case whether it involves multiple defendants or not, or multiple charges. Expunging a case for a single defendant in a multiple-defendant case requires us to essentially re-program our entire system because our system only tracks cases by cases, and not cases by defendant.<sup>132</sup>

This has resulted in non-marijuana specific records to be sealed, which has frustrated access to otherwise public records. Arizona is not alone in crafting statutes that do not align with the previous criminal code or whose language is imprecise and has not considered existing data management systems. The Missouri ballot initiative that legalized marijuana also suffers from a weight categorization that differed from previously criminalized possession.<sup>133</sup> This

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130. Panel Response, *supra* note 126.

131. *Id.*

132. *Id.*

133. Rebecca Rivas, *Experts Worry Expungements Under Missouri Marijuana Law Could Be Procedural 'Nightmare,'* MO. INDEP. (Dec. 7, 2022),

created a similar dynamic as in the state of Arizona, made even more difficult by the fact that under Missouri law, the record sealing is supposed to be done automatically by government entities.<sup>134</sup> While some courts in Missouri seem to be navigating the uncertainties successfully, others are not, reinforcing the need for any marijuana reform efforts to pay close attention to the existing criminal code and data management practices, and draft language precisely.<sup>135</sup>

These findings emphasize the need to stay connected to social change and take proactive steps to participate in and guide legislative changes to ensure carefully crafted laws account for stakeholder needs, workloads, existing laws, and data management systems.

2. Concrete scientific consensus on marijuana impairment is needed.

**Main Finding 2** | *A lack of concrete scientific consensus on marijuana impairment has complicated prosecution and defense specific to DUI's. This has also resulted in a gap in the public's understanding of marijuana impairment.*

All workshop participants agreed that marijuana legalization has had a profound impact on their work with respect to driving under influence offenses where marijuana is involved. Most of this difficulty stems from the fact that unlike alcohol, there is no bright line rule of what constitutes impairment when it comes to marijuana.

The prosecutors pointed to two related issues: lack of clear scientific standard for objectively measuring impairment and their ability to adequately educate juries about marijuana impairment. Unlike alcohol, there is no scientifically established concentration of marijuana that results in intoxication, which means that prosecutors cannot simply rely on a blood test

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<https://missouriindependent.com/2022/12/07/experts-worry-expungements-under-missouri-marijuana-law-could-be-procedural-nightmare/> [<https://perma.cc/2VAC-M7ML>].

134. *See id.*

135. Alexander Lekhtman, *Missouri Makes Promising Expungements Start, Erasing 7,500 Cannabis Records*, FILTER (Mar. 3, 2023), <https://filtermag.org/missouri-marijuana-expungement/> [<https://perma.cc/DW6A-GKNK>].

to prove impairment.<sup>136</sup> Prior to Proposition 207, most marijuana related DUI cases had two charges with distinct elements: a charge related to impairment (A.R.S. § 28-1381(A)(1)) and a charge related to the presence of THC or its psychoactive metabolite (A.R.S. § 28-1381(A)(3)) in the blood or urine.<sup>137</sup> By stating that “[n]otwithstanding any other law, a person with metabolites or components of marijuana in the person's body is guilty of violating § 28-1381, subsection A, paragraph 3 only if the person is also impaired to the slightest degree,” A.R.S. § 36-2852 functionally duplicated the “impairment” charge for prosecutors by adding a caveat for DUI prosecution instead of removing marijuana from the list of drugs that are proscribed for use while driving.<sup>138</sup> Because there is no “per se” limit for THC under Arizona law, and the strict liability “presence” charge is no longer viable, now Arizona prosecutors can only charge based on actual impairment. This is further complicated by the fact that even experts admit that what constitutes impairment might be different for different people based on their prior use or their physiology:

Science will say universally everyone is impaired at .08 BAC [blood alcohol concentration]. Doesn't matter your size, shape, gender, anything. But science agrees on that. We don't have that for marijuana. There isn't a nanogram count in marijuana where they say, at four nanograms, everyone is impaired. That doesn't exist. Science hasn't come to that consensus.<sup>139</sup>

As a result, prosecutors have to spend significant time educating the jury on complex scientific concepts during marijuana DUI trials:

Even in cases with high THC levels, let's say more than thirty-five nanograms, . . . you go in front of a jury and you're trying to establish . . . what's the frame of reference for that? So that they understand thirty-five is a lot. So now you're talking about scientific

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136. G.T. Wurz & M.W. DeGregorio, *Indeterminacy of Cannabis Impairment and  $\Delta^9$ -tetrahydrocannabinol ( $\Delta^9$ -THC) Levels in Blood and Breath*, SCI. REPS. (May 18, 2022), <https://doi.org/10.1038/s41598-022-11481-5> [<https://perma.cc/V88C-J64Q>].

137. ARIZ. REV. STAT. ANN. § 28-1381(A)(3) (2023) (“It is unlawful for a person to drive or be in actual physical control of a vehicle in this state . . . [w]hile there is any drug defined in § 13-3401 or its metabolite in the person's body.”); ARIZ. REV. STAT. ANN. § 28-1381(A)(1) (“It is unlawful for a person to drive or be in actual physical control of a vehicle in this state . . . while under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances if the person is *impaired to the slightest degree*.” (emphasis added)).

138. See ARIZ. REV. STAT. ANN. § 36-2852(B) (2023).

139. Panel Response, *supra* note 126.

studies in front of a jury and they're slowly falling asleep because you're trying to establish what the frame of reference is for a high nanogram count.<sup>140</sup>

In addition to the difficulty of presenting complex scientific materials to the jury, prosecutors also noted that the change in societal norms surrounding marijuana has made it more difficult to get juries to reach guilty verdicts:

[T]here's obviously a significant shift in societal views on marijuana and an overall reluctance to convict people for doing something that is now perceived as legal. If they can legally smoke marijuana, why are you asking to convict somebody for smoking marijuana?<sup>141</sup>

For defense attorneys participating in the workshop, they too emphasized the lack of scientific consensus on marijuana impairment, as well as the fact that the public has not been sufficiently educated on what legalization means:

I think the biggest issue we have with our clients is that most of them read the bumper sticker version of the bill, which is "marijuana is now legal." And they react [to] that. [T]hey'll come to court . . . [for a marijuana] DUI . . . for driving on the sidewalk, you open the car and they're smoking a joint, and they're just like "I don't understand what the problem is. It's legal." . . . [W]e have people come to court that just reek [of marijuana]. Yeah, it's legal but it's similar to whiskey, and it's not a good idea to come to court reeking of whiskey either.<sup>142</sup>

In addition to the fact that there is no objective marker of impairment, the defense attorneys also discussed whether sobriety tests developed for alcohol are applicable to marijuana DUI cases:

[O]ne of the things we're litigating [fairly often] is the use of field sobriety tests designed specifically for alcohol in trying to measure the amount of impairment for a [marijuana] DUI. . . . [A] few people . . . are adamant that it transfers across[, b]ut without science . . . . So, I guess what it really did was it really clouded the water for everybody.<sup>143</sup>

All participants agreed that scientifically studied and research-backed *per se* impairment limits would clarify marijuana DUI prosecution as well as help

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

educate the general public on marijuana impairment. Importantly, judges and defense attorneys agreed that *per se* limits cannot be set without rigorous and precise scientific grounding:

I think there's a fundamental fairness issue about *per se*. I mean, this is now a presumptively legal substance and just like you can use a certain amount of a substance, you can use a certain amount of alcohol. The alcohol was established as a matter of science and behavior. And I think you just can't pick a number out of thin air for marijuana and say now everybody's on notice that they've got to watch that line. I think as a matter of fundamental fairness you need to do enough research to figure out where that is.<sup>144</sup>

With a scientifically supported *per se* level for marijuana, users can begin to assess when they are nearing the legal limit. The decades of education on drunk driving helped the majority of adults develop some understanding of how much alcohol they can consume to stay within the legal limit. But no such understanding exists for marijuana intoxication. According to one attendee:

[I]f you have [per se limits] in the law, it's really simple, it's really clear for everyone. [E]ven for the general public. You start to get a focus of ok, well how much could I smoke before I'm at five nanograms? Or how much could I [ingest]? I know it's not an exact science, but at least you're thinking . . . [about] monitoring how much [your] ingesting, what the concentration is, whether it's a wax, [or] whatever it might be. I just think the focus for the community is healthier when you have a per se limit.<sup>145</sup>

These findings emphasize the need to double down on research on marijuana impairment to help both the prosecution and the public. As demonstrated in Part I, revenue from marijuana taxes and application fees is substantial. Tying those funds to research to help scientifically determine that *per se* rule would be advantageous for all actors.

### 3. Workload and Type of Work Were Impacted Across Stakeholders.

**Main Finding 3** | *Following the legalization of marijuana, there has been an impact on workload and type of work in the initial period of change.*

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144. *Id.*

145. *Id.*

*a. Impact on Judicial Workload*

As the bulk of simple marijuana possession or paraphernalia cases often did not make their way in front of trial judges—they were diverted to early disposition courts and drug diversion programs—there was minimal reduction of trial courtroom dockets. One participant stated:

We didn't see an extraordinary volume of simple possession cases through our court system, and those that went through our court went automatically to diversion . . . [T]he net result was that our court system didn't spend an enormous amount of time on simple possession matters. So, when simple possession matters were legalized, it didn't have a substantial impact on us.<sup>146</sup>

Because some courts did not anticipate Proposition 207 would pass, implementation plans had not been adequately considered before passage, leaving courts with a shortened timeframe to develop and implement expungement procedures. From the words of one participant:

[E]xpungement was the biggest issue that we had with the court. Because . . . we didn't have a process, so when the proposition passed . . . and [we had been told], "It's not going to pass. It's not going to pass." Well, it passed with quite a margin. We were scrambling to get ahead and put a process in place.<sup>147</sup>

For the county level judiciary, the primary workload impact also centered on A.R.S. § 36-2862's expungement provision. Reviewing expungement petitions that could result in the need to resentence an offender if the expunged charge served as the basis for a sentence enhancement or aggravator, added to daily dockets for judges and additional paperwork processing for judicial branch staff. Where expungement eligibility was unclear or the courts needed more information, hearings added to the daily workload in the courts. However, the increase in workload in the initial months after July 1, 2021 has reportedly declined over time.

Additionally, some court case management systems, have been functionally unable to keep up, resulting in situations where entire cases are sealed, including co-defendants' records and non-marijuana charges. One participant provided:

And the other aspect . . . the sealing—the law doesn't contemplate sealing. The law contemplates only expungement, but the same

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<sup>146.</sup> *Id.*

<sup>147.</sup> *Id.*

reason that we can't expunge out a defendant in a multi-defendant case, we can't expunge out possession [C]ount 2 in a murder case, possession of marijuana case. And so the only thing we have left to do is to seal the entirety of both of those cases because we can't expunge portions of them. And the sealing of cases is not only different but it makes access to what are otherwise public records very difficult going forward.<sup>148</sup>

This workaround has complicated access to court records for the public *and* for other criminal justice actors. As one participant explained:

[N]ow if that someone is up for parole . . . [and there's] a co-defendant who got their case sealed, I can't access that case from the court's website. I have to file a motion just to get access to documents even if that person is convicted of possessing meth. And they had marijuana at the same time. Because they had the marijuana, they're entitled to get it expunged. The case is then sealed. And if they're actively on probation, we can't access any paperwork on the case even though they're on probation for a non-prop 207 case.<sup>149</sup>

This added to workloads, and will continue to add to workloads until the case management system changes or can be updated. Overall, the impact for the judiciary was considerate, partially due to lack of advance preparations and partially because the new statutes did not track to existing criminal codes or account for the data management systems in place.

*b. Impact on Law Enforcement Workload*

On the human resources and personnel side, law enforcement had to adjust hiring eligibility criteria to comport with the change in law in respect to use of cannabis as well as changing social views regarding marijuana use. Under previous rules, candidates were disqualified if they admitted to using cannabis at any point in the prior three years.<sup>150</sup> Many leaders at police departments across the state believed that this rule reduced the number of eligible recruits at a critical time for police staffing.<sup>151</sup> The Arizona Peace

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148. *Id.*

149. *Id.*

150. Ben Adlin, *Arizona Loosens Restrictions on Past Marijuana Use by Police Recruits*, MARIJUANA MOMENT (Oct. 7, 2020), <https://www.marijuanamoment.net/arizona-loosens-restrictions-on-past-marijuana-use-by-police-recruits> [<https://perma.cc/74AJ-TUPB>].

151. Uriel Garcia, *Want To Be a Police Officer? State May Loosen Prior Drug Use Rules*, AZ CENTRAL (May 12, 2020, 1:51 PM),

Officer Standards and Training Board discussed changing the minimum qualifications several months prior to Proposition 207's passage, and later submitted and gained approval for the changes a month before passage.<sup>152</sup> One participant stated:

[W]ithin the profession, our policies on use [have had to change] . . . . [L]ooking at candidates . . . every department is different and they fall within the guidelines . . . [of] the Arizona standards for peace officer standards and training . . . . [P]reviously . . . [in our agency] you could not have used [marijuana] within three years of applying for the position. And so over time we've had to adjust that because of the number of people using it . . . using at a young age . . . . [M]ost people are starting their career in their early 20s, and so to wait three years isn't possible—we need the bodies. And so, we were forced to adjust those policies [as a city].<sup>153</sup>

In addition to shifts in recruiting, law enforcement's workload expanded in the initial period after passage to get patrol officers up to speed on not just criminality of conduct changes, but also how decriminalization necessitates a shift in (1) understandings of probable cause based on the presence or smell of marijuana, (2) field determinations of threshold, (3) what substances fall under the statute, and (4) how to correctly determine what stages of harvest and cultivation equate to the allowable number of plants or to the amount of usable marijuana.<sup>154</sup> One participant noted:

We started getting a lot of BHO labs and basically we were caught with the definition of cannabis and what was the plant and what is the crime? Is it actually a violation of a felony? Is it a narcotic drug? Or is it marijuana?<sup>155</sup>

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<https://www.azcentral.com/story/news/local/arizona/2020/05/12/arizona-may-loosen-prior-drug-history-rules-police-recruits-marijuana-steroids-adderall/3016966001> [<https://perma.cc/P2XH-5HSZ>].

152. ARIZ. ADMIN. CODE § 13-4-105 (2023); MATT GIORDANO, ARIZ. PEACE OFFICER STANDARDS AND TRAINING BD., MINUTES OF THE AUGUST 19, 2020 MEETING (2020), <https://post.az.gov/sites/default/files/081920%20Minutes.pdf> [<https://perma.cc/J5UE-GDAT>].

153. Panel Response, *supra* note 126.

154. *See generally* ARIZ. REV. STAT. ANN. § 36-2852(A)(2) (2023) (allowing those over the age of twenty-one to possess, transport, cultivate, or process up to six marijuana plants at the individual's primary residence).

155. Panel Response, *supra* note 126; *see also* Ihsan Al-Zouabi et al., *Butane Hash Oil and Dabbing: Insights into Use, Amateur Production Techniques, and Potential Harm Mitigation*, 9 SUBSTANCE ABUSE & REHAB. 91, 91 (2018) (explaining that Butane hash oil (BHO)—also known as honey oil, dabs, shatter, crumble, and budder—is high concentration THC extracted using the solvent butane).



We also heard the following from our participants:

[E]ducating the public as well as our officers on this law change. Implementing training is also a lift for departments, so we have to train the officers on the law and how to apply it. And then the enforcement aspect, right . . . when officers are actually applying the law when they're out on the street.

Specific to the training and education, Prop 207 just required our officers to understand, for example, an ounce of marijuana for personal possession is legal. So, you had a lot of conditioned officers who didn't even know what an ounce was, to be honest with you, just patrol officers . . . understanding the legality that a person could have six plants in a residence, or 12 total for two [adults in] residence. Understanding the probable cause, the threshold for probable cause was no longer the smell of marijuana, you know. Understanding that . . . if you were doing a DUI investigation, you had to have a lot more factors such as: this person saw this person smoking, this person actually has it on them, they were involved with the individual who actually caused the accident, just build up the . . . probable cause to get the search warrant.<sup>156</sup>

We also heard from participants that the new law increased their workload and caused financial outlays in respect to their drug-detecting K-9 units. Many drug-detecting canines are trained to identify multiple drugs including marijuana, but the dogs do not alert differently based on the type of drug detected.<sup>157</sup> Drug detecting canines not trained to differentiate between legal marijuana and other illegal drugs like fentanyl, methamphetamine, cocaine, or heroin are rendered useless for developing probable cause to search since officers cannot rely on those dogs' alerts to the presence of *illegal* drugs.<sup>158</sup> For law enforcement to continue to use drug-detecting canines, they had to retire dogs trained to detect marijuana and acquire and train new dogs.

Overall, law enforcement participants stated that they did not see a reduction in the number cases or daily work for officers. Though there are fewer marijuana possession and paraphernalia cases—many of which had been informally resolved without charging before Proposition 207 passed—

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156. Panel Response, *supra* note 126.

157. Chris Roberts, *Marijuana Legalization Is Retiring Police Dogs. Why That's Good—And Why All Drug K9 Units Should Go*, FORBES (May 30, 2021, 2:01 PM), [forbes.com/sites/chrisroberts/2021/05/30/marijuana-legalization-is-retiring-police-dogs-why-thats-good-and-why-all-drug-k9-units-should-go/?sh=18c80cdc3695](https://forbes.com/sites/chrisroberts/2021/05/30/marijuana-legalization-is-retiring-police-dogs-why-thats-good-and-why-all-drug-k9-units-should-go/?sh=18c80cdc3695) [https://perma.cc/KE27-G65M].

158. *Id.*

some agencies saw increased criminal activity surrounding dispensaries. One participant provided, “[W]e obviously saw an increase in dispensaries. So there are security plans that need to be put in place. Some of them have been burglarized. We’ve also had robberies. So that is also an area of enforcement that we’ve had to look at.”<sup>159</sup>

Officers are still responding to violent crimes and other crimes with marijuana in the mix along with street-level sales of marijuana that fall outside the decriminalization bubble. As one officer stated:

Historically throughout my career . . . any time there was a homicide involving some type of drug activity it was almost always over marijuana prior to and even after. So, just to kind of put it out there that it would help reduce kind of those serious crimes, they continue . . . [J]ust because marijuana became legal, it didn’t mean it was easier to access. For a lot of the community, it is still actually cheaper to purchase illegally. So there’s a certain portion of the population that will go to a dispensary to purchase it, but it’s much more expensive. So . . . that’s why you don’t see that impact that you think that you would, because we still have those illegal sales occurring, because it’s much cheaper and easier to buy on the street . . . . So we saw an increase in hand-to-hand of high THC that was being sold. And I think the public perception was that because it was legal for the person to sell it at the dispensary that it was legal to sell it person-to-person and that is not correct.<sup>160</sup>

One additional initial spike in law enforcement workload that has since dissipated with time and education was community members calling police to address nuisance calls about the smell of marijuana. With legalization, some community members were unhappy that police could no longer address their concerns. We heard from one participant:

The community was very angry because they could smell it and they could smell it everywhere. And, you know they have an apartment, and it’s their next-door neighbor, and there’s kids around, and from a community aspect it was very frustrating because there was nothing they could do anymore.<sup>161</sup>

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159. Panel Response, *supra* note 126.

160. *Id.*

161. *Id.*

*c. Impact on Prosecution Workload*

Similar to the courts, prosecutors did not see significant impact to their daily workload outside of addressing expungement petitions. Some prosecutorial agencies took on the work of A.R.S. § 36-2862(I) which allows prosecuting agencies to file expungement petitions on behalf of individuals the agency prosecuted.<sup>162</sup> We heard from one participant:

[O]ur office has taken the position that we are going to file expungements [for] people who are eligible. We have filed almost 20,000 to date . . . [O]ur first criteria was, people convicted in the last 5 years who have no other convictions afterwards, and who [had an amount] under the threshold of 2.5 ounces . . . And so that was about 7500 cases [in] just in the last 5 years. Now we're just doing misdemeanors, people who were convicted of misdemeanors. And solely of possession of marijuana, so not those cases where they've got a burglary and are arrested with marijuana. And that spreadsheet was about 50,000 cases. And I'm sure there are tens of thousands of cases afterwards of people who are eligible, but we're just devoting our resources to kind of the people who would be most impacted by expungement [for now].<sup>163</sup>

As noted above, one challenge of increased time spent on expungement petitions came where the charging documents did not include specific information on the amount of marijuana involved. Because the expungement criteria are for amounts less than 2.5 ounces and the statutory prohibition before 2020 was any amount up to two pounds, determining whether a charge meets eligibility for expungement can rarely be determined without locating and reviewing related police reports, a time-consuming process, especially for older records. Recent caselaw established that the burden is on the State to show that the petitioner does not meet eligibility requirements—including the weight/amount of marijuana possessed—but in the early stages, courts, petitioners, and prosecutors struggled to determine who had the burden for eligibility.<sup>164</sup>

Municipal level prosecutors saw notable shifts to their marijuana DUI practice. One participant stated:

[O]n the municipal level, the biggest impact has been DUIs. Prop 207 fundamentally changed what we had to prove to convict

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162. ARIZ. REV. STAT. ANN. § 36-2862(I) (2023).

163. Panel Response, *supra* note 126.

164. *State v. Santillanes*, 522 P.3d 691, 696–97 (Ariz. Ct. App. 2022); *State v. Ibarra*, 522 P.3d 1111, 1116 (Ariz. Ct. App. 2022).

somebody of the marijuana DUI. Previously you could convict somebody just for the presence of active THC in their system. Now under 207 you have to show that they were actually impaired.<sup>165</sup>

For prosecutors, expungements and navigating the changes with marijuana DUI prosecution had the most significant workload impacts.

*d. Impact on Defense Workload*

The felony public defenders felt little impact to their regular workload, consistent with the experience of the trial docket judges. As noted above, marijuana legalization had a significant impact for litigating DUI cases involving marijuana. The bulk of the motion practice for marijuana DUI cases is taken on by public defenders primarily in municipal or limited jurisdiction courts throughout the state.

#### IV. A MODEL FOR LAWMAKERS LOOKING TO LEGALIZE

Two of Arizona's Proposition 207 provisions resulted in statutes that have complicated implementation. This section will use those two statutes and their related statutory definitions to serve as a model for lawmakers in other states looking to legalize. The analysis demonstrates that with careful crafting—tracking statutes to previous criminal codes, using precise language, and taking lessons learned from Arizona—a significant change to a criminal statute can be implemented successfully and with minimal disruptions.

*A. A.R.S. §§ 36-2852 and 2850 – Allowable Possession and Definitions*

As noted above in Main Finding 1, certain portions of A.R.S. § 36-2852 that define allowable weight for adult possession create challenges for police investigations and DUI prosecutions. Further review of the possession statute and its attendant definitions in A.R.S. § 36-2850 raises additional opportunities to insert remedying language for criminal justice stakeholders. Key areas that would benefit from clarification are: (1) *specifying when a marijuana plant becomes a marijuana product* and (2) *removing marijuana and cannabis from related statutes in other titles of the Arizona Revised Statutes*. This section will detail Arizona's marijuana possession law (in relevant part), propose changes to these statutes to address these challenges,

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165. Panel Response, *supra* note 126.

provide model fill-in-the-blank possession statute for states looking to legalize marijuana with clear guidelines for possession, and address all relevant statutes that address marijuana.

1. Arizona's Current Possession Law and Related Definitions and Statutes

A.R.S. § 36-2852. Allowable possession and personal use of marijuana, marijuana products, and marijuana paraphernalia.<sup>166</sup>

- A. Except as specifically and expressly provided in §§ 36-2851 and 36-2853 and notwithstanding any other law, the following acts by an individual who is at least twenty-one years of age are lawful, are not an offense under the laws of this state or any locality, may not constitute the basis for detention, search or arrest, and cannot serve as the sole basis for seizure or forfeiture of assets, for imposing penalties of any kind under the laws of this state or any locality or for abrogating or limiting any right or privilege conferred or protected by the laws of this state or any locality:
1. Possessing, consuming, purchasing, processing, manufacturing by manual or mechanical means, including sieving or ice water separation but excluding chemical extraction or chemical synthesis, or transporting one ounce or less of marijuana, except that not more than five grams of marijuana may be in the form of marijuana concentrate.
  2. Possessing, transporting, cultivating or processing not more than six marijuana plants for personal use at the individual's primary residence, and possessing, processing and manufacturing by manual or mechanical means, including sieving or ice water separation but excluding chemical extraction or chemical synthesis, the marijuana produced by the plants on the premises where the marijuana plants were grown if all of the following apply:
    - (a) Not more than twelve plants are produced at a single residence where two or more individuals who are at least twenty-one years of age reside at one time.
    - (b) Cultivation takes place within a closet, room, greenhouse or other enclosed area on the grounds of the

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166. ARIZ. REV. STAT. ANN. § 36-2852 (2023).

residence equipped with a lock or other security device that prevents access by minors.

- (c) Cultivation takes place in an area where the marijuana plants are not visible from public view without using binoculars, aircraft or other optical aids.
  3. Transferring one ounce or less of marijuana, of which not more than five grams may be in the form of marijuana concentrate, to an individual who is at least twenty-one years of age if the transfer is without remuneration and is not advertised or promoted to the public.
  4. Transferring up to six marijuana plants to an individual who is at least twenty-one years of age if the transfer is without remuneration and is not advertised or promoted to the public.
  5. Acquiring, possessing, manufacturing, using, purchasing, selling or transporting paraphernalia relating to the cultivation, manufacture, processing or consumption of marijuana or marijuana products.
  6. Assisting another individual who is at least twenty-one years of age in any of the acts described in this subsection.
- B. Notwithstanding any other law, a person with metabolites or components of marijuana in the person's body is guilty of violating section 28-1381, subsection A, paragraph 3 only if the person is also impaired to the slightest degree.
- C. [Omitted].

A.R.S. § 36-2850. Definitions<sup>167</sup>

20. "Marijuana concentrate": (a) Means resin extracted from any part of a plant of the genus cannabis and every compound, manufacture, salt, derivative, mixture or preparation of that resin or tetrahydrocannabinol.
23. "Marijuana products" means marijuana concentrate and products that are composed of marijuana and other ingredients and that are intended for use or consumption, including edible products, ointments and tinctures.

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167. ARIZ. REV. STAT. ANN. § 36-2850(20), (23).

A.R.S. § 13-3401. Definitions<sup>168</sup>

(4) “Cannabis” means the following substances under whatever names they may be designated:

- (a) The resin extracted from any part of a plant of the genus cannabis, and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or its resin. Cannabis does not include oil or cake made from the seeds of such plant, any fiber, compound, manufacture, salt, derivative, mixture or preparation of the mature stalks of such plant except the resin extracted from the stalks or any fiber, oil or cake or the sterilized seed of such plant which is incapable of germination.
- (b) Every compound, manufacture, salt, derivative, mixture or preparation of such resin or tetrahydrocannabinol.

2. Proposed Changes to Arizona’s Adult Marijuana Possession Law

Under A.R.S. § 36-2852(A)(2), an individual can possess or process up to six marijuana plants in their primary residence.<sup>169</sup> This statute, as currently written, has resulted in a number of implementation challenges for stakeholders, including identifying whether what officers are encountering in the field meets the criminal thresholds for possession. A.R.S. § 36-2850 defines processing as “to harvest, dry, cure, trim or separate parts of the marijuana plant.”<sup>170</sup> However, once live plants have been harvested and are in any of the processing stages, it is difficult for officers to determine whether the six-plant threshold has been exceeded because the weight of the plants can change during drying and processing stages. It is also unclear where in the processing stage the plants transition to marijuana for the purposes of A.R.S. § 36-2852(A). Adding further complexity, cannabis plant yields can vary considerably in their production of usable marijuana per plant—yielding between six and sixty ounces, or five to fifty-nine ounces over the lawful

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168. ARIZ. REV. STAT. ANN. § 13-3401(4)(a) & (b).

169. ARIZ. REV. STAT. ANN. § 36-2852(A)(2).

170. ARIZ. REV. STAT. ANN. § 36-2850(28).

possession threshold.<sup>171</sup> These challenges can be felt by actors across the board including law enforcement, prosecution, defense, and the judicial branch. Proposed changes to A.R.S. § 36-2852(A)(2) detailed below aim to clarify the distinction between a marijuana plant, marijuana in a processing stage, and usable marijuana/marijuana products.

Given § 36-2852(B)'s language that "[n]otwithstanding any other law, a person with metabolites or components of marijuana in the person's body is guilty of violating § 28-1381, subsection A, paragraph 3 only if the person is also impaired to the slightest degree," A.R.S. § 36-2852 was likely an attempt to exempt marijuana from the strict liability offense under A.R.S. § 28-1381(A)(3) of driving with a illegal/controlled/unprescribed drug in the driver's system.<sup>172</sup> However, the statutory reference for what constitutes an illegal/controlled/unprescribed drug still lists both marijuana and cannabis.<sup>173</sup> Additionally, marijuana is still listed as a narcotic drug under A.R.S. § 13-3401(20)(w), complicating enforcement, particularly for "marijuana products." The suggested changes to A.R.S. § 36-2852(B) include removing the subsection entirely and removing cannabis from A.R.S. § 13-3401 both as a controlled substance and as a listed narcotic:

A.R.S. § 36-2852. Allowable possession and personal use of marijuana, marijuana products, and marijuana paraphernalia.

- A. Except as specifically and expressly provided in §§ 36-2851 and 36-2853 and notwithstanding any other law, the following acts by an individual who is at least twenty-one years of age are lawful, are not an offense under the laws of this state or any locality, may not constitute the basis for detention, search or arrest, and cannot serve as the sole basis for seizure or forfeiture of assets, for imposing penalties of any kind under the laws of this state or any locality or for abrogating or limiting any right or privilege conferred or protected by the laws of this state or any locality:

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171. Marcus L. Warner et al., *Comparative Analysis of Freshly Harvested Cannabis Plant Weight*, 3 FORENSIC CHEMISTRY 52, 53–57 (2017) (discussing changes in weight between freshly harvested ("wet") cannabis and dry cannabis).

172. ARIZ. REV. STAT. ANN. § 28-1381(A)(3) ("It is unlawful for a person to drive or be in actual physical control of a vehicle in this state . . . [w]hile there is any drug defined in § 13-3401 or its metabolite in the person's body."). Section 13-3401 still lists both marijuana and cannabis as prohibited drugs and identifies cannabis as a narcotic drug. ARIZ. REV. STAT. ANN. § 13-3401(4), (19), (20)(w); see also ARIZ. REV. STAT. ANN. § 28-1381(A)(1), (A)(3).

173. See ARIZ. REV. STAT. ANN. § 36-2501.



1. Possessing, consuming, purchasing, ~~processing, manufacturing by manual or mechanical means, including sieving or ice water separation but excluding chemical extraction or chemical synthesis,~~ or transporting one ounce or less of marijuana, ~~except that~~ **of which** not more than five grams of marijuana may be in the form of marijuana concentrate **or marijuana products**.
2. Possessing, transporting, **or** cultivating ~~or processing~~ not more than six **live** marijuana plants for personal use at the individual's primary residence, ~~and possessing, processing and manufacturing by manual or mechanical means, including sieving or ice water separation but excluding chemical extraction or chemical synthesis, the marijuana produced by the plants on the premises where the marijuana plants were grown~~ if all of the following apply:
  - (a) Not more than twelve **live** plants are produced at a single residence where two or more individuals who are at least twenty-one years of age reside at one time.
  - (b) Cultivation takes place within a closet, room, greenhouse or other enclosed area on the grounds of the residence equipped with a lock or other security device that prevents access by minors.
  - (c) Cultivation takes place in an area where the marijuana plants are not visible from public view without using binoculars, aircraft or other optical aids.
  - (d) **Marijuana plants in any state of processing cannot exceed more than 16 ounces marijuana, of which not more than 8 ounces can be in the form of marijuana concentrate.**
  - (e) **Marijuana in process must remain in the residence where the original live marijuana plant was grown.**
  - (f) **Marijuana plants may not be processed using chemical extraction or chemical synthesis in a residential building.**
3. Transferring one ounce or less of marijuana, of which not more than five grams may be in the form of marijuana concentrate **or marijuana products**, to an individual who is at least twenty-one years of age if the transfer is without remuneration and is not advertised or promoted to the public. **Marijuana in process may not be transferred to any individual.**
4. Transferring up to six **live** marijuana plants to an individual who is at least twenty-one years of age if the transfer is without remuneration and is not advertised or promoted to the public.
5. Acquiring, possessing, manufacturing, using, purchasing, selling or transporting paraphernalia relating to the cultivation, manufacture, processing or consumption of marijuana or marijuana products.

6. Assisting another individual who is at least twenty-one years of age in any of the acts described in this subsection.
- B. ~~Notwithstanding any other law, a person with metabolites or components of marijuana in the person's body is guilty of violating section 28-1381, subsection A, paragraph 3 only if the person is also impaired to the slightest degree.~~
- C. Notwithstanding any other law, the odor of marijuana or burnt marijuana does not by itself constitute reasonable articulable suspicion of a crime. This subsection does not apply when a law enforcement officer is investigating whether a person has violated section 28-1381.

A.R.S. § 36-2850. Definitions

**(#). “Marijuana plant” means a plant of the genus cannabis, actively growing, of whatever size.**

**(#). “Marijuana in process” means any form of the marijuana plant as defined above when it is in any of the stages of processing defined below.**

A.R.S. § 13-3401. Definitions

1-3. [Omitted]

4. “Cannabis” as defined below and under whatever names they may be designated, is not a controlled substance:
  - (a) The resin extracted from any part of a plant of the genus cannabis, and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or its resin. Cannabis does not include oil or cake made from the seeds of such plant, any fiber, compound, manufacture, salt, derivative, mixture or preparation of the mature stalks of such plant except the resin extracted from the stalks or any fiber, oil or cake or the sterilized seed of such plant which is incapable of germination.
  - (b) Every compound, manufacture, salt, derivative, mixture or preparation of such resin or tetrahydrocannabinol.<sup>174</sup>

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174. Oregon’s recreational marijuana legislation explicitly removed “(A) [t]he plant Cannabis family Cannabaceae; (B) [a]ny part of the plant Cannabis family Cannabaceae, whether growing or not; (C) [r]esin extracted from any part of the plant Cannabis family Cannabaceae;

5–19. [Omitted]

20. "Narcotic drugs" means the following, whether of natural or synthetic origin and any substance neither chemically nor physically distinguishable from them:

20(a-v). [Omitted]

~~(w) Cannabis.~~

20(x-qqqq). [Omitted]

21–40. [Omitted]

### 3. Model Fill-in-the-Blank Adult Marijuana Possession Law

For states looking to legalize marijuana, below is a model fill-in-the-blank style possession statute drawn primarily from Arizona's current marijuana definitions, legal possession statute, and the resulting lessons learned. **[Bold and bracketed language]** is intended to be filled in by the legalizing state.

[Statute]. Allowable possession and personal use of marijuana, marijuana products, and marijuana paraphernalia.

A. Except as specifically and expressly provided in §§ 36-2851 and 36-2853 and notwithstanding any other law, the following acts by an individual who is at least twenty-one years of age are lawful, are not an offense under the laws of this state or any locality, may not constitute the basis for detention, search or arrest, and cannot serve as the sole basis for seizure or forfeiture of assets, for imposing penalties of any kind under the laws of this state or any locality or for abrogating or limiting any right or privilege conferred or protected by the laws of this state or any locality:

1. Possessing, consuming, purchasing, or transporting [#] ounce[s] or less of marijuana, of which not more than [#] grams of marijuana may be in the form of marijuana concentrate or marijuana products.
2. Possessing, transporting, or cultivating not more than [#] live marijuana plants for personal use at the individual's primary residence if all of the following apply:

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(D) [t]he seeds of the plant Cannabis family Cannabaceae; [and] (E) [a]ny compound, manufacture, salt, derivative, mixture or preparation of a plant, part of a plant, resin or seed described in this paragraph" from its controlled substances statutes. OR. REV. STAT. § 475.005(6)(b) (2023); OR. REV. STAT. § 855-080-0021(6)(c).

- (a) Not more than [#] live plants are produced at a single residence where two or more individuals who are at least twenty-one years of age reside at one time.
  - (b) Cultivation takes place within a closet, room, greenhouse or other enclosed area on the grounds of the residence equipped with a lock or other security device that prevents access by minors.
  - (c) Cultivation takes place in an area where the marijuana plants are not visible from public view without using binoculars, aircraft or other optical aids.
  - (d) Marijuana plants in any state of processing cannot exceed more than sixteen ounces of marijuana, of which not more than eight ounces can be in the form of marijuana concentrate.
  - (e) Marijuana in process must remain in the residence where the original live marijuana plant was grown.
  - (f) Marijuana plants may not be processed using chemical extraction or chemical synthesis in a residential building.
3. Transferring one ounce or less of marijuana, of which not more than five grams may be in the form of marijuana concentrate or marijuana products, to an individual who is at least twenty-one years of age if the transfer is without remuneration and is not advertised or promoted to the public. Marijuana in process may not be transferred to any individual.
  4. Transferring up to six live marijuana plants to an individual who is at least twenty-one years of age if the transfer is without remuneration and is not advertised or promoted to the public.
  5. Acquiring, possessing, manufacturing, using, purchasing, selling or transporting paraphernalia relating to the cultivation, manufacture, processing or consumption of marijuana or marijuana products.
  6. Assisting another individual who is at least twenty-one years of age in any of the acts described in this subsection.

**[Statute].** Definitions

(#). "Marijuana plant" means a plant of the genus *cannabis*, actively growing, of whatever size.

(#). "Marijuana in process" means any form of the marijuana plant as defined above when it is in any of the stages of processing defined below.

**[Statute].** Definitions of Controlled Substances

[#]. "Cannabis" as defined below and under whatever names they may be designated, is not a controlled substance:

- (a) The resin extracted from any part of a plant of the genus *cannabis*, and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or its resin. Cannabis does not include oil or cake made from the seeds of such plant, any fiber, compound, manufacture, salt, derivative, mixture or preparation of the mature stalks of such plant except the resin extracted from the stalks or any fiber, oil or cake or the sterilized seed of such plant which is incapable of germination.
- (b) Every compound, manufacture, salt, derivative, mixture or preparation of such resin or tetrahydrocannabinol.

[#]. "Narcotic drugs" does not include marijuana or cannabis.

*B. A.R.S. § 36-2862 – Expungement*

Under A.R.S. § 36-2862(A)(1), an individual may petition the court to have the record of an arrest, charge, adjudication, conviction, or sentence expunged if it was for "possessing, consuming, or transporting two and one-half ounces or less of marijuana, of which not more than twelve and one-half grams was in the form of marijuana concentrate."<sup>175</sup> As discussed above, the implementation of this well-intentioned statute has created three specific challenges and unintended consequences for the court actors: (1) difficulty identifying eligible applicants, (2) unintended sealing of non-marijuana offenses, and (3) the accompanying difficulty of accessing sealed non-marijuana records. This section will detail Arizona's marijuana expungement law (in relevant part), propose changes to this law to address these challenges,

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175. ARIZ. REV. STAT. ANN. § 36-2862(A)(1) (2023).

and provide a model fill-in-the-blank expungement statute for states looking to legalize marijuana and create a process for expunging and sealing records.

### 1. Arizona's Current Expungement Law

Currently written, the relevant portions read as follows:

#### A.R.S. § 36-2862. Expungement<sup>176</sup>

- A. Beginning July 12, 2021, an individual who was arrested for, charged with, adjudicated or convicted by trial or plea of, or sentenced for, any of the following offenses based on or arising out of conduct occurring before the effective date of this section may petition the court to have the record of that arrest, charge, adjudication, conviction or sentence expunged:
1. Possessing, consuming or transporting two and one-half ounces or less of marijuana, of which not more than twelve and one-half grams was in the form of marijuana concentrate.
  2. Possessing, transporting, cultivating or processing not more than six marijuana plants at the individual's primary residence for personal use.
  3. Possessing, using or transporting paraphernalia relating to the cultivation, manufacture, processing or consumption of marijuana.
- B. [Omitted]
- C. If the court grants a petition for expungement:
1. The signed order or minute entry required pursuant to subsection B, paragraph 4 of this section shall do all of the following:
    - (1)(a-d). [Omitted]
    - e. Require the clerk of the court to seal all records relating to the expunged arrest, charge, adjudication, conviction or sentence and allow the records to be accessed only by the individual whose record was expunged or the individual's attorney.
- (2-4). [Omitted]

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176. ARIZ. REV. STAT. § 36-2862.

(D-I). [Omitted]

## 2. Proposed Changes to Arizona's Expungement Law

The proposed changes below to subsection (A) are intended to remedy the difficulty with challenge one—identifying eligible applicants—by eliminating the 2.5 ounces threshold for expungement eligibility. By removing (A)(1-3) and adding in the “decriminalize” or “no longer criminal” language, the complexities in determining who qualifies for expungement will be alleviated for states looking to create expungement statutes. At the same time, it would also reduce the resource burden placed on those tasked with tracking down old records. The “disclaimer” on weight delineation in the charging document will be required for states looking to legalize and looking to avoid the difficulties of implementing an eligibility threshold that does not track with prior law.

The proposed additions to subsection (C)(1)(e) are intended to address challenges two and three—unintended sealing of non-marijuana offenses and the accompanying difficulty of accessing sealed non-marijuana records. As discussed in Part III, in some court systems, there is no mechanism to expunge one (marijuana) count in a multi-count case. Likewise, in those same court systems, there is no mechanism to expunge one defendant's (marijuana) case in a co-defendant case. Ideally, states looking to legalize would coordinate *ahead of time* with the courts and involved agencies to determine case management capacity and consider any hurdles in drafting an expungement statute. That aside, in looking at Arizona's current expungement statute, adding in a presumption of sealing in these limited cases—with carve outs for certain actors—would alleviate the burden on the courts and prosecutors in accessing records while balancing the unintended sealing of non-marijuana offenses.

### A.R.S. § 36-2862. Expungement

- A. Beginning July 12, 2021, an individual who was arrested for, charged with, adjudicated or convicted by trial or plea of, or sentenced for, any **marijuana or marijuana paraphernalia conviction that has been now “decriminalized”<sup>177</sup> or is “no**

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177. The term decriminalized being drawn from Delaware's code allowing for expungement of one's record for a past conviction as well as Massachusetts' specific uses of the term decriminalization within its chapters. DEL. CODE. ANN. tit. 16, § 4764(i) (2023); MASS. GEN. LAWS ch. 276, § 100K 1/4 (a) (2023).

**longer criminal**<sup>178</sup> under the provisions of A.R.S. § 36-2862 of the following offenses based on or arising out of conduct occurring before the effective date of this section may petition the court to have the record of that arrest, charge, adjudication, conviction or sentence expunged. **Where charging documents failed to include a weight delineation, a presumption of eligibility for expungement shall apply.**



Note: If your state is looking to legalize and create a process for expunging and sealing records, we strongly suggest your expungement statute track to a statute with the same threshold. If so, this added language is unnecessary.

- ~~1. Possessing, consuming or transporting two and one half ounces or less of marijuana, of which not more than twelve and one half grams was in the form of marijuana concentrate.~~
- ~~2. Possessing, transporting, cultivating or processing not more than six marijuana plants at the individual's primary residence for personal use.~~
- ~~3. Possessing, using or transporting paraphernalia relating to the cultivation, manufacture, processing or consumption of marijuana.~~

B. [Omitted]

C. If the court grants a petition for expungement:

1. The signed order or minute entry required pursuant to subsection B, paragraph 4 of this section shall do all of the following:

(1)(a-d). [Omitted]

- e. Require the clerk of the court to seal all records relating to the expunged arrest, charge, adjudication, conviction or sentence and allow the records to be accessed only by the individual whose record was expunged or the individual's attorney. **Where a co-defendant case exists and the case management system does not allow for sealing of one**

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178. The phrase no longer criminal being drawing from MO. CONST. amend. III, § 2(7-8), (10). This language would also remedy the issue raised in *State v. Sorensen*, 531 P.3d 378 (Ariz. Ct. App. 2023), as illegal sales are still prohibited.



**eligible co-defendant, a presumption of sealing the entire record shall apply. In these limited instances, the courts, prosecuting agencies, victims and victims counsel, and probation shall maintain a copy of the unsealed record. Where a case with multiple counts exists and the case management system does not allow for sealing of one eligible count, a presumption of sealing the entire record shall apply. In these limited instances, the courts, prosecuting agencies, victims and victims counsel, and probation shall maintain a copy of the unsealed record.**



Note: If your state is looking to legalize and create a process for expunging and sealing records and your state utilizes a case management system that allows for partial sealing of records, this added language is unnecessary.

(2-4). [Omitted]

(D-1). [Omitted]

### 3. Model Fill-in-the-Blank Expungement Law

For states looking to legalize marijuana and create a process for expunging and sealing records, below is a model fill-in-the-blank style expungement statute drawn primarily from Arizona's current expungement statute and the resulting lessons learned. [**Bold and bracketed language**] is intended to be filled in by the legalizing state.

[Statute]. Expungement.

- A. Beginning [**date of legalization**], an individual who was arrested for, charged with, adjudicated or convicted by trial or plea of, or sentenced for, any marijuana or marijuana paraphernalia conviction

that has been now “decriminalized”<sup>179</sup> or is “no longer criminal”<sup>180</sup> under the provisions of [law] based on or arising out of conduct occurring before the effective date of this section may petition the court to have the record of that arrest, charge, adjudication, conviction or sentence expunged.

- B. If the court receives a petition for expungement pursuant to this section:
1. The court shall notify the prosecuting agency of the filing of the petition, and allow the prosecuting agency to respond to the petition within thirty days.
  2. The court may hold a hearing:
    - a. On the request of either the petitioner or the prosecuting agency.
    - b. If the court concludes there are genuine disputes of fact regarding whether the petition should be granted.
  - b. The court shall grant the petition unless the prosecuting agency establishes by clear and convincing evidence that the petitioner is not eligible for expungement.
  4. The court shall issue a signed order or minute entry granting or denying the petition in which it makes findings of fact and conclusions of law.
- C. If the court grants a petition for expungement:
1. The signed order or minute entry required pursuant to subsection B, paragraph 4 of this section shall do all of the following:
    - a. If the petitioner was adjudicated or convicted of an offense set forth in subsection A of this section, vacate the judgment of adjudication or conviction.
    - b. State that it expunges any record of the petitioner's arrest, charge, conviction, adjudication and sentence.

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179. The term decriminalized being drawn from Delaware’s code allowing for expungement of one’s record for a past conviction as well as Massachusetts’ specific uses of the term decriminalization within its chapters. DEL. CODE. ANN. tit. 16, § 4764(i) (2023); MASS. GEN. LAWS ch. 276, § 100K 1/4 (a) (2023).

180. The phrase no longer criminal being drawing from MO. CONST. amend. III, § 2(7–8), (10). This language would also remedy the issue raised in *State v. Sorensen*, 531 P.3d at 378, as illegal sales are still prohibited.

- c. If the petitioner was convicted or adjudicated of an offense set forth in subsection A of this section, state that the petitioner's civil rights, including the right to possess firearms, are restored, unless the petitioner is otherwise not eligible for the restoration of civil rights on grounds other than a conviction for an offense set forth in subsection A of this section.
  - d. Require the clerk of the court to notify the department of public safety, the prosecuting agency, and the arresting law enforcement agency, if applicable, of the expungement order.
  - e. Require the clerk of the court to seal all records relating to the expunged arrest, charge, adjudication, conviction or sentence and allow the records to be accessed only by the individual whose record was expunged or the individual's attorney. **[Add this language only if your court case management system does not allow for partial sealing: Where a co-defendant case exists and the case management system does not allow for sealing of one eligible co-defendant, a presumption of sealing the entire record shall apply. In these limited instances, the courts, prosecuting agencies, victims and victims' counsel, and probation shall maintain a copy of the unsealed record. Where a case with multiple counts exists and the case management system does not allow for sealing of one eligible count, a presumption of sealing the entire record shall apply. In these limited instances, the courts, prosecuting agencies, victims and victims' counsel, and probation shall maintain a copy of the unsealed record.]**
2. The department of public safety shall seal and separate the expunged record from its records and inform all appropriate state and federal law enforcement agencies of the expungement. Unless the petitioner is indigent, the department of public safety may charge the successful petitioner a reasonable fee determined by the director of the department of public safety to research and correct the petitioner's criminal history record.
  3. The arresting and prosecuting agencies shall clearly identify in each agency's files and electronic records that the petitioner's arrest, charge, conviction, adjudication and sentence are expunged and shall not make any records of the expunged arrest, charge, conviction, adjudication or sentence available as

a public record to any person except to the individual whose record was expunged or that individual's attorney.

- D. An arrest, charge, adjudication, conviction or sentence that is expunged pursuant to this section may not be used in a subsequent prosecution by a prosecuting agency or court for any purpose.
- E. An individual whose record of arrest, charge, adjudication, conviction or sentence is expunged pursuant to this section may state that the individual has never been arrested for, charged with, adjudicated or convicted of, or sentenced for the crime that is the subject of the expungement.
- F. If the court denies a petition for expungement, the petitioner may file a direct appeal pursuant to section **[insert state law relating to direct appeal]**.
- G. On motion, the court shall dismiss with prejudice any pending complaint, information or indictment based on any offense set forth in subsection A of this section, to include charges or allegations based on or arising out of conduct occurring before the effective date of this chapter. The individual charged may thereafter petition the court to expunge records of the arrest and charge or allegation as provided in this section. A motion brought pursuant to this subsection may be filed with the court before **[date of legalization]**.
- H. The supreme court may adopt rules necessary to implement this section, and may also sponsor public service announcements or other notifications intended to provide notice to individuals who may be eligible to file petitions for expungement pursuant to this section.
- I. A prosecuting agency may file a petition for expungement pursuant to this section on behalf of any individual who was prosecuted by that prosecuting agency, and the attorney general may file a petition for expungement pursuant to this section on behalf of any individual.

## V. CONCLUSION

Marijuana legalization is a growing trend that will likely continue to be on the minds of state legislatures and ballot initiatives in the coming years. Faced with changing public perception as well as the growing evidence of the profitableness of legalized marijuana revenue, other states will soon look to join the thirty-eight states that have legalized its medical use and the twenty-two that have legalized its adult recreational use. While the promise of additional state revenue is certainly appealing, as Arizona's partial use of the

revenue shown in Part I above reveals, there are a myriad of considerations that must be considered by prospective law makers in states seeking legalization. Arizona, in its legalization process, can act as a useful guide to determining both the opportunities from and roadblocks to successful marijuana legalization.

The Arizona stakeholders who shared their experiences provided invaluable insight into the practicalities and challenges of implementing voter-initiated criminal justice reform. The most critical takeaway is the need for careful legislative crafting in marijuana legalization efforts by tracking statutes to previous criminal codes, using precise language, and maintaining a forward-looking perspective for implementation. Though a number of studies have shed light on what effects marijuana legalization has on public safety and public health, relatively little qualitative work has been done to assess and understand how different criminal justice actors perceive this change and the impact it has had on their day-to-day operations.

Though the criminal justice system undoubtedly needs to change and adapt to shifting social norms and expectations, it must do so with caution and thoughtfulness toward the ultimate goals of improving the safety and well-being of all community members:

[I]t's hard to look at the criminal justice system as the answer to societal problems. We're the last step. . . . We can't solve things. And maybe if it wasn't marijuana it would be something else[:] . . . a lack of supervision, lack of education, poverty, whatever it is that's driving that action isn't a criminal justice issue. So[,] to say "Ok we're going to legalize marijuana or other drugs" isn't going to solve that problem unless you address it on the front end.<sup>181</sup>

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181. Panel Response, *supra* note 126.