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Multiunit Housing and Cannabis: Good Laws Make Good Neighbors

Daniel G. Orenstein

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MULTIUNIT HOUSING AND CANNABIS: GOOD LAWS MAKE GOOD NEIGHBORS

*Daniel G. Orenstein**

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INTRODUCTION

The march toward cannabis legalization has triggered an array of law and policy challenges. Many of the issues presented are novel, but others

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have direct links to other longstanding controversies. In public health law, one of the clearest parallels is between regulating cannabis smoking and tobacco smoking.¹ With that broad frame, emerging tensions related to cannabis consumption in multiunit housing (MUH) are inextricably intertwined with similar disputes in the tobacco control context.² Nationally, over one in four U.S. residents live in MUH, and the proportion is far higher in some states.³ However, these issues are particularly salient for urban communities, in which an even higher share of the population typically lives in MUH.⁴

Both cannabis use and tobacco use are frequently framed as self-regarding actions that affect only the person using the substance. However, this is often not the case, particularly with respect to smoking, vaporizing, and vaping, which remain the most common methods of both cannabis⁵ and tobacco⁶ consumption in the United States. Smoking and other aerosol-producing methods each pose potential health risks not only to the person using the product but also to those nearby who are exposed to secondhand smoke (SHS), thirdhand smoke (THS), or chemicals present in other aerosolized emissions.⁷ In the context of MUH, this includes those who are exposed to emissions that travel through shared ventilation, windows, walls, and other pathways and intrude into other units.⁸ According to a 2015 Centers for Disease Control and Prevention (CDC) report, despite

1. See Daniel G. Orenstein, *Nowhere to Now, Where? Reconciling Public Cannabis Use in a Public Health Legal Framework*, 126 PENN ST. L. REV. 59, 60 (2021).

2. See *id.* at 99.

3. See Brian A. King et al., *National and State Estimates of Secondhand Smoke Infiltration Among U.S. Multiunit Housing Residents*, 15 NICOTINE & TOBACCO RES. 1316, 1318 (2013). By state, MUH residency ranges from just over 10% in West Virginia to over 50% in New York. See *id.*

4. See generally Michael Maciag, *Renter Population Data by City*, GOVERNING (Mar. 27, 2019), <https://www.governing.com/archive/city-renter-population-housing-statistics.html> [<https://perma.cc/NQ5E-U9NL>].

5. See Gillian L. Schauer, Rashid Njai & Althea M. Grant-Lenzy, *Modes of Marijuana Use — Smoking, Vaping, Eating, and Dabbing: Results from the 2016 BRFSS in 12 States*, 209 DRUG & ALCOHOL DEPENDENCE 107900 (2020) (finding that respondents who used cannabis most commonly reported smoking (90.7%), and much less commonly reported edibles (24.7%), vaping (19.5%), and dabbing (14.6%), though many reported more than one mode of use).

6. See Monica E. Cornelius et al., *Tobacco Product Use Among Adults — United States, 2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 1736, 1736 (2020) (finding that 80.5% of current tobacco product users reported using combustible products, with the most common types of products being cigarettes (used by 14.0% of the U.S. population) and e-cigarettes (4.5%)).

7. See Orenstein, *supra* note 1, at 91.

8. See Kerry Cork, *Recreational Marijuana, Tobacco, & The Shifting Prerogatives of Use*, 45 S. ILL. U. L.J. 45, 67 (2020).

declines in SHS exposure over the past decades, over one in three nonsmokers who live in rental housing are still exposed to SHS.⁹

Many property owners prohibit smoking in rental units. In part, this is motivated by a desire to prevent direct damage from smoke, but smokefree rules also reduce owners' legal exposure to claims by tenants impacted by others' smoking.¹⁰ In addition to property owners' voluntary smokefree policies, a small but growing number of localities have specifically mandated smokefree rules for both public and privately-owned MUH to protect the right of all tenants to breathe smokefree air.¹¹ Many smokefree rules, whether imposed by contract or state or local law, explicitly apply to tobacco, but a growing number now also include cannabis.¹² The extension of MUH tobacco smoking bans to cannabis is logical, as the smoke produced by both substances is highly similar.¹³ However, two significant complications demand attention.

First, the variety of noncombustible forms of cannabis requires a nuanced approach. Smoking cannabis typically uses the dried flower of the plant,¹⁴ which can also be heated to a lower temperature for vaporization without combustion.¹⁵ Oils, extracts, and concentrates derived from the plant, which generally have far higher concentrations of active

9. See David M. Homa et al., *Vital Signs: Disparities in Nonsmokers' Exposure to Secondhand Smoke — United States, 1999–2012*, 64 MORBIDITY & MORTALITY WKLY. REP. 103, 103 (2015).

10. See Cork, *supra* note 8, at 67.

11. See U.S. Laws for 100% Smokefree Multi-Unit Housing, AM. NONSMOKERS' RTS. FOUND. (Feb. 5, 2022), <https://no-smoke.org/wp-content/uploads/pdf/smokefreemuh.pdf> [<https://perma.cc/RW5N-26KD>] (noting that at least 65 communities, currently all in California, have enacted such ordinances).

12. See Orenstein, *supra* note 1, at 64 n.14; see also *State and Local Laws Prohibiting Smoking AND Vaping Marijuana*, AM. NONSMOKERS' RTS. FOUND. (Feb. 5, 2022), <https://no-smoke.org/wp-content/uploads/pdf/marijuana-smokefree-laws-map.pdf> [<https://perma.cc/53EX-SPYS>] (noting laws restricting cannabis use in workplaces, restaurants, bars, and gambling facilities). In general, "cannabis" is the more appropriate and useful term, both because "marijuana" has a racist history in the U.S. context and because "marijuana" has traditionally referred only to the dried flower of the plant, which excludes the abundant variety of other novel products produced from the plant, such as extracts and concentrates, that have grown in popularity under legalization. See, e.g., Alex Halperin, *Marijuana: Is It Time to Stop Using a Word with Racist Roots?*, GUARDIAN (Jan. 29, 2019, 5:00 AM), <https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism> [<https://perma.cc/4RSD-LBRN>]. However, many state, local, and federal laws still use "marijuana" (or less commonly "marihuana"), so its use cannot be avoided consistently.

13. See David Moir et al., *A Comparison of Mainstream and Sidestream Marijuana and Tobacco Cigarette Smoke Produced Under Two Machine Smoking Conditions*, 21 CHEM. RSCH. TOXICOLOGY 494, 494–95 (2008).

14. See Schauer et al., *supra* note 5, at 2.

15. See Anro Hazekamp et al., *Evaluation of a Vaporizing Device (Volcano®) for the Pulmonary Administration of Tetrahydrocannabinol*, 95 J. PHARM. SCIS. 1308, 1309 (2006).

cannabinoids such as delta-9-tetrahydrocannabinol (THC), can also be consumed via smoking, vaping/aerosolizing, or “dabbing.”¹⁶ Smoked cannabis is highly similar to smoked tobacco, and vaporized or vaped cannabis products are likewise reasonably similar to comparable tobacco products. However, the evidence base for the effects of cannabis on health is underdeveloped compared to tobacco. This is particularly true for non-smoking consumption methods.¹⁷ While the legal underpinnings of MUH smoking restrictions easily apply to smoked cannabis and credibly extend to vaporized and vaped cannabis, generalized prohibitions on all cannabis use in MUH properties are on far less stable ground, as products like edibles or tinctures are unlikely to produce relevant risks to the unit or other residents.¹⁸

Second, the absence of available public spaces for cannabis differs markedly compared to tobacco use. Persons who use tobacco products may legally do so in a variety of locations outside a MUH property, for example by relocating to a parking lot, sidewalk, or another nearby site. In contrast, nearly all jurisdictions that have legalized medical or recreational cannabis continue to prohibit public cannabis use.¹⁹ As a result, renters who use cannabis may risk arrest or other penalty for using cannabis outside their homes, but they also potentially risk eviction or other threats to housing security for using cannabis within their homes in violation of lease terms. The troubling history of cannabis prohibition²⁰ and the War on Drugs more broadly²¹ intersects here with inequities in housing access, as those populations disproportionately harmed by cannabis prohibition —

16. See Schauer et al., *supra* note 5, at 2. Dabbing is the rapid consumption of a highly concentrated extract from a hot metal surface. See *id.* Oils, extracts, and concentrates can also be added to foods, drinks, and topical products. See *id.* As discussed in Part IV, *infra*, these types of products do not pose the same types of exposure risks to third parties and thus necessitate a different legal approach, as well.

17. See NAT'L ACADS. OF SCIS., ENG'G & MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH 398 (2017) [hereinafter NASEM REPORT].

18. See Orenstein, *supra* note 1, at 82.

19. See *id.* at 74–79.

20. See Douglas A. Berman & Alex Kreit, *Ensuring Marijuana Reform Is Effective Criminal Justice Reform*, 52 ARIZ. ST. L.J. 741, 746–52 (2021) (tracing the history of cannabis prohibition under federal law, including a history rife with racism and persistent racial inequities in enforcement).

21. See, e.g., Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, 58 AM. CRIM. L. REV. 1685, 1691–97 (2021) (describing the underlying and persistent racism of the War on Drugs and its racially inequitable impacts); Lahny Silva, *The Trap Chronicles, Vol. 1: How U.S. Housing Policy Impairs Criminal Justice Reform*, 80 MD. L. REV. 565, 573–87 (2021) (detailing the underlying criminal laws of the War on Drugs and their immensely inequitable repercussions, especially for Black and Hispanic communities).

predominantly Black and Hispanic persons — are also more likely to be renters.²² These overlapping concerns make the issue of regulating cannabis use in MUH one of particular importance for urban law and policy, as urban residents are more likely to be renters, MUH residents, and members of minoritized and other marginalized populations.

This Article explores the legal and ethical grounding of restrictions on cannabis use in MUH properties, situating these issues in the context of both existing tobacco control and the unique history of cannabis prohibition. Part I surveys the current scientific evidence base related to cannabis smoking, including comparisons to tobacco smoking, with emphasis on risks posed by secondhand smoke and thirdhand exposure. This Part also explains similar concerns related to aerosol emissions from noncombustible cannabis and tobacco products, such as vape pens and e-cigarettes. Part II describes the unique vulnerabilities of MUH and equity implications related to urban populations, communities of color, and other groups in their exposure to cannabis and tobacco in these settings. This Part also outlines key elements of existing legal frameworks for smoking prohibitions in MUH and underlying legal theories. Part III considers the distinctive legal challenges posed by cannabis regulation, including its status under federal law, continuing state prohibitions on public cannabis use, and the use of cannabis as medicine. This Part also contextualizes cannabis regulation in the history of cannabis prohibition and the War on Drugs, including how this history intersects with urban populations, housing, and equity. Part IV offers recommendations for improving smokefree protections for MUH. Specifically, this Article recommends that smokefree policies include all cannabis products that produce smoke or aerosols while avoiding complete prohibitions on cannabis use and that such approaches be incorporated into local or state law as a means of promoting equity. However, enforcement must focus on non-punitive measures to avoid exacerbating existing housing inequities.

22. See Anthony Cilluffo, A.W. Geiger & Richard Fry, *More U.S. Households Are Renting than at Any Point in 50 Years*, PEW RSCH. CTR. (July 19, 2017), <https://pewrsr.ch/3zvBxXY> [<https://perma.cc/BVF2-FXDM>] (reporting analysis of U.S. Census Bureau data finding that 58% of Black household heads and 54% of Hispanic household heads rent their home, compared to 28% of white household heads).

I. “SMOKING” AND ITS PUBLIC HEALTH IMPACTS

A. Combustible Tobacco and Cannabis Products

The myriad health risks of tobacco smoke for the smoker are at this point well known and have been so for decades.²³ The dangers of SHS were slower to be recognized but are also well established.²⁴ SHS, also known as “environmental tobacco smoke,” is the inhaled mixture of particles and gaseous components from sidestream smoke (emitted from the lit, smoldering end of a combustible product) and mainstream smoke (inhaled and then exhaled by the smoker).²⁵ SHS contains many of the same components as directly inhaled smoke and consequently poses many of the same health risks.²⁶ Tobacco SHS is known to cause premature death in children and adults, increase the risk of numerous childhood ailments, adversely affect cardiovascular function, and cause coronary heart disease and lung cancer.²⁷ To reduce the population health impacts of SHS exposure, tobacco control advocates have spent decades advancing clean indoor air laws at the local and state levels across the country.²⁸ However, MUH remains a modern frontier for clean air laws²⁹ and an important source of continued involuntary SHS exposure. Tobacco smoke

23. See U.S. DEP’T OF HEALTH & HUM. SERVS., THE HEALTH CONSEQUENCES OF SMOKING — 50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 7–12 (2014), https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf [<https://perma.cc/C4H9-2EGR>] (summarizing conclusions of the report, issued 50 years after the original landmark U.S. Surgeon General’s Report in 1964).

24. See U.S. DEP’T OF HEALTH & HUM. SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL 11 (2006), https://www.ncbi.nlm.nih.gov/books/NBK44324/pdf/Bookshelf_NBK44324.pdf [<https://perma.cc/HYS3-ATTS>].

25. See *id.* at 9, 85.

26. See *id.* at 85.

27. See *id.* at 11–16.

28. See STANTON A. GLANTZ & EDITH D. BALBACH, TOBACCO WAR: INSIDE THE CALIFORNIA BATTLES 1–32 (2000); see also David B. Ezra, “Get Your Ashes Out of My Living Room!”: Controlling Tobacco Smoke in Multi-Unit Residential Housing, 54 RUTGERS L. REV. 135, 146–47 (2001); Andrew Hyland, Joaquin Barnoya & Juan E Corral, *Smoke-Free Air Policies: Past, Present and Future*, 21 TOBACCO CONTROL 154, 155–58 (2012).

29. See PUB. HEALTH L. CTR., SMOKE-FREE MULTI-UNIT HOUSING: EQUITABLE ENFORCEMENT STRATEGIES (2020), <https://www.publichealthlawcenter.org/sites/default/files/resources/SF-MUH-Equitable-Enforcement-Strategies.pdf> [<https://perma.cc/3PFN-CG89>] (noting that despite well-documented adverse health effects from SHS exposure, comprehensive public policy approaches focused on MUH have arisen only recently); see also Peggy Sarcomo, *Is the Air Clean Yet? Messaging to Housing Providers and Residents*, DENVER PUB. HEALTH, <https://www.tobaccofreeco.org/wp-content/uploads/2019/11/grantee-only-SF-MUH-Presentation-for-LCC-11.2019.pdf> [<https://perma.cc/VX2Y-FYJA>] (last visited Jan. 18, 2022).

passes easily between units in MUH through walls, ductwork, ventilation systems, windows, and similar pathways.³⁰ Mitigation methods such as air purifiers, ventilation, or fans cannot eliminate these exposure risks.³¹

Recent evidence also indicates the potential for harm from what has been termed “thirdhand smoke” (THS). THS refers to residue that adheres to and accumulates on and in various surfaces, including carpets and furniture.³² Chemicals and compounds from this residue can enter the body through inhalation, ingestion, or through the skin, which poses particular risks for infants and children due to their developmental stage and common behaviors, including crawling and placing objects in their mouths.³³ Tobacco THS contains a variety of volatile and semi-volatile organic compounds that can cause adverse health effects in humans.³⁴ While SHS exposure occurs during or shortly after smoking, THS exposure can persist long after smoking has ceased.³⁵ Long-term smoking in a particular location may produce a substantial buildup of THS residue, including on surfaces that are difficult to access and clean, making remediation difficult.³⁶ These accumulations can continue polluting the remainder of the home by releasing volatile compounds into the air that are then absorbed by other objects.³⁷ In the context of MUH, this means that a prior occupant’s smoking behaviors can expose a future resident to toxic substances even if the new resident steadfastly maintains a smokefree home and even if the property adopts a smokefree rule.³⁸

Compared to tobacco, there is considerably less evidence regarding the harms of cannabis smoke.³⁹ This includes a general dearth of data related to long-term health outcomes associated with either primary cannabis

30. See D. L. Bohac et al., *Secondhand Smoke Transfer and Reductions by Air Sealing and Ventilation in Multiunit Buildings: PFT and Nicotine Verification*, 21 *INDOOR AIR* 36, 36, 42–43 (2011); see also Brian A. King et al., *Secondhand Smoke Transfer in Multiunit Housing*, 12 *NICOTINE & TOBACCO RSCH.* 1133, 1139 (2010); T. A. Kraev et al., *Indoor Concentrations of Nicotine in Low-Income, Multi-Unit Housing: Associations with Smoking Behaviours and Housing Characteristics*, 18 *TOBACCO CONTROL* 438, 442–44 (2009).

31. See Bohac et al., *supra* note 30, at 42–43; see also AM. SOC’Y OF HEATING, REFRIGERATING & AIR-CONDITIONING ENG’RS, *ANSI/ASHRAE STANDARD 62.1–2019: VENTILATION FOR ACCEPTABLE INDOOR AIR QUALITY* 76 (2019).

32. See Georg E. Matt et al., *Persistent Tobacco Smoke Residue in Multiunit Housing: Legacy of Permissive Indoor Smoking Policies and Challenges in the Implementation of Smoking Bans*, 18 *PREVENTIVE MED. REPS.* 101088 (2020).

33. See *id.*

34. See *id.*

35. See *id.*

36. See *id.*

37. See *id.*

38. See *id.*

39. See NASEM REPORT, *supra* note 17, at 181–82.

smoke exposure by the smoker or SHS and THS exposures. A 2017 systematic review identified only eight experimental studies in controlled environments assessing the immediate effects of cannabis smoke in humans, none of which included THS.⁴⁰ Most of the studies focused on cannabinoid presence in exposed nonsmokers or cannabinoid concentration in the air,⁴¹ rather than negative health outcomes from exposure to other chemical components, but the presence of cannabinoids in nonsmokers supports the biological plausibility of adverse effects from cannabis SHS exposure.⁴² The review found no studies on long-term exposure effects.⁴³

A 2016 World Health Organization Report similarly concluded that there was a research gap on the risks and impacts of cannabis SHS.⁴⁴ A comprehensive report by the National Academies of Sciences, Engineering, and Medicine in 2017 did evaluate evidence on a number of health outcomes related to cannabis smoking,⁴⁵ including potential medical benefits,⁴⁶ but the report did not address SHS or THS in any depth. The relative lack of evidence is in large part a consequence of the historical difficulty of conducting scientific research involving cannabis consumption, especially in the United States, during longstanding legal prohibition.⁴⁷ However, the combination of the similarity of cannabis and tobacco smoke and emerging cannabis-specific evidence supports the conclusion that cannabis SHS exposure likely has at least some adverse health effects.

Tobacco and cannabis smoke are highly similar in composition, differing primarily in the presence of nicotine in tobacco smoke and cannabinoids in cannabis smoke.⁴⁸ This similarity served as one of the major bases for including cannabis smoke in California's Proposition 65 list of known carcinogenic substances.⁴⁹ Cannabis smoke contains many of the same

40. See Hannah Holitzki et al., *Health Effects of Exposure to Second- and Third-Hand Marijuana Smoke: A Systematic Review*, 5 CMAJ OPEN E814, E815 (2017).

41. See *id.* at E817–19.

42. See *id.* at E821.

43. See *id.*

44. See WORLD HEALTH ORG., THE HEALTH AND SOCIAL EFFECTS OF NONMEDICAL CANNABIS USE 43 (2016), https://www.who.int/substance_abuse/publications/msbcannabis.pdf [<https://perma.cc/22RG-68JS>].

45. See NASEM REPORT, *supra* note 17, at 15–21 (summarizing findings related to various health outcomes).

46. See *id.* at 13–14 (summarizing findings related to therapeutic effects).

47. See *id.* at 12, 22, 66–67, 378–85.

48. See Moir et al., *supra* note 13, at 496–97.

49. See RAJPAL S. TOMAR ET AL., CAL. ENV'T PROT. AGENCY, EVIDENCE ON THE CARCINOGENICITY OF MARIJUANA SMOKE 1, 77–85 (2009), <https://oehha.ca.gov/media/downloads/crn/finalmjsmokehid.pdf> [<https://perma.cc/8JLA-7C6R>].

toxins, irritants, and carcinogenic compounds as tobacco smoke.⁵⁰ Some harmful chemicals, such as ammonia and hydrogen cyanide, can be present in greater amounts in cannabis smoke.⁵¹ Moreover, cannabis smoking produces greater amounts of SHS, with one study finding that cannabis joints produced a higher indoor fine particle (PM_{2.5}) concentration and emitted over 3.5 times as much fine particle pollution compared to cigarettes.⁵² The same study found emissions from other cannabis smoking and vaping methods, including bongs, glass pipes, and vape pens, to be lower than from cannabis joints, but all of these methods produced higher emissions than tobacco cigarettes.⁵³ Another recent study similarly estimated that emission rates for cannabis SHS are two to six times higher than for tobacco.⁵⁴

While cannabis-specific evidence regarding the health effects of SHS lags that for tobacco, some studies have identified potential adverse impacts. An animal study comparing cannabis and tobacco SHS found substantial impairment of vascular function after one minute of cannabis SHS exposure that was greater than that produced by tobacco.⁵⁵ Another study found a strongly suggestive — but not statistically significant — association between living in a home with indoor cannabis smoking and adverse health outcomes among children.⁵⁶ While the latter study appears to have lacked sufficient statistical power, the observed relationship persisted after adjusting for secondhand tobacco exposure, suggesting that the two types of smoke produce similar outcomes.⁵⁷

Given their similarity, it is reasonable to expect cannabis smoke and tobacco smoke to behave comparably in terms of the potential to migrate to other units in MUH, and existing studies on cannabis SHS exposure

50. See Moir et al., *supra* note 13, at 501.

51. See *id.* at 497–98.

52. See Wayne Ott et al., *Measuring Indoor Fine Particle Concentrations, Emission Rates, and Decay Rates from Cannabis Use in a Residence*, 10 *ATMOSPHERIC ENV'T* 100106 (2021).

53. See *id.*

54. See generally Tongke Zhao et al., *Characteristics of Secondhand Cannabis Smoke from Common Smoking Methods: Calibration Factor, Emission Rate, and Particle Removal Rate*, 242 *ATMOSPHERIC ENV'T* 117731 (2020).

55. See generally Xiaoyin Wang et al., *One Minute of Marijuana Secondhand Smoke Exposure Substantially Impairs Vascular Endothelial Function*, 5 *J. AM. HEART ASS'N* e003858 (2016).

56. See Alexander Ivan B Posis et al., *Indoor Cannabis Smoke and Children's Health*, 14 *PREVENTIVE MED. REPS.* 100853 (2019).

57. See *id.*

support this presumption.⁵⁸ The influential American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) also updated its indoor air quality standards to expand the definition of “environmental tobacco smoke” (another term for SHS) to include cannabis smoke, as well as emissions from electronic smoking devices.⁵⁹ ASHRAE’s technical standards are frequently incorporated into local building codes,⁶⁰ and for over 15 years, ASHRAE has acknowledged that indoor smoking is incompatible with acceptable indoor air quality, regardless of ventilation approaches.⁶¹

B. Noncombustible, Aerosol-Producing Products

Both tobacco and cannabis can be used via multiple consumption methods. Tobacco use has long been dominated by combustible products like cigarettes and cigars, with a smaller proportion of use via smokeless oral products like chewing tobacco. More recently, another class of tobacco products, Electronic Nicotine Delivery Systems (ENDS), has come to represent a significant portion of tobacco use, particularly among U.S. youth.⁶² ENDS include a wide array of noncombustible products like vapes, vaporizers, vape pens, hookah pens, e-pipes, and e-cigarettes.⁶³ In 2016, the FDA issued a rule deeming such products to meet the definition of “tobacco product” under federal law, bringing them under the agency’s regulatory purview.⁶⁴

ENDS have potential utility as a means of harm reduction and a smoking cessation aid, though current evidence is not definitive and that conclusion

58. See Alanna K. Chu, Pamela Kaufman & Michael Chaiton, *Prevalence of Involuntary Environmental Cannabis and Tobacco Smoke Exposure in Multi-Unit Housing*, 16 INT’L J. ENV’T RES. & PUB. HEALTH 3332 (2019).

59. See AM. SOC’Y OF HEATING, REFRIGERATING & AIR-CONDITIONING ENG’RS, *supra* note 31.

60. See Thomas L. Roterling, Lauren K. Lempert & Stanton A. Glantz, *Emerging Indoor Air Laws for Onsite Cannabis Consumption Businesses in the U.S.*, 61 AM. J. PREVENTIVE MED. e267, e268 (2021).

61. See *id.*

62. See generally Tushar Singh et al., *Tobacco Use Among Middle and High School Students — United States, 2011–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 361 (2016) (reporting tobacco use trends and finding a substantial increase in e-cigarette use among high school and middle school students despite a significant decrease among the same group in the use of most other tobacco products).

63. See *Vaporizers, E-Cigarettes, and Other Electronic Nicotine Delivery Systems (ENDS)*, FDA (Feb. 16, 2022), <https://www.fda.gov/tobacco-products/products-ingredients-components/e-cigarettes-vapes-and-other-electronic-nicotine-delivery-systems-ends> [<https://perma.cc/UFQ9-ZJ6G>].

64. See *Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act*, 81 Fed. Reg. 28,974 (May 10, 2016).

remains controversial.⁶⁵ Public health concerns regarding ENDS are typically focused on youth use and initiation, including the potential for later transition to combustible tobacco.⁶⁶ These concerns are exacerbated by the continued focus of ENDS manufacturers in the United States on marketing ENDS as consumer products rather than as smoking cessation aids.⁶⁷ The broader law and policy debate on regulating ENDS is beyond the scope of this Article, but their use in MUH triggers many of the same concerns as smoking.

ENDS do not reach the temperatures required for combustion and, consequently, do not produce “smoke,” meaning they are likely much less harmful than traditional combustible tobacco products.⁶⁸ However, the common conception that these products produce only water vapor is patently incorrect.⁶⁹ What is produced is technically an aerosol, not a vapor, containing droplets of liquid medium, flavorings, preservatives, and other submicrometer-size particles surrounded by air and a mixture of vapors.⁷⁰ Aerosols produced by ENDS include potentially toxic substances,⁷¹ including many of the same chemicals and compounds emitted by combustible tobacco products that are associated with adverse health effects.⁷²

The potential for ENDS emissions to travel between building units is understudied but supported by at least some analyses. For example, a study of a vape shop in a multi-business complex found that aerosols from e-cigarettes were present in other nearby businesses.⁷³ However, ENDS emissions may not travel as readily as smoke. A study comparing ENDS and hookah use, for example, found that both increased fine particulate

65. See David J. K. Balfour et al., *Balancing Consideration of the Risks and Benefits of E-Cigarettes*, 111 AM. J. PUB. HEALTH 1661, 1661–63 (2021).

66. See *id.* at 1664.

67. See *id.* at 1663 (“Noteworthy is the lack of trials by e-cigarette manufacturers in pursuit of regulatory agency approval to use e-cigarettes for smoking cessation, likely reflecting the profitability of selling e-cigarettes as consumer products, rather than medicinal devices.”).

68. See Esteve Fernández et al., *Particulate Matter from Electronic Cigarettes and Conventional Cigarettes: A Systematic Review and Observational Study*, 2 CURRENT ENV'T HEALTH REPS. 423, 427 (2015).

69. See Tomasz R. Sosnowski & Marcin Odziomek, *Particle Size Dynamics: Toward a Better Understanding of Electronic Cigarette Aerosol Interactions with the Respiratory System*, 9 FRONTIERS PHYSIOLOGY 1, 1 (2018); see also Fernández et al., *supra* note 68.

70. See Sosnowski & Odziomek, *supra* note 69, at 2.

71. See Fernández et al., *supra* note 68, at 427.

72. See Balfour et al., *supra* note 65, at 1662.

73. See Caren Khachatoorian et al., *Electronic Cigarette Chemicals Transfer from a Vape Shop to a Nearby Business in a Multiple-Tenant Retail Building*, 28 TOBACCO CONTROL 519, 521–22 (2019).

matter in the room where they were used; however, hookah use also increased particulate matter in an adjacent room, while ENDS use did not.⁷⁴

Although evidence of the direct health effects of cannabis vaping is growing,⁷⁵ there is only very limited existing evidence focused on secondhand or thirdhand risks.⁷⁶ Many cannabis vaping products are highly similar to ENDS. In fact, some ENDS can, either by design or via after-market adapters or other modifications, use nicotine and cannabis products interchangeably.⁷⁷ When used for cannabis extracts, e-liquids for vaping products typically contain thickening or thinning agents and/or flavorings, some unique and others similar to nicotine e-liquids.⁷⁸ The toxicology of such products is immensely complex⁷⁹ and replete with current research gaps.⁸⁰ However, vaporized or dabbed cannabis does produce fine particle pollution, potentially at high levels. For example, measurements of PM_{2.5} concentrations at a cannabis dispensary that allowed these forms of consumption but prohibited smoking found concentrations similar to those observed in indoor spaces where smoking is allowed.⁸¹

Cannabis vaping products were also associated with over 2,800 cases of e-cigarette or vaping use-associated lung injury in the United States in 2019 to 2020.⁸² Many of the associated products were under- or unregulated, and an investigation linked cases in particular to the additive vitamin E acetate.⁸³ Despite its unique aspects, such incidents highlight that, while noncombustible products may not have the same risk profile as combustible cannabis or tobacco, these newer products are not riskless, and

74. See Jenni A. Shearston et al., *Effects of Electronic Cigarettes and Hookah (Waterpipe) Use on Home Air Quality*, NAT'L LIBR. MED. (May 21, 2021), <https://pubmed.ncbi.nlm.nih.gov/34021062/> [<https://perma.cc/RF4L-A9XR>].

75. See, e.g., Nicholas Chadi, Claudia Minato & Richard Stanwick, *Cannabis Vaping: Understanding the Health Risks of a Rapidly Emerging Trend*, 25 J. PAEDIATRICS & CHILD HEALTH S16, S17 (2020).

76. See, e.g., Aleksandr B. Stefaniak et al., *Toxicology of Flavoring- and Cannabis-Containing E-Liquids Used in Electronic Delivery Systems*, 224 PHARMACOLOGY & THERAPEUTICS 107838 (2021).

77. See *id.* at 4; see also Chadi et al., *supra* note 75, at S17.

78. See Stefaniak et al., *supra* note 76.

79. See *id.*

80. See *id.*

81. See Morgan B. Murphy, Abel S. Huang & Suzaynn F. Schick, *PM_{2.5} Concentrations in a Cannabis Store with On-Site Consumption*, 129 ENV'T HEALTH PERSP. 067701-1, 067701-1 (2021).

82. See *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 25, 2020, 1:00 PM), https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html [<https://perma.cc/X9Q5-V4UL>].

83. See *id.*; see also Stefaniak et al., *supra* note 76.

there is a substantial research gap regarding what risks such products may pose to human health. Logic and prudence caution that risks associated with ENDS, other than those specific to nicotine, are thus likely to apply to related cannabis products as well. In jurisdictions where these products are legally available, their use in MUH and other contexts requires careful legal treatment.

II. MULTIUNIT HOUSING CONTEXT

A. Multiunit Housing and Implications for Equity

Multiunit (or multi-family) housing includes any single building set up to accommodate more than one family living separately. This includes apartments, condos, townhouses, duplexes, and other types of units in both privately-owned buildings and public housing. While units in MUH buildings may be rented or owned, this Article focuses on rental units, which have particular salience for urban environments.

Because smoke and other emissions can pass between units in MUH, a smoker in one apartment may expose several neighbors to SHS, even if those neighbors maintain their own units as smokefree spaces. Such intrusions of SHS are very common in MUH and include emissions from both cannabis and tobacco products. Because historically marginalized populations are more likely to live in MUH, these intrusions also have significant equity implications.⁸⁴ For example, a 2016 study of adults living in MUH found that over one-third (34.4%) of MUH residents who had smokefree homes experienced incursions of secondhand tobacco smoke from neighboring units or common areas, including 7.8% who reported exposure every day and 9.0% who reported exposure multiple times per week.⁸⁵ The same study found that the adjusted odds of experiencing SHS incursions were higher for women, younger adults, non-Hispanic Black residents, Black residents, and residents with lower incomes.⁸⁶ Other studies have found even higher reported rates of SHS infiltration into otherwise-smokefree homes among MUH residents.⁸⁷

84. See Diana Hernández et al., ‘If I Pay Rent, I’m Gonna Smoke’: Insights on the Social Contract of Smokefree Housing Policy in Affordable Housing Settings 13 (Apr. 10, 2020) (also published in 56 J. HEALTH & PLACE 106 (2019)) (“Marginalized (e.g., lower-income or racial minority) groups are more likely to experience substandard housing conditions . . .”).

85. See Kimberly H. Nguyen et al., *Tobacco Use, Secondhand Smoke, and Smoke-Free Home Rules in Multiunit Housing*, 51 AM. J. PREVENTIVE MED. 682, 684 (2016).

86. See *id.* at 689.

87. See Andrea S. Licht et al., *Attitudes, Experiences, and Acceptance of Smoke-Free Policies Among US Multiunit Housing Residents*, 102 AM. J. PUB. HEALTH 1868, 1869 (2012) (finding 44% of residents with smokefree homes experienced SHS incursions in the

The differential impact of SHS exposures in MUH is particularly noticeable in urban centers. For example, 67% of San Francisco residents live in MUH, about double the rate for California as a whole.⁸⁸ San Francisco also has numerous older Edwardian and Victorian houses that have been repurposed into MUH, and these often have features that make it easier for smoke to drift between units, such as shared vents, limited insulation, and lack of modern heating and cooling systems.⁸⁹ Racial or ethnic minorities, younger adults, and lower-income populations are more likely to live in MUH, and these same populations are more likely to use tobacco and to be exposed to SHS.⁹⁰ A study of San Francisco residents found that living in higher-density MUH was associated with greater odds of SHS exposure and that perceived neighborhood disorder was also associated with greater odds of SHS exposure in areas with higher housing density and greater concentrations of lower income residents.⁹¹ These findings are especially thought-provoking given that California has among the nation's lowest overall tobacco smoking rates at 10%, as of 2019,⁹² while the Bay Area has a comparatively high 27% rate of adult cannabis use.⁹³ This highlights the looming challenge of cannabis SHS exposure in MUH.

San Francisco is far from anomalous on that point. A 2019 study in Los Angeles similarly found that 49% of MUH tenants surveyed reported SHS exposure, with 39% reporting tobacco SHS, 36% reporting cannabis SHS, and 9% reporting drifting e-cigarette emissions.⁹⁴ Overall reported exposure was higher among Black and Latinx tenants compared to white or

prior year, with 31% reporting incursions occurred “most of the time” or “often”); *see also* Brian A. King et al., *Multiunit Housing Residents' Experiences and Attitudes Toward Smoke-Free Policies*, 12 NICOTINE & TOBACCO RSCH. 598, 598 (2010) (finding 46.2% of MUH residents with personal smokefree policies reporting SHS incursions, including 9.2% reporting daily incursions).

88. *See* Louisa M. Holmes et al., *Drifting Tobacco Smoke Exposure Among Young Adults in Multiunit Housing*, 45 J. CMTY. HEALTH 319 (2020).

89. *See id.*

90. *See id.*

91. *See id.*

92. *See Extinguishing the Tobacco Epidemic in California*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 24, 2021), <https://www.cdc.gov/tobacco/stateandcommunity/state-fact-sheets/pdfs/2021/California-fpo.pdf> [<https://perma.cc/F6X7-PV7W>].

93. *See* Holmes, *supra* 88.

94. *See* PEGGY TOY ET AL., UCLA CTR. FOR HEALTH POL'Y RSCH., HEALTH AT RISK: POLICIES ARE NEEDED TO END CIGARETTE, MARIJUANA, AND E-CIGARETTE SECONDHAND SMOKE IN MULTI-UNIT HOUSING IN LOS ANGELES 2 (2020), <https://healthpolicy.ucla.edu/publications/Documents/PDF/2020/Health-at-Risk-policybrief-may2020.pdf> [<https://perma.cc/ZXA7-ZSBQ>].

Asian American and Pacific Islander (AAPI) tenants.⁹⁵ A study of families living in MUH in New York City similarly found that nearly one-third reported smelling secondhand cannabis smoke in their homes and that exposures were much more common among Black and Hispanic respondents.⁹⁶ The same New York City study found that about 74% of residents in public housing or who used Section 8 vouchers reported SHS exposure, compared to just 37% of other MUH residents.⁹⁷ SHS exposure is particularly likely to affect children and nonsmoking adults living below the federal poverty level and elderly persons with limited mobility.⁹⁸ These groups are more likely to live in public housing, of which the vast majority is MUH.⁹⁹ A recent study of self-reported cannabis SHS exposure in subsidized housing in New York City found that exposure was pervasive, with two-thirds of residents reporting smelling cannabis smoke in their homes in the past year.¹⁰⁰ These disparities demonstrate ways in which SHS exposure and its health impacts fall disproportionately on persons of color, persons of lower socioeconomic status, and other marginalized or vulnerable populations.¹⁰¹ The cumulative impacts of these inequitable

95. *See id.* at 4 (finding exposure among 51% of Black and 54% of Latinx tenants compared to 45% of white and 41% of AAPI tenants).

96. *See* Lodie Sangmo et al., *Reported Marijuana and Tobacco Smoke Incursions Among Families Living in Multiunit Housing in New York City*, 21 *ACAD. PEDIATRICS* 670, 670–72 (2021) (finding exposures reported by 51% of Non-Hispanic Black and 51% of Hispanic respondents, compared to 31% of white respondents and 37% of respondents classified as Non-Hispanic other). This study used a convenience sample enrolled from a small number of pediatric clinics, so its findings may not be broadly applicable. *See id.* at 671. However, at the time of the study, New York had only legalized medical cannabis and only legally permitted noncombustible consumption methods, *id.*, so it is likely the state's 2020 adult use legalization will produce an even higher incidence of exposure. *See Recreational Cannabis Use Among Adults in the Home Is on the Rise, but What About the Children?*, *COLUM. UNIV.* (Mar. 17, 2021), <https://www.publichealth.columbia.edu/public-health-now/news/recreational-cannabis-use-among-adults-home-rise-what-about-children> [<https://perma.cc/KU79-UL54>].

97. Sangmo et al., *supra* note 96, at 672. The association between exposure and public housing remained after adjusting for covariates, but the association for Section 8 housing was no longer statistically significant. *Id.*

98. *See* Jacquelyn Mason, William Wheeler & Mary Jean Brown, *The Economic Burden of Exposure to Secondhand Smoke for Child and Adult Never Smokers Residing in U.S. Public Housing*, 130 *PUB. HEALTH REPS.* 230, 231 (2015).

99. *See id.*

100. *See* Elle Anastasiou et al., *Self-Reported Secondhand Marijuana Smoke (SHMS) Exposure in Two New York City (NYC) Subsidized Housing Settings, 2018: NYC Housing Authority and Lower-Income Private Sector Buildings*, 45 *J. CMTY. HEALTH* 635, 638 (2020).

101. *See* Sangmo et al., *supra* note 96, at 674.

exposures in terms of morbidity, mortality, and attributable economic costs are staggering.¹⁰²

Tenants, particularly those who are part of marginalized groups, may not feel empowered to take actions to prevent smoking by their neighbors, even when it intrudes into an otherwise smokefree home. For example, a study of Hispanic MUH residents in Los Angeles showed 97% did not allow smoking in their homes, yet 80% had experienced SHS infiltration in the past year and 32% had smelled THS in their building.¹⁰³ A majority were bothered by the smell and considered it a nuisance.¹⁰⁴ Although most were aware of potential adverse health effects from cannabis and tobacco SHS and THS,¹⁰⁵ few residents took action to prevent these intrusions either because they felt they were unable to control others' actions, wanted to avoid causing trouble in their building, or did not feel comfortable telling others not to smoke.¹⁰⁶ Most residents were confident they could protect their own homes but less confident about confronting smokers about SHS.¹⁰⁷

This speaks to the need for formal smokefree policies and the potential benefits of enshrining them in law. MUH residents reported overwhelming support for these policies for their own buildings, but many had misconceptions about legal frameworks that support such policies and protect their right to clean air.¹⁰⁸ For example, 83% thought their landlord needed permission from the city to prohibit smoking, and 34% believed their neighbors had a legal right to smoke in the building because smoking is generally legal.¹⁰⁹ In the vast majority of communities, the battle over smokefree MUH is fought building by building, disempowering the collective majority of MUH residents by forcing them to organize and advocate to one landlord at a time for the right to breathe smokefree air. The continued expansion of cannabis legalization will exacerbate this problem in the absence of a thoughtful and comprehensive policy response.

102. See Mason et al., *supra* note 98, at 232, 241–42 (estimating the annual economic burden attributable to SHS exposure in U.S. public housing residents who have never smoked at between \$183–267 million).

103. Angelica Delgado-Rendon et al., *Second and Thirdhand Smoke Exposure, Attitudes and Protective Practices: Results from a Survey of Hispanic Residents in Multi-Unit Housing*, 19 J. IMMIGRANT & MINORITY HEALTH 1148 (2017).

104. *See id.*

105. *See id.*

106. *See id.* Some of these sentiments may be related to cultural values and acculturation within the Hispanic community. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

B. Law and Policy Context

Tobacco smokefree air laws are widespread. As of February 2022, 28 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and over 1,100 cities and counties — altogether covering over 60% of the U.S. population — have adopted comprehensive laws prohibiting smoking in all non-hospitality workplaces, restaurants, and bars.¹¹⁰ Many of these laws also explicitly prohibit cannabis smoking in the same locations,¹¹¹ while others do so implicitly due to their intersection with widespread prohibitions on public cannabis use.¹¹² However, MUH generally lacks these types of comprehensive legal protections against SHS exposure. Just 67 municipalities (all in California) have enacted a city or county law prohibiting smoking in all private units of rental MUH properties.¹¹³ According to a 2010 survey, smokefree building rules cover about one in three MUH residents, though over half of respondents support such policies.¹¹⁴ Coverage varies substantially by geography. For example, in a study of Los Angeles MUH, 69% of building owners reported having a voluntary smokefree policy of some type, with 90% of these covering tobacco, 75% covering cannabis, and 62% covering e-cigarettes.¹¹⁵ Property owners can look to a variety of viable legal theories to support voluntary smokefree policies for MUH buildings.

Property owners, including MUH property owners, adopt smokefree rules to protect their property and to protect themselves from potential liability. Both tobacco and cannabis smoke are noticeable and typically have an odor. While individual reactions may vary, many find the odor of one or both substances unpleasant.¹¹⁶ More importantly, smoke contains

110. See *Overview List — Number of Smokefree and Other Tobacco-Related Laws*, AM. NONSMOKERS' RTS. FOUND. (Feb. 5, 2022), <https://no-smoke.org/wp-content/uploads/pdf/mediaordlist.pdf> [<https://perma.cc/DY8D-WZ4M>].

111. See *U.S. 100% Smokefree Laws in Non-Hospitality Workplaces AND Restaurants AND Bars*, AM. NONSMOKERS' RTS. FOUND. (Feb. 5, 2022), <https://no-smoke.org/wp-content/uploads/pdf/WRBLawsMap.pdf> [<https://perma.cc/ZQ4E-Q7P6>] (showing numerous localities and 26 states with cannabis included in smokefree laws compared to just two states — Colorado and Michigan — with specific exemptions for restaurants and bars to allow cannabis use).

112. See Orenstein, *supra* note 1, at 75–79. Some of these jurisdictions allow cannabis smoking in on-site consumption locations that are workplaces. See *id.* While in many cases there are specific requirements for ventilation or physical separation to limit worker exposure to SHS, such protections are insufficient to provide full protection. See *id.* at 70, 102–04.

113. See *U.S. Laws for 100% Smokefree Multi-Unit Housing*, *supra* note 11.

114. See Licht et al., *supra* note 87, at 1868–69.

115. See TOY ET AL., *supra* note 94, at 5.

116. See William Garriott, *Change Is in the Air: The Smell of Marijuana, After Legalization*, 45 LAW & SOC. INQUIRY 995, 1008–14 (2020) (assessing the smell of cannabis

particulate matter that adheres to various materials and can produce lasting odor, discoloration, or other damage as it accumulates over time.¹¹⁷ Amelioration of this damage between unit occupants imposes potentially significant costs on property owners that can be far greater than costs for turning over a smokefree unit.¹¹⁸ Moreover, combustible products, by their very nature, present a fire hazard that owners are similarly justified in seeking to prevent in order to avoid both physical and economic injuries.¹¹⁹ Smoking remains the leading cause of U.S. home fire deaths, responsible for 23% of fatalities, and it is among the leading causes of home fires, home fire injuries, and home fire direct property damage.¹²⁰ Accordingly, MUH property owners can cite abundant legal justification in imposing smokefree rules.

In addition to avoiding direct costs and preventing damage and injury, smokefree rules also provide legal protection for property owners against possible legal claims by tenants affected by SHS or THS. Affected tenants are most likely to argue that, by failing to prevent intrusion of SHS or THS into the rental unit, the owner has breached either the warranty of habitability or the covenant of quiet enjoyment.¹²¹ Each type of claim may be made either defensively or offensively. For example, a tenant may refuse to pay rent and then raise the claim in response to eviction proceedings, or the tenant may seek to obtain rate abatement or force action by the landlord.¹²²

The warranty of habitability requires landlords to ensure rental properties are fit for occupancy, including essential aspects such as heat, light, plumbing, and ventilation. Depending on state law, SHS exposure could rise to the level of violating the warranty of habitability if it is sufficiently frequent and the property owner fails to take steps to eliminate

as nuisance). Notably, however, others may find the odor quite pleasing or desirable. *See id.* at 1015–21 (assessing the smell of cannabis as commerce); *see also* Emily Anne McDonald, Lucy Popova & Pamela M. Ling, *Traversing the Triangulum: The Intersection of Tobacco, Legalised Marijuana and Electronic Vaporisers in Denver, Colorado*, 25 TOBACCO CONTROL i96, i99–100 (2016) (reporting research participants’ comments regarding the odor of cannabis and tobacco smoke).

117. *See* Ezra, *supra* note 28, at 152–54.

118. *See* Phyllis A. Roestenberg, *Implementing No-Smoking Policies in Multi-Unit Housing: How to Do It and Why*, 44 COLO. LAW. 93, 94 (2015).

119. *See* Ezra, *supra* note 28, at 154–55.

120. *See* MARTY AHRENS & RADHIKA MAHESHWARI, NAT’L FIRE PROT. ASS’N, HOME STRUCTURE FIRES 5 (2021), <https://www.nfpa.org/-/media/Files/News-and-Research/Fire-statistics-and-reports/Building-and-life-safety/oshomes.pdf> [<https://perma.cc/UV8E-UE5W>].

121. *See* Ezra, *supra* note 28, at 160–63.

122. *See id.* at 160–63.

it.¹²³ Such a violation may entitle the tenant to use a rent escrow action to compel the owner to take action and may result in rent abatement.¹²⁴ For example, a jury in Oregon awarded a nonsmoking tenant sensitive to SHS a 50% reduction in rent and damages to cover medical bills after her landlord moved a known smoker into the apartment below hers.¹²⁵

The implied covenant of quiet enjoyment protects a tenant's right to be free from unreasonable interference with their use of their property during tenancy. This right is most commonly asserted in relation to physical intrusion by the landlord (e.g., entrance into the unit without warning absent an emergency). However, the intrusion of smoke into the unit may also breach the covenant of quiet enjoyment if the landlord is aware of it and fails to take appropriate action. A housing court in Boston, for example, found that SHS intrusion was significant enough to breach the covenant of quiet enjoyment (as well as the warranty of habitability) and ordered the landlord to correct the problem and pay damages.¹²⁶ Tenants may also claim that, by allowing smoking, the landlord has permitted a public nuisance. For example, in response to a 2009 suit by a tenant family with a young child with asthma, California courts held that their landlord could be liable under a public nuisance theory for allowing smoking in outdoor common areas.¹²⁷

Tenants affected by the intrusion of SHS or THS may also be able to bring nuisance claims against the neighbor responsible for the smoke. In the context of a rental property, a private nuisance is the unreasonable interference with another person's use and enjoyment of their rental unit. State laws vary, but many states have recognized that intrusion of smoke into a plaintiff's home can constitute a nuisance if sufficiently severe or frequent.¹²⁸ States may also provide for smoking-related nuisance claims

123. See PUB. HEALTH L. CTR., SMOKE-FREE HOUSING AND RENT ABATEMENT 1–2 (2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/Smoke-Free-Housing-Rent-Abatement-MN-2019.pdf> [<https://perma.cc/V6CV-3AE5>].

124. See *id.* at 2–3.

125. See *Fox Point Apt. v. Kippes*, No. 92-6924 (Dist. Or. 1992); see also CHANGELAB SOLS., LEGAL OPTIONS FOR TENANTS SUFFERING FROM DRIFTING TOBACCO SMOKE 1, 3 (2018), https://www.changelabsolutions.org/sites/default/files/LegalOptionsforTenantsSufferingfromDriftingSmoke_FINAL_20180630.pdf [<https://perma.cc/US5X-MUK9>].

126. See 50-58 Gainsborough St. Realty Tr. v. Haile, No. 98-02279 (Bos. Housing Ct. 1998); see also CHANGELAB SOLS., *supra* note 125, at 3. Similar claims may also be made under a theory of constructive eviction. See *Poyck v. Bryant*, 820 N.Y.S.2d 775, 775–76 (N.Y. Civ. Ct. 2006); see also CHANGELAB SOLS., *supra* note 125, at 3.

127. See *Birke v. Oakwood Worldwide*, 87 Cal. Rptr. 3d 602, 609–11 (Cal. Ct. App. 2009) (finding that aggravation of plaintiff child's allergies and respiratory disorders by SHS was potentially sufficiently different in kind compared to general respiratory irritation experienced by other residents to support a public nuisance claim).

128. See *Ezra*, *supra* note 28, at 156–58.

directly in statute. For example, Utah’s definition of a nuisance explicitly includes “tobacco smoke that drifts into a residential unit a person rents, leases, or owns, from another residential or commercial unit” if the smoke “drifts in more than once in each of two or more consecutive seven-day periods” and is “injurious to health” or “offensive to the senses” such that it “interfere[s] with the comfortable enjoyment of life or property.”¹²⁹ Of note, the explicit reference to “tobacco smoke” in the statutory language could complicate potential application to cannabis smoke.

Depending on state law, the type of injury a tenant plaintiff must prove to support a nuisance claim may vary. For example, in California, a *public* nuisance requires a showing that the plaintiff suffered a special injury different in kind (rather than merely degree) compared to that suffered by the general public, while a *private* nuisance claim requires harm to or interference with a property interest.¹³⁰ Notably, landlords may also be able to use nuisance law to evict tenants in some jurisdictions.¹³¹

Nuisance claims against neighbors based on secondhand smoke have met with mixed success.¹³² The application of nuisance doctrine to smells and odors crossing property lines has a long history,¹³³ but many courts have been reluctant to recognize SHS exposure as sufficiently unreasonable to support a private nuisance claim.¹³⁴ A New York court specifically worried that “the law of private nuisance would be stretched beyond its breaking point if [the court] were to allow a means of recovering damages when a neighbor merely smokes inside his or her own apartment in a multiple dwelling building.”¹³⁵ The court acknowledged that “odors emanating from a smoker’s apartment may generally be considered annoying and uncomfortable to reasonable or ordinary persons,” but classified them merely as “but one of the annoyances one must endure in a multiple dwelling building.”¹³⁶ A Maryland court similarly cited “certain inconveniences and discomforts incident to living in a city or in a thickly-

129. See UTAH CODE ANN. §§ 78B-6-1101(1), (3) (2021).

130. See LANDLORD LIABILITY FOR INJURIES FROM ACTS OF OTHERS, CL. PRACTICE GUIDE — LANDLORD-TENANT §§ 6:79.1–6:79.2; see also *Birke*, 87 Cal. Rptr. 3d at 609–11 (finding that aggravation of plaintiff child’s allergies and respiratory disorders by SHS was potentially sufficiently different in kind compared to general respiratory irritation experienced by other residents to support a public nuisance claim and that interference with plaintiff’s use and enjoyment of outdoor facilities on the premises was sufficient to support a private nuisance claim).

131. See *Cork*, *supra* note 8, at 64.

132. See Nicholas Evoy, Note, *Secondhand Smoke as a Private Nuisance: Lost in the Fog*, 44 REAL EST. L.J. 20, 21 (2015).

133. See *id.* at 27.

134. See *id.* at 32–37 (citing several examples of failed nuisance claims based on SHS).

135. *Ewen v. Maccherone*, 927 N.Y.S.2d 274, 276 (N.Y. App. Div. 2011).

136. *Id.* at 277.

settled suburban community” in addressing a private nuisance claim based on SHS exposure.¹³⁷

Such cases illustrate the uphill battle against the notion that smoking in one’s home is a purely private and self-regarding act. They also betray an unfortunate lack of judicial support for the rights of MUH residents. While there are undoubtedly annoyances and inconveniences inherent to living in MUH, abdication of one’s right to breathe clean, smokefree air is not among them. Nevertheless, many tenants will have difficulty obtaining relief through any of the legal avenues outlined above. All require legal filings and potentially attorneys’ fees,¹³⁸ as well as other commitments of time, effort, and money that may not be feasible, particularly for tenants with lower incomes or who are already overburdened by other obligations. Moreover, taking one’s neighbor or landlord to court is likely to sour existing relationships and may make remaining in one’s home unpleasant, stressful, or even dangerous. Many may prefer to accept the intrusion of SHS rather than take on the substantial practical risks of trying to use the law to stop it.

III. UNIQUE CONSIDERATIONS FOR CANNABIS

A. General Cannabis Legal Framework

Cannabis has been prohibited under U.S. federal law for the better part of a century,¹³⁹ and since 1970 cannabis and its derivatives have been listed on Schedule I of the Controlled Substances Act (CSA).¹⁴⁰ Schedule I is the most strictly regulated category under federal law, reserved for substances with high potential for abuse, no currently accepted medical use in treatment, and no accepted safety for use under medical supervision.¹⁴¹ While cannabis remains unquestionably illegal as a matter of federal law, as of September 2021, cannabis is legal for medical purposes in 36 states and four territories, and for adult use in 18 states, two territories, and the District of Columbia.¹⁴² While there are numerous connections between

137. *Schuman v. Greenbelt Homes, Inc.*, No. CAL10-06047, 2010 WL 8654560, at *4 (Md. Cir. Ct. Sept. 1, 2010) (quoting *Five Oaks Corp. v. Gathmann*, 58 A.2d 656 (1947)).

138. *See, e.g.*, CHANGE LAB SOLS., *supra* note 125, at 4.

139. *See* Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 793–800 (2019) (tracing the baldly racist early history of cannabis regulation in the United States).

140. 21 U.S.C. §§ 811, 812(b)(1).

141. *See id.* § 812(b)(1).

142. *State Medical Cannabis Laws*, NAT’L CONF. ST. LEGISLATURES (Aug. 23, 2021), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/XK5U-PMNB>].

the criminalization of drugs and impacts on housing,¹⁴³ the transition of cannabis to a legal or at least quasi-legal product creates a unique legal environment.

State legal restrictions on permissible cannabis use locations vary considerably, but most states do not permit open public cannabis consumption.¹⁴⁴ Instead, most either allow public use only in a small number of licensed venues or prohibit public use entirely.¹⁴⁵ Both of these approaches heavily favor consumption in private locations, which presents few legal concerns for persons who own private property and wish to consume cannabis. In contrast, renters encounter a puzzle: if the property owner does not allow cannabis consumption on the premises, renters who use cannabis at home face possible eviction or lease termination, and those who consume elsewhere risk potential law enforcement encounters triggered by illicit public use.¹⁴⁶

B. Demographics, Public Use, and Social Equity

In most states that have legalized adult-use cannabis to date, a large proportion of the population lives in rental units.¹⁴⁷ Of the ten states with the lowest percentage of owner-occupied homes, six — New York, California, Nevada, Massachusetts, Washington, and Oregon — have legalized adult use of cannabis.¹⁴⁸ In major urban areas, the trend is similarly pronounced. Of the 100 largest U.S. cities by population, nearly half are in adult-use states.¹⁴⁹ In 23 of these cities, over half of the population are renters,¹⁵⁰ ranging as high as 73% in Newark, New Jersey.¹⁵¹ As a result of these demographics, a plurality or even a majority of voters in legalizing jurisdictions have few or no locations where they can lawfully consume cannabis,¹⁵² placing them in the renters' puzzle outlined above.

143. See, e.g., Silva, *supra* note 21, at 588–605.

144. See Orenstein, *supra* note 1, at 74–79.

145. See *id.*

146. See *id.* at 87.

147. See Cork, *supra* note 8, at 65.

148. Julia Campbell, *Is It More Common to Rent or Own in Each State?*, MOVE.ORG (Jan. 21, 2019), <https://www.move.org/states-with-highest-lowest-owner-occupied-homes/> [<https://perma.cc/65CV-BN9A>].

149. Author's calculations in Excel using data from Maciag, *supra* note 4.

150. See *id.*

151. See *id.*

152. See Cork, *supra* note 8, at 65–66 (“Given that recreational marijuana is legal in these states, and that public use . . . is commonly banned, marijuana proponents often contend that few options remain for tenants who want to smoke or vape a legal product in their

Due to historical and structural factors that continue to influence the socioeconomics of homeownership, issues impacting renters disproportionately affect persons of color. As of mid-2021, overall homeownership stood at 65.4%, approximately the same as early 2020 and generally consistent with the past few decades.¹⁵³ However, while 74.2% of non-Hispanic white households owned their home, this was true of only 44.6% of Black households, 47.5% of Hispanic households, and 56.2% of households of another race or ethnicity.¹⁵⁴

At the same time, some of these groups, in particular Black and Latinx communities, have also been unjustly targeted by the enforcement of cannabis prohibition.¹⁵⁵ Cannabis use rates are largely similar across most racial and ethnic groups in the United States.¹⁵⁶ Yet cannabis enforcement has been and remains profoundly inequitable. Even amid significant state legalization and decriminalization reforms, Black persons are still 3.64 times more likely than white persons to be arrested for cannabis possession nationally.¹⁵⁷ Racial arrest disparities are still present in *every* state,¹⁵⁸ and

apartments. This buttresses the claim that in jurisdictions where voters pass laws legalizing recreational marijuana, the majority of voters often have limited ability to use it.”)

153. U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP (CPS/HVS), TABLE 16. QUARTERLY HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLD: 1994 TO PRESENT, <https://www.census.gov/housing/hvs/data/histtabs.html> [<https://perma.cc/L74J-HLUY>] (last visited Aug. 17, 2021) (showing that overall ownership rates have remained between 63–70% since 1994).

154. *See id.*

155. *See, e.g.*, ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 94 (2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-re11.pdf [<https://perma.cc/T7YL-JG26>]; Graham Boyd, *The Drug War Is the New Jim Crow*, ACLU (July 2001), <https://www.aclu.org/other/drug-war-new-jim-crow> [<https://perma.cc/K34P-JM7P>].

156. *See, e.g.*, Hongying Dai & Kimber P. Richter, *A National Survey of Marijuana Use Among US Adults with Medical Conditions, 2016–2017*, 2 JAMA NETWORK OPEN e1011036 (2019) (reporting past-month use rates among respondents with no current medical condition of 10.7% for Non-Hispanic Black participants, 8.9% for Non-Hispanic White participants, 6.3% for Hispanic participants, and 7.3% for participants of other race/ethnicity). *But see, e.g.*, William Mitchell, Roma Bhatia & Nazlee Zebardast, *Retrospective Cross-Sectional Analysis of the Changes in Marijuana Use in the USA, 2005–2018*, 10 BMJ OPEN e037905 (2020), <https://bmjopen.bmj.com/content/bmjopen/10/7/e037905.full.pdf> [<https://perma.cc/D2TK-VEP4>] (finding statistically significant differences in self-reported past-year use, with somewhat higher prevalence among Black respondents compared to other groups). *See generally* Joseph J. Palamar, Austin Le & Benjamin H. Han, *Quarterly Trends in Past-Month Cannabis Use in the United States, 2015–2019*, 219 DRUG & ALCOHOL DEPENDENCE 108494 (2021) (reporting overall past-month use prevalence rates of 11.1–12.4% for Non-Hispanic Black respondents, 9.2–10.4% for Non-Hispanic White respondents, 7.3–8.5% for Hispanic respondents, and 6.9–8.6% for respondents of other race/ethnicity).

157. *See* ACLU, A TALE OF TWO COUNTRIES: RACIAL TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 29 (2020), https://www.aclu.org/sites/default/files/field_document/042020-marijuanareport.pdf [<https://perma.cc/87KT-FJD8>]. This is also true of the War on

between 2010 and 2018, these disparities *increased* in 31 states, even as overall arrest rates decreased.¹⁵⁹ The lowest statewide disparity in 2018 was in Colorado, where a Black person was still 1.5 times as likely to be arrested as a white person, while the highest disparity was a staggering 9.6 times more likely in Montana.¹⁶⁰ Among legalizing states, arrest rates for possession decreased in general, but racial disparities also persisted and sometimes increased,¹⁶¹ illustrating plainly that legalization alone does not correct pervasive systemic inequities, including those in law enforcement.¹⁶² Despite expanding legalization, renters who consume cannabis in their units face potential eviction, lease termination, exclusion from public housing, or other penalties that could exacerbate existing housing disparities.¹⁶³ Yet, those who consume cannabis outside face potential arrest or civil penalties, as well as the omnipresent and disturbing potential that even a minor law enforcement encounter may escalate and lead to injury or even death.¹⁶⁴

Concerns multiply with respect to those living in public or federally subsidized housing. The U.S. Department of Housing and Urban Development (HUD) requires public housing agencies to prohibit tobacco smoking in all indoor areas, but this does not include noncombustible tobacco products (e.g., e-cigarettes) or cannabis.¹⁶⁵ However, HUD also requires public housing agencies and owners of federally assisted housing to deny applications for public or Section 8 housing¹⁶⁶ and allows owners to terminate tenancy¹⁶⁷ if the owner determines that a member of the household is currently using cannabis, regardless of state legalization, because the substance remains prohibited under federal law.¹⁶⁸ Changes

Drugs more broadly. *See, e.g.*, Silva, *supra* note 21, at 585, 603; Exum, *supra* note 21, at 1693–97.

158. *See* ACLU, *supra* note 155, at 4–6, 28–29.

159. *See id.* at 31.

160. *See id.* at 32.

161. *See id.* at 34–35.

162. *See id.* at 35.

163. *See* Cork, *supra* note 8, at 64–65.

164. *See* Orenstein, *supra* note 1, at 85–86.

165. *See* Cork, *supra* note 8, at 49–50.

166. *See* 42 U.S.C. § 13661(b).

167. *See id.* § 13662(a).

168. *See* Memorandum from Benjamin T. Metcalf, Deputy Assistant Sec’y for Multifamily Hous. Programs, Dep’t of Hous. & Urb. Dev., on Use of Marijuana in Multifamily Assisted Properties to the All Multifamily Reg’l Ctr. Dirs. et al. (Dec. 29, 2014), <https://www.hud.gov/sites/documents/USEOFMARIJINMFASSISTPROPTY.PDF> [<https://perma.cc/57VL-ZDTZ>] (stating HUD policy regarding cannabis use, including medical use); *see also* 42 U.S.C. § 13661(a) (stating that prior eviction for drug-related criminal activity also results in a three-year exclusion unless the tenant completes an approved rehabilitation program); Cork, *supra* note 8, at 56.

have been proposed to prevent HUD from using its funds to evict or deny admission to residents using cannabis in states where it is legal, but to date, these changes have not been adopted.¹⁶⁹ Similar concerns regarding intersections with federal law also apply to federally funded independent and dependent senior living facilities.¹⁷⁰ These housing laws are painful vestiges of the failed War on Drugs, which enlisted not only criminal law but also civil and administrative law in waging its expansive battle plan.¹⁷¹

C. Medical Cannabis Use

Further complicating the cannabis legal landscape, there is growing consensus that cannabis and cannabinoids have at least some medical utility.¹⁷² Nevertheless, the drug's Schedule I status under federal law means that, even in legalized states, medical cannabis use does not receive legal protections typically afforded to other forms of medical treatment. For example, the Fair Housing Act (FHA) prohibits discrimination in housing on the basis of disability, among other prohibited characteristics, and requires reasonable accommodations in rules and policies to provide a disabled person with an equal opportunity to use and enjoy a dwelling unit or common space.¹⁷³ The FHA applies to a broad range of conditions, including (non-exhaustively) autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, and HIV infection.¹⁷⁴ Many of the conditions for which patients use medical cannabis qualify as a disability under the FHA.¹⁷⁵ For example, while qualifying conditions for state medical cannabis programs vary widely, Louisiana's program includes all six conditions listed above.¹⁷⁶

However, the FHA explicitly provides that its protections are not applicable to "current, illegal use of or addiction to a controlled

169. See Kyle Jaeger, *Congress Could Vote to Protect People from Losing Public Housing for Marijuana Use Next Week*, MARIJUANA MOMENT (July 20, 2021), <https://www.marijuanamoment.net/congress-could-vote-to-protect-people-from-losing-public-housing-for-marijuana-use-next-week/> [<https://perma.cc/CB6Y-8XRL>].

170. See Erin Malter, Note, *High Times at the Senior Center: The Impact of Growing Marijuana Legalization on Senior Housing Policies*, 28 ELDER L.J. 453, 457–65 (2021).

171. See Silva, *supra* note 21, at 588–98.

172. See NASEM REPORT, *supra* note 17, at 13–14.

173. See generally 42 U.S.C. §§ 3601–3619.

174. See 24 C.F.R. § 100.201 (2021).

175. See 42 U.S.C. § 3602(h)(1) (defining a "handicap" as "a physical or mental impairment which substantially limits one or more . . . major life activities"). The Americans with Disabilities Act uses the same language to define "disability." *Id.* § 12102(1) ("The term 'disability' means . . . a physical or mental impairment that substantially limits one or more major life activities . . .").

176. See LA. STAT. ANN. § 40:1046(A)(2)(a) (2022).

substance,”¹⁷⁷ which includes cannabis. Arguably, an exemption from property rules to allow the use of medical cannabis to treat a disabling condition might be considered a reasonable accommodation. Yet, because current federal law explicitly prohibits cannabis use or possession under the CSA, it is unlikely that a court would find such an accommodation reasonable.¹⁷⁸ HUD has clearly stated its interpretation that the status of cannabis under the CSA means that existing federal nondiscrimination laws, including the FHA, do not require allowing cannabis use as a reasonable accommodation.¹⁷⁹

Additionally, the availability of alternative, non-smoked forms of cannabis, including tinctures and edibles,¹⁸⁰ as well as a small number of FDA-approved pharmaceutical cannabinoids,¹⁸¹ provides potential options for medical use that do not impose SHS exposures on other tenants.¹⁸² These alternatives would further erode a claim that accommodating cannabis *smoking* is reasonable and, thus, necessary to comply with the FHA. For example, under New York’s medical cannabis law, a skilled nursing facility developed a program to allow medical cannabis use by facility residents as an alternative therapy for a range of conditions.¹⁸³ Because the facility had an existing and comprehensive smokefree policy, residents’ cannabis use was limited to capsules and orally administered cannabis oils.¹⁸⁴ Similarly, allowing non-aerosol producing cannabis product use in MUH generally would accomplish the goal of facilitating

177. 42 U.S.C. § 3602(h).

178. See PUB. HEALTH L. CTR., MARIJUANA IN MULTI-UNIT RESIDENTIAL SETTINGS 3 (2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/Marijuana-in-Multi-Unit-Residential-Setting-2019-1.pdf> [<https://perma.cc/669U-VM5R>].

179. See Memorandum from Helen R. Kanovsky, U.S. Dep’t of Hous. & Urb. Dev., on Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing to John Trasviña, David Stevens & Sandra B. Henriquez 4–9 (Jan. 20, 2011), [https://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm\(012011\).pdf](https://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm(012011).pdf) [<https://perma.cc/P5Z7-XMNE>].

180. See generally Lesley Nickus, *A Guide to Cannabis Product Types*, WEEDMAPS (Feb. 16, 2022), <https://weedmaps.com/learn/introduction/guide-cannabis-product-types> [<https://perma.cc/KNE7-VU3A>].

181. See NASEM REPORT, *supra* note 17, at 53–55.

182. See Cork, *supra* note 8, at 67. HUD has also specifically clarified that FDA-approved drugs are legal under federal law and therefore are allowed in public housing and voucher programs. See Memorandum from Sandra B. Henriquez, Assistant Sec’y for Pub. & Indian Hous., U.S. Dep’t of Hous. & Urb. Dev., on Medical Marijuana in Use in Public Housing and Housing Choice Voucher Programs to All Field Offs. & Pub. Hous. Agencies 2 (Feb. 10, 2011), <https://www.hud.gov/sites/documents/MED-MARIJUANA.PDF> [<https://perma.cc/2B8B-JDNU>].

183. See Zachary J. Palace & Daniel A. Reingold, *Medical Cannabis in the Skilled Nursing Facility: A Novel Approach to Improving Symptom Management and Quality of Life*, 20 J. AM. MED. DIRS. ASS’N 94, 94–95 (2018).

184. See *id.* at 97.

medical uses without imposing SHS risks on other residents. However, even these would not be protected under current HUD policy unless they were FDA-approved formulations.

Even if cannabis were removed from Schedule I, an accommodation for smoked cannabis would likely be unreasonable because of its impacts on other tenants. While smokers are not a protected class for FHA purposes, HUD has indicated that some accommodations must be considered in public housing on a case-by-case basis with respect to underlying disabilities that make compliance with building smokefree rules difficult, such as mobility impairments that inhibit leaving the property to smoke or cognitive impairments that make it difficult to remember or understand rules.¹⁸⁵ However, accommodations may take the form of additional time for compliance, the opportunity to purchase products that do not violate smokefree rules, or allowing relocation to a unit closer to a designated smoking area¹⁸⁶ rather than allowing the tenant to violate smokefree rules indefinitely or with impunity. Additionally, the FHA may work in the opposite direction, as it also requires reasonable accommodations to protect persons with disabilities who are adversely affected by SHS exposure.¹⁸⁷ Such accommodations may include the adoption and implementation of smokefree rules for MUH properties.¹⁸⁸

Federal courts have thus far rejected requests to apply the protections of the FHA, the Americans with Disabilities Act (ADA),¹⁸⁹ or Section 504 of the Rehabilitation Act¹⁹⁰ to medical cannabis use in public housing in legalizing states, citing federal preemption under the CSA.¹⁹¹ Federal guidelines require prohibitions on drug use for federally subsidized housing but permit landlords significant discretion in enforcement, including

185. See NAT'L HOUS. L. PROJECT, A GUIDE TO EQUITABLE SMOKE-FREE PUBLIC HOUSING 13–14, https://www.nhlp.org/wp-content/uploads/FINAL_-A-Guide-to-Equitable-Smoke-Free-Public-Housing-2020.01.14.pdf [<https://perma.cc/L36T-FD4F>] (last visited Feb. 23, 2022).

186. See *id.* at 13–14. The National Housing Law Project also includes allowing e-cigarettes as a potential accommodation, *id.*, but this Article takes the position that such products should be treated in the same manner as combustible products.

187. See *id.* at 14.

188. See Roestenberg, *supra* note 118, at 94.

189. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as 42 U.S.C. § 12101).

190. Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified as 29 U.S.C. § 794).

191. See *Forest City Residential Mgmt., Inc. v. Beasley*, 71 F. Supp. 3d 715, 727–31 (E.D. Mich. 2014) (finding no FHA, ADA, or Rehabilitation Act protection against public housing eviction based in part on deference to HUD's interpretation of the FHA); see also *Nation v. Trump*, 395 F. Supp. 3d 1271 (N.D. Cal. 2019), *aff'd*, 818 Fed. Appx. 678 (9th Cir. 2020) (rejecting for failure to exhaust administrative remedies a challenge to HUD requirements of zero-tolerance policies for controlled substances, including medical cannabis and holding the evicted public housing resident was required to first petition for reclassification of cannabis under the CSA).

whether to impose automatic eviction for violation.¹⁹² Despite initial confusion regarding the interaction of state cannabis legalization and federal housing law and policy, current statutes and controlling HUD memoranda require denial of admission for known drug use and prohibit lease provisions that affirmatively permit cannabis use.¹⁹³ The U.S. Supreme Court has generally rejected affirmative defenses and putative constitutional rights regarding medical cannabis, typically relying on federal authority to regulate cannabis under the Commerce Clause.¹⁹⁴ However, state courts have sometimes been reluctant to find that citizens availing themselves of state medical cannabis programs are entirely without protection. For example, a Pennsylvania court held that federal law did not require a housing authority to actually deny an applicant Section 8 housing benefits due to (state-legal) medical cannabis use but rather only to establish reasonable standards for such denials.¹⁹⁵ The court based its decision in part on the constitutional inability of the federal government to require states to enforce federal law, including the CSA, under anti-commandeering principles.¹⁹⁶

Similarly, some states' medical cannabis laws prohibit landlords from discriminating against a tenant for being a medical cannabis patient, but these laws do not require landlords to allow tenants to smoke cannabis on the premises. For example, Illinois's medical cannabis statute prohibits landlords from discriminating on the basis of a tenant's status as a registered medical cannabis patient, but the statute explicitly states that landlords retain the authority to prohibit cannabis *smoking* on the premises.¹⁹⁷ In fact, it is likely a court would find a requirement that landlords permit cannabis smoking preempted by the CSA. While state courts have been reluctant to find total federal preemption of state cannabis laws,¹⁹⁸ preemption looms as a significant limitation on cannabis-related rights provided by state law. The CSA explicitly disclaims field

192. See Sarah Simmons, Comment, *Medical Marijuana Use in Federally Subsidized Housing: The Argument for Overcoming Federal Preemption*, 48 U. BALT. L. REV. 117, 124–26 (2018).

193. See 42 U.S.C. §§ 13661, 13662; see also Memorandum from Benjamin T. Metcalf, *supra* note 168; Memorandum from Helen R. Kanovsky, *supra* note 179; Simmons, *supra* note 192, at 124–26.

194. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 27–33 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494–95 (2001).

195. See *Cease v. Hous. Auth. of Ind. Cnty.*, 247 A.3d 57, 59 (Pa. Commw. Ct. 2021).

196. See *id.* at 63–64.

197. 410 ILL. COMP. STAT. 130/40(a)(1) (2021).

198. See Mathew Swinburne & Kathleen Hoke, *State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs*, 15 J. BUS. & TECH. L. 235, 241–43 (2020); see also Lea Brilmayer, *A General Theory of Preemption: With Comments on State Decriminalization of Marijuana*, 58 B.C. L. REV. 895, 900–02 (2017).

preemption of state drug laws in its text,¹⁹⁹ and multiple courts have held that, in general, state cannabis legalization does not create conflict or impossibility preemption because such laws do not inhibit enforcement of federal law by the federal government.²⁰⁰ This also holds for state licensure and regulation regimes that directly recognize the legality and legitimacy of cannabis businesses that are unquestionably illegal under black-letter federal law.²⁰¹ However, in instances where state law creates an affirmative right to cannabis use in some manner, even for medical purposes, courts have been more willing to view this as triggering conflict preemption. For example, in the employment law context, state and federal courts have found that the CSA preempts state laws requiring employers to accommodate medical cannabis use²⁰² or to reimburse claims for medical cannabis under workers' compensation frameworks.²⁰³ It is likely that courts would similarly view mandatory accommodation by landlords as beyond what even a flexible reading of the CSA can bear. As the Maine Supreme Judicial Court explained, "a person's right to use medical marijuana cannot be converted into a sword that would require another party . . . to engage in conduct that would violate the CSA."²⁰⁴

IV. RECOMMENDATIONS

Taking into account the existing scientific evidence related to SHS, THS, aerosol-producing products, and the similarities between cannabis and tobacco products, broader coverage of smokefree MUH policies is logical and desirable to protect public health. Rather than voluntary, building-by-building policies, smokefree rules should be incorporated into local or state law to provide more comprehensive and equitable protection for MUH residents. However, a variety of factors, including the complicated legal status and fraught history of cannabis criminalization,

199. See 21 U.S.C. § 903.

200. See, e.g., *Hager v. M&K Constr.*, 247 A.3d 864, 886–87 (N.J. 2021) (holding that the CSA did not preempt New Jersey's medical cannabis law); see also *Reed-Kaliher v. Hoggatt*, 347 P.4d 136, 141–42 (Ariz. 2015) (holding that the CSA did not preempt Arizona's medical cannabis law); *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 536–541 (Mich. 2014) (holding that the CSA did not preempt Michigan's medical cannabis law).

201. See *White Mountain Health Ctr., Inc. v. Maricopa Cnty.*, 386 P.3d 416, 426–28 (Ariz. App. 2016).

202. See *Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus.*, 230 P.3d 518, 526–30 (Or. 2010); see also *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1229–30 (D.N.M. 2016).

203. See *Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10, 22 (Me. 2018). But see *M&K Constr.*, 247 A.3d at 888 (acknowledging departure from other states' rulings on federal preemption and holding that state workers' compensation orders could compel employers to reimburse medical cannabis costs).

204. *Twin Rivers Paper Co.*, 187 A.3d at 20.

caution that such laws should focus on non-punitive enforcement to avoid contributing to existing social inequities.

A. Broaden Definitions of “Smoking” in Smokefree Rules

1. Include All Combustible and Aerosol-Producing Products

Smoke passes easily through vents and walls, penetrating other homes in multiunit buildings and potentially exposing other residents to adverse health risks. Particles contained in smoke also accumulate on and in various surfaces, creating risks that linger long after active smoking has ceased. Similar particles and chemicals are also present in aerosol emissions produced by noncombustible methods of consumption, such as vaporizing and vaping. Due to the similarities, many modern definitions of “smoking” incorporate aerosolized emissions not only from common combustible tobacco products like cigarettes but also those from smoked cannabis and various electronic vaporizing and vaping devices for cannabis and tobacco products.²⁰⁵

Laws and policies to restrict cannabis smoking in MUH properties are legally justified by public health interests in the prevention of potentially harmful SHS exposure. Such restrictions are entirely compatible with commonplace restrictions on tobacco smoking, and the two should be merged for ease of administration and enforcement. This approach adopts the public health messaging that “smoke is smoke.” Smokefree policies and laws should include not only traditional combustible tobacco products but also combustible cannabis and all tobacco or cannabis products that produce potentially harmful aerosols.

Restrictions on cannabis vaping and related noncombustible products in MUH have less evidentiary basis due to the relative lack of studies of secondhand harms compared to combustible products. As well, aerosol-producing products likely present considerably less secondhand exposure risk to other tenants and are thus less likely to give rise to claims of nuisance or of breach of the warranties of habitability or quiet enjoyment. There is also no danger of smoke damage and little danger of fire damage (at least beyond that of any given electronic device capable of malfunction).

205. See, e.g., *Model Smokefree Lease Addendum*, AM. NONSMOKERS’ RTS. FOUND. § 2, <https://no-smoke.org/wp-content/uploads/pdf/model-smokefree-lease-addendum.pdf> [<https://perma.cc/R8JS-J7QT>] (last visited Aug. 26, 2021) (defining “Smoking” and “Electronic Smoking Device”); AM. SOC’Y OF HEATING, REFRIGERATING & AIR-CONDITIONING ENG’RS, *supra* note 31 (defining “environmental tobacco smoke”); see also N.Y. PUB. HEALTH L. § 1399-n(8) (McKinney 2021) (defining “smoking” for purposes of state smokefree air laws to include both cannabis and tobacco products).

However, emissions from such products may still pose unknown health risks to other residents. While likely less harmful than combustible products, aerosol-producing products still contain many of the same toxicants that may be capable of penetrating other units and accumulating on surfaces. There is evidence from at least one study that sidestream emissions from vaporized cannabis, for example, produce quantifiable levels of THC on nearby surfaces and objects.²⁰⁶ While that study did not investigate other chemical components,²⁰⁷ the presence of THC on the surfaces suggests that other emitted substances are also likely to attach to and perhaps accumulate in and on various surfaces. This pattern has been observed for tobacco THS, which creates a lingering source of harmful exposures for future residents.²⁰⁸ In the face of uncertain evidence regarding the potential harms of secondhand and thirdhand emissions, the burden should fall on the proponent of the activity to produce supportive evidence that such products do *not* present a significant risk of harm, particularly in light of existing direct evidence and evidence gleaned from similar products.

This framing adopts a limited version of the precautionary principle. At its weakest and most unobjectionable, this principle holds that the absence of scientific certainty regarding risk should not preclude regulation.²⁰⁹ Stronger and more controversial versions of the principle impose the burden of proof on those in favor of an action to demonstrate that it poses *no* substantial risks.²¹⁰ This Article does not proceed that far. There will undoubtedly be *some* risks, possibly even substantial ones, firmly established as the consequence of cannabis use in the near future, and some are already emerging. However, the presence of risks should not bar a product from commerce, even if its use and sale are deserving of substantial regulatory oversight. In the context of use in MUH, there may be a hypothetical point along the continuum of risk at which other tenants' exposure risks are low enough to permit the use of some forms of cannabis and tobacco products in rental units. Establishing that point requires considerable evidence, but it does not require that the risk be zero.

For now, however, given existing limited evidence and the general similarities of the products, it is appropriate to use public health best practices borrowed from tobacco control as the starting point for regulating

206. See generally Cristina Sempio et al., *Surface Detection of THC Attributable to Vaporizer Use in the Indoor Environment*, 9 SCI. REPS. 18587 (2019).

207. See *id.*

208. See Georg E. Matt et al., *supra* note 32.

209. See, e.g., Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PENN. L. REV. 1003, 1014–18 (2003).

210. See *id.*

the use of cannabis, aerosol-producing cannabis products, and tobacco products in MUH. With that in mind, owners' rights to protect their property and tenants' rights under the warranties of habitability and quiet enjoyment must trump any claims of a "right to smoke." Any such right, if it exists at all,²¹¹ must be grounded in general rights to privacy or bodily autonomy that do not justify behaviors that harm others.²¹² Critiques of smoking restrictions in MUH that focus on privacy or liberty interests within one's home²¹³ are reasonable in the desire to protect lawful activity from the prying eye of the state. However, such interests must be weighed against harms to those exposed to smoke and other emissions, particularly as those harmed are also in their own homes. In the close quarters of MUH, some rights must yield, and the claimed right to smoke should give way to the right to breathe clean air.

2. Exclude Products that Do Not Produce Aerosols

There is at least one important limitation on the recommendation to broaden the scope of smokefree rules. Smokefree rules should *not* include general prohibitions on all cannabis use, at least in jurisdictions where such use has been legalized under state law. Cannabis products that do not produce aerosols, such as edibles and tinctures, present no clear risks to other tenants, no obvious parallels to tobacco smoking, and no meaningful risk of damaging the unit. In a state where cannabis is legal for adult use, a lease term prohibiting cannabis consumption entirely would thus be similar to a term prohibiting alcohol consumption. Depending on state law, such terms may not be legally valid,²¹⁴ but, regardless of validity, they would be almost impossible to enforce in practice without violating the implied warranty of quiet enjoyment by entering a tenant's unit without notice in the absence of an emergency.²¹⁵ In jurisdictions where medical or recreational cannabis use is legal, tenants' privacy rights outweigh any

211. See generally, HUDSON B. KINGSTON, PUB. HEALTH L. CTR., THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE OR TOKE (2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/No-Constitutional-Right-Smoke-Toke-2019.pdf> [<https://perma.cc/U7Z3-ELBX>] (arguing that no such right exists).

212. See, e.g., Hernández et al., *supra* note 84, at 7–8.

213. See Dave Fagundes & Jessica L. Roberts, *Housing, Healthism, and the HUD Smoke-Free Policy*, 113 NW. U. L. REV. 917, 930–31 (2019) (critiquing HUD's tobacco smokefree policy through the lens of healthism, including health liberty interests).

214. With respect to cannabis specifically, total prohibitions on use might be legally enforceable due to federal prohibition. However, this is far from certain, as the vast majority of landlord-tenant disputes would be decided under state law.

215. It is worth noting that public housing authorities have certainly violated this right — and tenants' Fourth Amendment rights — as collaborators in the War on Drugs. See Silva, *supra* note 21, at 600. Cannabis legalization presents a new framework, but past abuses remain highly relevant.

remaining interests of property owners in preventing cannabis use as a general matter.

Non-inhaled cannabis products, such as edibles, are not yet well studied; consequently, little is known about their health effects as compared to smoked or aerosolized cannabis.²¹⁶ Even within the category of smoked cannabis, there is considerable variety in routes of administration — joint, blunt, pipe, waterpipe, bong, etc. — with little existing data on potential differences in effects or outcomes.²¹⁷ This implicates the same issues of regulating in an environment of scientific uncertainty as cannabis policymaking more generally. However, unlike combusted or vaporized cannabis, there is no obvious mechanism by which non-inhaled cannabis products would present secondhand or thirdhand exposure risks or risks of property damage.

At least one adult-use state has enshrined a similarly tailored approach in law but has left a significant gap. Massachusetts allows landlords to prohibit cannabis smoking but explicitly bars lease provisions that “prohibit a tenant from consuming marijuana *by means other than smoking* on or in property in which the tenant resides unless failing to do so would cause the landlord to violate a federal law or regulation.”²¹⁸ Superficially, this appropriately distinguishes between types of cannabis consumption, but the application of this provision to vaporized or other aerosol-producing cannabis products is unclear. There is no definition of “smoking” in either the statutes or regulations that provide Massachusetts’s adult-use cannabis framework.²¹⁹ Regulations for on-site cannabis consumption businesses mandate employee access to a “smoke-free, vapor-free area,”²²⁰ indicating that smoke and “vapor” are to be considered together. But the same section also refers to “vaporization or other nonsmoking forms of consumption involving heat,”²²¹ indicating vaporization of cannabis is not considered “smoking.” Further complicating matters, the regulations also require

216. See NASEM REPORT, *supra* note 17, at 9, 51–53.

217. See Joanna M. Streck et al., *Modes of Cannabis Use: A Secondary Analysis of an Intensive Longitudinal Natural History Study*, 98 ADDICTIVE BEHAVS. 106033, 106033–34 (2019).

218. MASS. GEN. LAWS ch. 94G, § 2(d)(1) (2021) (emphasis added); see also MASS. CANNABIS CONTROL COMM’N, CONSUMPTION OF MARIJUANA FOR ADULT USE (2018), <https://mass-cannabis-control.com/wp-content/uploads/2018/06/Fact-Sheet-Consumption.pdf> [<https://perma.cc/7M3M-VBUQ>]. The carve out regarding violation of federal law leaves public housing residents vulnerable but is likely necessary to avoid preemption, as discussed *supra* note 214.

219. See MASS. GEN. LAWS ch. 94G, § 1 (2021) (supplying other definitions but not for “smoking”); see also 935 MASS. CODE REGS. 500.002 (2021) (supplying other definitions but not for “smoking”).

220. 935 MASS. CODE REGS. 500.101(3)(i)(3)(b) (2021).

221. *Id.* 500.101(3)(i)(3).

consumption establishments to have “[p]rocedures to ensure that smoking as defined by [Massachusetts General Laws chapter 270, section 22] is prohibited indoors.”²²² The referenced state statute prohibits smoking in public places but refers only to tobacco products and not to cannabis. Yet the definition of “smoking” in that statute includes not only combustible products but also “the use of electronic cigarettes, electronic cigars, electronic pipes or other similar products that rely on vaporization or aerosolization.”²²³ In other words, Massachusetts appears to consider vaporizing *tobacco* to be “smoking” but may or may not consider vaporizing *cannabis* to be.

In contrast, a Model Smokefree Lease Addendum from smokefree air advocacy group Americans for Nonsmokers’ Rights Foundation (ANRF) provides a more comprehensive definition of “smoking” that appropriately and explicitly incorporates existing types of combustible and noncombustible aerosol-producing products while providing the necessary flexibility to account for novel types, as well.²²⁴ ANRF’s definition of “smoking” includes “inhaling, exhaling, burning, or carrying any lighted or heated . . . tobacco or plant product intended for inhalation, including hookahs and marijuana, whether natural or synthetic, in any manner or in any form.”²²⁵ The definition also includes electronic smoking devices that create an aerosol or vapor of any form, focusing on the emission and applying broadly to the category, rather than specifying product types likely to become rapidly outdated.²²⁶

One aspect arguably missing from the Model Smokefree Lease Addendum is an explicit discussion on non-aerosol-producing forms of cannabis (or tobacco) consumption. This is unsurprising, as the Model is focused specifically on smoking, albeit broadly defined. By implication, the Model Addendum would not affect a tenant’s ability to consume cannabis in forms that do not produce aerosols, provided that this is not disallowed under any other provision of the lease. However, cannabis consumption in other forms may still fall under the terms of other lease provisions targeting illegal or criminal conduct if those provisions do not distinguish between state and federal law. An explicit “right” to use any form of cannabis would also risk preemption by the CSA, so silence and implication may be the only viable options under current law.

222. *Id.* 500.101(3)(i)(6).

223. MASS. GEN. LAWS ch. 270, § 22 (2021).

224. *See Model Smokefree Lease Addendum*, *supra* note 205, at § 2.

225. *Id.*

226. *See id.* (defining “Electronic Smoking Device” to include “any such device, whether manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, e-hookah, or vape pen, or under any other product name or descriptor” (emphasis added)).

B. Enshrine Smokefree Protections in Law to Promote Equity

Most existing smokefree rules for MUH appear, where they exist at all, in lease agreements. As discussed above, MUH property owners are legally justified in mandating smokefree rules for their properties.²²⁷ However, such laudable efforts are inherently piecemeal and likely to produce inequitable results. Owners may be more likely to pursue such policies if their properties are in more affluent areas where tenants have more power and choice in where to rent, as compared to less affluent areas where tenants may have fewer viable options. MUH owners may also be more likely to add smokefree lease terms as an effort to improve a property and consequently increase potential rents, contributing to gentrification and the uneven distribution of the benefits of smokefree housing.

A more comprehensive and equitable solution, as others have suggested,²²⁸ is to impose smokefree MUH rules not only through lease agreements but also through local ordinance or state law. There is precedent for this approach. For public housing, such laws are already common. According to ANRF, as of July 2017, at least 585 municipalities partially or fully prohibited smoking in private units of public MUH buildings, including 432 that prohibited smoking in all units.²²⁹ Most of these restrictions appear in public housing authority policy, but a few dozen are in local ordinances.²³⁰ For private housing, legal smokefree mandates are far less common, but at least 67 California municipalities have enacted comprehensive smokefree MUH laws covering all existing and future buildings, whether public or privately owned.²³¹

Provisions regulating various aspects of MUH properties are commonplace in local regulation, as is the regulation of public smoking.²³² While MUH regulation is not an exclusively urban issue, it is certainly a key issue for urban jurisdictions, and they should take a lead role in advancing smokefree MUH rules. Renters have various rights under federal and state law, but local ordinances, particularly in urban jurisdictions, provide critical additional protections. For example, rent

227. See *supra* Section II.B.

228. See, e.g., TOY ET AL., *supra* note 94, at 7; *Smokefree Multi-Unit Housing Policies: Where Are We Now?*, AM. NONSMOKERS' RTS. FOUND., <https://no-smoke.org/smokefree-multi-unit-housing-policies-now/> [<https://perma.cc/ZCQ9-GGVF>] (last visited Oct. 29, 2021).

229. See *Smokefree Multi-Unit Housing Policies: Where Are We Now*, *supra* note 228.

230. See *id.*

231. *U.S. Laws for 100% Smokefree Multi-Unit Housing*, *supra* note 11.

232. See, e.g., *Municipalities with Local 100% Smokefree Laws*, AM. NONSMOKERS' RTS. FOUND. (Feb. 5, 2022), <https://no-smoke.org/wp-content/uploads/pdf/100ordlistabs.pdf> [<https://perma.cc/ZHX4-7HQJ>].

control or stabilization provisions, where they exist, are generally found in local laws.²³³ Rent control laws are concentrated in just a few states, but this still includes several major urban centers, including New York City, Los Angeles, San Francisco, Oakland, and Washington, D.C.²³⁴ A few states have now adopted statewide rent control laws, but this is in contrast to the far more common scenario in which states not only lack such protections in state law but also affirmatively preempt localities from adopting them.²³⁵

Enshrining smokefree MUH protections in law provides several benefits. First, such provisions would apply equally to all MUH residents, regardless of income or other characteristics that may otherwise vary considerably from building to building. This is a more equitable approach because it does not depend on individual property owners' decisions about whether or not to adopt smokefree rules. Smokefree housing benefits all residents, and the protections and public health gains from such policies should not be limited to those in higher-income communities.²³⁶ At the same time, enforcement should not be focused on lower-income communities, as this raises significant concerns about unnecessary and harmful surveillance of minoritized and other marginalized communities.²³⁷ Widespread adoption of smokefree MUH rules through law will help equalize distribution of the benefits and burdens of such rules.²³⁸

Second, local or statewide MUH smokefree laws offer a potential mechanism for tenants dealing with SHS intrusion to gain relief without needing to take actions that might threaten their own personal safety or housing security. Confronting a smoking neighbor may conceivably result in a physical altercation, and taking a neighbor or landlord to court entails a significant commitment of time, effort, and money. Moreover, even if legally successful, withholding rent from a landlord as part of a claim

233. See PRASANNA RAJASEKARAN, MARK TRESKON & SOLOMON GREENE, URB. INST., RENT CONTROL: WHAT DOES THE RESEARCH TELL US ABOUT THE EFFECTIVENESS OF LOCAL ACTION? 1 (2019), https://www.urban.org/sites/default/files/publication/99646/rent_control_what_does_the_research_tell_us_about_the_effectiveness_of_local_action_1.pdf [<https://perma.cc/RH4Z-SKYK>].

234. See *id.* at 3.

235. See Prasanna Rajasekaran, *Will New Statewide Rent Control Laws Decrease Housing Supply?*, URB. WIRE (Oct. 2, 2019), <https://www.urban.org/urban-wire/will-new-statewide-rent-control-laws-decrease-housing-supply> [<https://perma.cc/JK9X-R8XQ>]; see also RAJASEKARAN ET AL., *supra* note 233, at 3–4.

236. See Hernández et al., *supra* note 84, at 13.

237. See *id.*

238. As discussed *infra* Section IV.C, enforcement approaches must be cognizant of existing social inequities. In particular, enforcement in this context should avoid police involvement. See Hernández et al., *supra* note 84. Broader issues of policing and social equity are critically important but are beyond the scope of this Article.

related to breach of warranty of habitability or quiet enjoyment may sour the relationship, leading eventually to a later decision not to renew the tenant's lease or to other retaliatory action.

Using the law rather than a building-specific policy to achieve smokefree MUH also takes advantage of the broad popularity of smokefree protections. In a study of MUH owners and tenants in Los Angeles, both groups expressed support for a citywide smokefree law.²³⁹ Among MUH tenants, 86% preferred to live in a nonsmoking section of a building, and 80% preferred to live in a completely nonsmoking building.²⁴⁰ In terms of the scope of smokefree rules, 72% felt that smokefree rules should cover both tobacco and cannabis, and 48% felt e-cigarettes should also be included.²⁴¹ Among MUH owners, 69% reported having a voluntary smokefree policy of some type, with 90% of these covering tobacco, 75% including cannabis, and 62% reaching e-cigarettes.²⁴² Consistent with this Article's approach, that study's authors recommend a single, citywide smokefree MUH policy in order to protect all tenants without requiring changes to leases or contributing to gentrification.²⁴³

Other studies have produced similar findings. A survey of MUH residents in six diverse communities²⁴⁴ found that residents expressed strong preferences for smokefree housing rules.²⁴⁵ However, residents of subsidized MUH were less likely to report living in a smokefree building and had fewer alternative smokefree housing options available compared to market-rate MUH residents.²⁴⁶ In a nationally representative online survey, about three in four respondents favored prohibiting both smoking and e-cigarette use in MUH, a result that held regardless of whether respondents were MUH residents themselves.²⁴⁷ Even majorities of current smokers favored banning cigarette smoking in MUH, though this was not true of current e-cigarette users.²⁴⁸

239. See TOY ET AL., *supra* note 94, at 6–7. Many did, however, raise enforcement concerns, as discussed *infra* Section IV.C.

240. See TOY ET AL., *supra* note 94, at 5.

241. See *id.* at 5.

242. See *id.* at 5.

243. See *id.* at 7.

244. Communities included Bismarck and Grand Forks, North Dakota, Fort Collins and Pueblo, Colorado, and Charleston and Columbia, South Carolina. See Andrea S. Gentzke et al., *Attitudes and Experiences with Secondhand Smoke and Smoke-Free Policies Among Subsidized and Market-Rate Multiunit Housing Residents Living in Six Diverse Communities in the United States*, 27 TOBACCO CONTROL 194, 195 (2018).

245. See *id.* at 197–99.

246. See *id.* at 196–97.

247. See *id.* at 196–99.

248. See Minal Patel et al., *Policy Support for Smoke-Free and E-Cigarette Free Multiunit Housing*, 36 AM. J. HEALTH PROMOTION 106, 111 (2022).

Of course, actual adoption of smokefree MUH laws requires addressing a number of specific questions beyond the scope of this Article, including whether to create designated smoking areas, exempt existing leases (e.g., “grandfather” clauses), or allow mutual rescission on existing leases.²⁴⁹ Nevertheless, the advantages of transitioning from building-specific voluntary policies to smokefree protections enshrined in law remain significant.

C. Ensure Enforcement Is Non-Punitive

Smokefree and clean indoor air laws are among the most powerful tools for protecting people from SHS and for reducing smoking rates.²⁵⁰ Increased diffusion of smokefree policies offers the promise of reducing disparities in the population health burdens of tobacco, which remain higher among several historically marginalized groups.²⁵¹ A disproportionate benefit may accrue to these populations if smokefree laws and policies encourage them to quit smoking or discourage them from starting. However, at the same time, because these populations have higher tobacco smoking rates, such laws and policies could disproportionately *harm* them if the policies contribute to housing insecurity by causing unnecessary eviction.²⁵² For example, among the most salient criticisms of HUD’s smokefree policy for tobacco is that it may disproportionately harm vulnerable communities because it relies on lease enforcement actions up to and including eviction and gives considerable discretion to public housing authorities in selecting appropriate action.²⁵³ Potential differences in cannabis use prevalence, to the extent they exist,²⁵⁴ should be regarded similarly: if some populations have higher incidence of use, smokefree policies may be helpful to the extent they discourage use but harmful to the extent they foster eviction. Housing is a critical social determinant of health.²⁵⁵ Affordable housing is also a scarce resource, particularly for populations heavily impacted by the War on Drugs.²⁵⁶ It is therefore

249. See Roestenberg, *supra* note 118, at 96.

250. See Amy Y. Hafez et al., *Uneven Access to Smoke-Free Laws and Policies and Its Effect on Health Equity in the United States: 2000–2019*, 109 AM. J. PUB. HEALTH 1568, 1569, 1572 (2019).

251. See *id.* at 1570.

252. See Fagundes & Roberts, *supra* note 213, at 933–34.

253. See *id.* at 923.

254. See *supra* note 156.

255. See, e.g., Emily A. Benfer et al., *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL’Y, L., & ETHICS 122, 148–50 (2020).

256. See Silva, *supra* note 21, at 604–05.

crucial that enforcement of smokefree laws not rely on punitive remedies such as fines and eviction that jeopardize housing security.

Smokefree MUH laws must be enacted with awareness of the broader legal environment. In states that do not permit open, outdoor public cannabis consumption,²⁵⁷ there are significant risks that rigorous enforcement of prohibitions on use both in public and in MUH may have adverse and highly inequitable effects. Instead, enforcement should focus on education and collaborative options and avoid using punitive tools except as a last resort, if at all. Education and collaborative approaches, including referral to cessation services, are potentially effective on their own merits.²⁵⁸ Residents who currently smoke or vape cannabis or tobacco products may need time to adapt to new policies or assistance in accessing evidence-based and culturally appropriate cessation services.²⁵⁹ Given the nature of addiction, punishment is the wrong tool for the job in such cases.

Avoiding punitive approaches is also essential to earning resident support.²⁶⁰ Resident support and earned community trust are especially important due to the unseemly history of administrative cooperation and complicity in abuses carried out in the name of the War on Drugs, particularly within public housing.²⁶¹ In a series of 2017 focus groups with New York City public housing residents regarding HUD's then-new policy that comprehensively prohibited smoking in public housing, many residents expressed support for the goal of eliminating smoking in public housing but were justifiably skeptical of how the rule would be implemented.²⁶² They noted that existing smokefree policies and many other rules were poorly enforced and that they feared retaliation for filing complaints or confronting other residents.²⁶³ They cited the lack of available spaces where smoking would be permitted, given the close proximity of public

257. As of the writing of this Article, only New York and, to a limited extent, Connecticut, allow open, outdoor public cannabis consumption. See Orenstein, *supra* note 1, at 75–77.

258. See Nan Jiang et al., *Perceptions About the Federally Mandated Smoke-Free Housing Policy Among Residents Living in Public Housing in New York City*, 15 INT'L J. ENV'T RSCH. & PUB. HEALTH (Online Edition) 1, 4–8 (2018) (addressing primarily secondhand tobacco smoke but drawing multiple parallels to cannabis); see also Sangmo et al., *supra* note 96, at 674.

259. See Kristen E. Ortega & Holly Mata, *Our Homes, Our Health: Strategies, Insight, and Resources to Support Smoke-Free Multiunit Housing*, 21 HEALTH PROMOTION PRAC. 110S, 113S (2020).

260. See Ann C. Klassen et al., *Secondhand Smoke Exposure and Smoke-Free Policy in Philadelphia Public Housing 12* (Sept. 22, 2017) (published in 3 TOBACCO REGUL. SCI. 192 (2017)).

261. See Silva, *supra* note 21, at 593–600.

262. See Jiang et al., *supra* note 258, at 3.

263. See *id.* at 3.

housing buildings to one another in dense urban environments.²⁶⁴ They worried that property owners would use the policy as cover to inappropriately evict residents or that focus on the new policy would detract from core priorities like repairs, sanitation, and safety.²⁶⁵

All of those concerns are quite reasonable. But those residents also highlighted a key path to success, as they suggested that resident engagement, tailored informational campaigns, and offers of cessation services would be necessary for the policy to be effective.²⁶⁶ One resident offered a particularly insightful take: “They . . . have to speak with people . . . [because if] there is no cooperation from the tenants, there won’t be any result.”²⁶⁷ This is a crucial piece of the challenge — a successful smokefree MUH law must be enforced *with* the community, not *on* the community. Meaningful engagement, earned trust, and cultivation of existing and new community relationships are essential.²⁶⁸

This also speaks to the issue of *who* is responsible for enforcement. Relying on MUH owners and property managers may reduce uniformity, negating much of the benefit of enshrining smokefree protections in law rather than individual building policies and leases.²⁶⁹ Owner enforcement also risks enabling inappropriate wielding of the law to evict tenants for improper purposes, such as to enable rent increases.²⁷⁰ City or county enforcement offers uniformity but risks the involvement of law enforcement personnel, which should be avoided due to, among numerous other reasons, echoes of the profoundly inequitable history of cannabis prohibition and the War on Drugs. City enforcement through administrative citation and community justice approaches is potentially viable,²⁷¹ though the practical details of such methods are beyond the scope of this Article and, more importantly, will likely vary by community, whose involvement in the process is at the core.

The purpose of smokefree policies is not punishment but rather the creation and maintenance of a healthy home environment. As perfectly articulated by Kristen E. Ortega and Holly Mata, “[s]moke-free housing is never about getting people who smoke out of housing — it is about getting

264. *See id.* at 3–4.

265. *See id.* at 4.

266. *See id.* at 4–5.

267. *Id.* at 5.

268. *See* Nicole M. Kuiper et al., *State Tobacco Control Program Implementation Strategies for Smoke-Free Multiunit Housing*, 17 HEALTH PROMOTION PRAC. 836, 840–42 (2016).

269. *See* Ortega & Mata, *supra* note 259, at 113S.

270. *See* TOY ET AL., *supra* note 94, at 8.

271. *See id.* at 7–8.

the *smoke* out of housing.”²⁷² This is a key distinction between the inclusion of cannabis in smokefree MUH laws and the decisively punitive stance of the War on Drugs’ approach to cannabis and other substances, which thoroughly demonized disfavored behavior and then treated all who came into contact with the transgressor as guilty by association.²⁷³

Enforcement of smokefree MUH laws should proceed primarily through non-punitive methods, such as education and cessation assistance, rather than through fines or eviction. One concrete example of a graduated enforcement approach is the Public Health Law Center’s (PHLC) Model Smoke-Free Lease Addendum,²⁷⁴ which covers both tobacco and cannabis products.²⁷⁵ The PHLC Model specifies a five-tier approach that proceeds through two verbal warnings, a written warning, and a notice to vacate with an opportunity to remedy or cure that is accompanied by a provision of smoking cessation resources.²⁷⁶ Only a fifth violation can result in a notice to vacate without an option to remedy or cure, and that is discretionary²⁷⁷ and explicitly recommended only as a “last resort.”²⁷⁸ The PHLC Model also excludes punitive fines entirely, noting that they may contribute to housing instability for low-income residents and may not be legal in some jurisdictions or for certain types of housing, including public housing.²⁷⁹

Punitive approaches risk contributing to existing inequities, though they might be imposed for particularly egregious or repeated violations if circumstances warrant, as in the PHLC Model. Others have similarly highlighted the need for collaborative and non-punitive approaches.²⁸⁰ Smokefree policies and laws should be clearly defined and adequately explained to minimize confusion and pushback.²⁸¹ Residents should be given considerable notice to enable them to prepare for compliance without risking fine or eviction.²⁸² Once policies are implemented, residents should be provided with opportunities for easy, anonymous reporting of

272. Ortega & Mata, *supra* note 259, at 116S.

273. See Silva, *supra* note 21, at 590–91, 597–98, 600.

274. See PUB. HEALTH L. CTR., MODEL SMOKE-FREE LEASE ADDENDUM (2020), <https://www.publichealthlawcenter.org/sites/default/files/resources/PHLC-Model-Smoke-Free-Lease-Addendum.pdf> [<https://perma.cc/H3J2-N8KH>].

275. See *id.* at 2.

276. See *id.* at 4.

277. See *id.* at 4 (“The fifth violation *may* result in a 10-day notice to vacate without the option to remedy or cure.” (emphasis added)).

278. *Id.* at 5 (“If eviction is used as a penalty, it should be used only as a last resort.”).

279. See PUB. HEALTH L. CTR., *supra* note 29.

280. See, e.g., Cork, *supra* note 8, at 64–65; Ezra, *supra* note 28, at 186–88; Sangmo et al., *supra* note 96, at 674; Hernández et al., *supra* note 84, at 12–13.

281. See Ezra, *supra* note 28, at 187.

282. See *id.*

violations.²⁸³ Cessation support and educational outreach are also crucial,²⁸⁴ and the latter should focus on both resident awareness of policies and on the health risks of SHS.²⁸⁵ This should include emphasizing the impacts of SHS, as some persons may not be aware that smoking in their own unit poses risks to others.²⁸⁶ Additional strategies may also include providing “smoking shelters” on the property in order to provide an alternative location for use that protects other residents while avoiding burdens on smokers with physical impairments or who may be placed at increased risk from crime or other factors if required to move off-site to smoke.²⁸⁷ Smokefree enforcement should also be incorporated into more comprehensive attention to other healthy housing issues, including code enforcement, maintenance, and response to other resident concerns, rather than existing as a standalone focal point.²⁸⁸

Many individuals and families, particularly those with lower incomes, are already at risk of eviction due to financial insecurity. This issue was thrown into stark relief by the COVID-19 pandemic, which produced numerous layoffs, business closures, hours reductions, and other actions that reduced or eliminated income. Consequently, numerous tenants fell behind on rent payments. Temporary eviction moratoria issued initially by Congress and then extended by the CDC,²⁸⁹ coupled with similar actions by a handful of states, largely prevented massive waves of evictions. However, most of these protections are temporary, and, particularly in a rising housing market, large numbers of evictions stemming from the pandemic remain a distinct possibility as protections expire and beneficiaries struggle to cover back rent in light of delays in receiving promised rental assistance.²⁹⁰ These burdens fall more heavily on historically marginalized groups and low-income populations already subject to other inequities. Historically racially discriminatory housing

283. See Hernández et al., *supra* note 84, at 12.

284. See *id.*; see also Fagundes & Roberts, *supra* note 213, at 937.

285. See Hernández et al., *supra* note 84, at 12.

286. See *id.*

287. See Fagundes & Roberts, *supra* note 213, at 936–37.

288. See Hernández et al., *supra* note 84, at 13.

289. See Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S.Ct. 2485, 2486–88 (2021). On August 26, 2021, the Supreme Court vacated a stay on a District Court ruling striking down the CDC’s extension, holding in a per curiam opinion over three dissenting Justices that CDC likely lacked statutory authority to continue the moratorium in the absence of specific Congressional authorization, even accounting for the strong public interest in combating COVID-19. See *id.* at 2490.

290. See All Things Considered, *The National Eviction Freeze Is Expiring. What Happens Next?*, NPR (July 31, 2021, 4:52 PM), <https://www.npr.org/2021/07/31/1023243863/the-national- eviction-freeze-is-expiring-what-happens-next> [<https://perma.cc/BF8J-K8EK>] (detailing an interview with Emily Benfer).

laws, lack of affordable housing, wealth disparities, and other structural factors contributed to a greater risk of housing instability for persons of color even before the pandemic, which has further exacerbated disparities.²⁹¹

Given the history and intersecting concerns described above, it is critical that smokefree MUH laws not be enforced in ways that contribute to or exacerbate existing inequities. Law commonly and tragically plays a significant role in creating and reinforcing social conditions that contribute to poverty, economic inequity, and health disparities. Among numerous examples, federal law and policy supported “redlining” that advantaged white persons buying suburban homes while concentrating Black and other minoritized populations in racially segregated neighborhoods with less economic investment, fewer resources, more pollution and noise, and comparatively poor and overcrowded housing stock.²⁹² Authorities fail to adequately enforce local housing codes, yet the law enables evictions to be aggressively pursued against poor persons while failing to provide sufficient public housing, wage supports, or other forms of aid that might reduce inequality.²⁹³ Perhaps most importantly, across these and many other areas, “law has a legitimizing effect, leaving a stamp of approval on whatever social conditions it is supporting.”²⁹⁴ Smokefree housing laws are no magic bullet. They will not fundamentally affect most of the social conditions that contribute to and reinforce various persistent inequities. Such laws are, at best, only a small step in the direction of equity. Other, bigger changes are also sorely needed.

CONCLUSION

All persons have the right to breathe clean, smokefree air, especially in their homes. For those who live in multiunit housing, however, other tenants’ smoking or vaping can reach beyond the smoker’s private space or common area and intrude into other residents’ homes. Clean indoor air laws have been an ongoing battle in the tobacco control context for decades, and multiunit housing is the latest frontier in protecting the public’s health from secondhand and thirdhand smoke and other emissions. Cannabis legalization has created a natural synergy in this policy space due to the abundant similarities between cannabis smoke and tobacco smoke

291. See Benfer et al., *supra* note 255, at 22–23.

292. See Ruqaiyah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 J.L. & BIOSCIENCES 1, 7–8 (2020).

293. See David Ray Papke & Mary Elise Papke, *A Foe More than a Friend: Law and the Health of the American Urban Poor*, 44 FORDHAM URB. L.J. 1, 30 (2017).

294. *Id.*

and between novel aerosol-producing cannabis and tobacco products like vape pens and e-cigarettes.

While many landlords prohibit smoking in rental units for a variety of reasons and with substantial legal support, many of these rules do not currently extend to cannabis products. A modern definition of “smoking,” in contrast, should incorporate a wide variety of tobacco and cannabis products, including all types that produce aerosols. Moreover, these smokefree rules should be enshrined in law at the city, county, or state level to provide broader, more comprehensive, and more equitable protection to multiunit housing residents and remove the obstacle of fighting the battle for clean air building by building. Enforcement challenges abound, but an appropriate focus on collaborative, educational, and other non-punitive measures can effectively support implementation without exacerbating existing inequities in housing and other dimensions.