

# LAST PRISONER PROJECT

## Leveraging the Rescheduling of Cannabis for Criminal Legal Reform

In October of 2022, President Biden made a series of historic cannabis-related [executive actions](#), including initiating a review by the Department of Health and Human Services (HHS) and the Department of Justice on rescheduling cannabis under federal law. In August 2023, [HHS recommended rescheduling cannabis](#) from a Schedule I drug to a Schedule III drug and referred it to the Drug Enforcement Agency (DEA) for final approval. On April 20, 2024 the DEA announced their agreement with HHS' recommendation.

While the action could result in some favorable tax and banking reform for the cannabis industry and more dedicated research for cannabis patients, there are no changes in how the criminal legal system punishes cannabis users. Rescheduling is a peripheral change that signals the reevaluation of cannabis but not the release of cannabis prisoners or relief for those who continue to be burdened by the lasting consequences of the carceral system.

Full descheduling and removing cannabis from the Controlled Substances Act is the only way to end the vast majority of cannabis-related criminal sanctions. But neither rescheduling *nor* full descheduling would address the prior unjust arrests, convictions, and criminal sentences for cannabis-related offenses. This is a critical detail as mitigating future criminal penalties as a result of cannabis does not solve for the millions of individuals harmed by decades of past prohibition. It will be imperative that as the federal government seeks to downgrade cannabis's status from a Schedule I drug, advocates are pushing effective strategies for *retroactive* relief.

Federal cannabis reclassification, whether Schedule III or removed entirely from the CSA, will have no impact on past cannabis convictions, nor will it expand the President's limited power to redress these consequences. He has issued pardons, but that does little to remove the barriers associated with a criminal record, and currently, there is no federal expungement statute to address these convictions. Thus, the best potential avenues for relief, as expounded on below, include broadening the scope of Biden's cannabis clemency action, working with Congress and certain administrative agencies to both provide retroactive relief and to reduce prospective cannabis criminal enforcement, and incentivizing states to provide broad retroactive relief, particularly in states that have adopted a fully legal cannabis market.

### Potential Avenues for Relief

#### I. Standalone federal expungement legislation

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To address his campaign promise that no one should continue to suffer the collateral consequences of a cannabis conviction, President Biden utilized his executive clemency power to issue pardons for all federal (and District of Columbia) cannabis possession convictions in October 2022. These pardons were limited both in scope and impact. First, very few individuals (an estimated 6,000) have *federal possession* convictions for cannabis, as the vast majority of these charges are prosecuted at the state level. Second, the president excluded a potentially substantial category of offenses by [failing](#) to extend this relief to anyone not deemed a “lawful permanent resident.”

Along with being limited in scope, pardons as a mechanism for relief do not go as far as most forms of record clearance to address the myriad collateral consequences of a criminal conviction. While a pardon has the legal effect of nullifying and forgiving an individual for the conviction, they do not actually clear or expunge the criminal record, at least at the federal level. Relevant case law on the subject confirms that a presidential pardon relieves the offender of all punishments, penalties, and disabilities that flow directly from the conviction, and courts have held that a pardon precludes grounds for deportation and firearms disabilities, for example. Supreme court precedent on this issue also states that while a pardon may obviate the punishment for a federal crime, it does not erase the facts associated with the crime or preclude all collateral effects arising from those facts. (See *Nixon v. United States*, 506 U.S. 224, 232 (1993). Since a pardoned offense still appears on one’s criminal record, many of the most detrimental collateral consequences, including employment, access to housing, loans, etc., are not addressed through a presidential pardon.

In addition, pardons at both the state and federal levels do not create a permanent solution to the persistent problem that individuals with cannabis-related convictions encounter. Pardons, however well-intentioned, are often limited in their efficacy because they only grant relief to a group of individuals who represent a snapshot in time. President Biden’s marijuana pardon proclamation is limited to individuals with a charge “on or before the date of this proclamation [October 6, 2022].” In effect, individuals who acquired an otherwise eligible conviction on October 7, 2022, would not qualify for the relief granted by the pardon proclamation. Federal laws must change to make permanent the promise of a pardon and to create a framework for permanent and perpetual relief. Another benefit of this approach is that as public sentiment and the criminalization of substances change over time, this framework can be amended to include more offenses, thereby ensuring relief is not entirely contingent on the current presidential administration.

To truly fulfill his campaign promise, the President should urge Congress to pass a federal expungement statute that addresses federal possession offenses. While every current pending omnibus legalization package includes language providing for the expungement of cannabis-related offenses, the definition of cannabis-related offenses and their associated eligibility vary widely. There are also several pending bills to introduce general federal expungement language that have broad, bipartisan support. (And robust, state-initiated expungement laws have been passed with bipartisan support in states like California, Pennsylvania, Oklahoma, and Utah.) While cannabis legalization legislation continues to

stumble in Congress, two opportunities in the wake of rescheduling would be to create a unified definition of a cannabis-related offense that is as inclusive as possible and to push for standalone legislation to address full record clearance for cannabis-related offenses or possession offenses for a broader class of substances. (This seems politically feasible both because Biden's campaign language included an intent to provide relief for drug use and possession beyond just cannabis, but also because many of the previously introduced federal expungement bills are tied to low-level drug offenses beyond cannabis.)

## **II. Federal commutations for cannabis-related sentences**

It is also important to note that the presidential cannabis pardons did not effectuate release for anyone currently incarcerated, and the White House indicated that currently, there is no one incarcerated at the federal level for simple possession. The President can utilize his executive clemency power at any time, and full descheduling is not a prerequisite for the White House to implement broader clemency, including commutations for those currently serving cannabis-related sentences. We have worked extensively with the White House clemency counsel and the Office of the Pardon Attorney, and it is clear that "nonviolent drug offenders" are a category of potential clemency recipients in which there is already executive interest. If the administration were to move cannabis to a lower schedule, it would present another opportunity to push for commutations for those serving cannabis-related sentences. Our full plan for categorical clemency for those serving cannabis-related sentences at the federal level, including a draft executive order, can be found [here](#).

## **III. Prosecutorial discretion and guidance to DOJ**

Rescheduling cannabis to Schedule III, without further action from the President, would likely lead to some prosecutors and sentencing judges viewing cannabis-related activity as a lower priority when making charging and sentencing decisions, respectively. We have already seen this in practice simply because of the change in the legal status of cannabis at the state level. The most recent [federal sentencing data](#) shows that marijuana trafficking cases continued to decline in 2022. With the vast majority of states having some form of legal cannabis, it is clear that federal enforcement priorities have already shifted, and cannabis-related prosecutions have declined significantly over recent years. Reclassification of cannabis to a lower schedule would likely further entrench the deprioritization of cannabis-related prosecutions federally, and it would allow the administration to produce formal guidance to the DOJ with that directive. Of course, an administration change can always rescind this type of guidance. Still, in the absence of full descheduling, it would be a missed opportunity not to press the current White House to formalize this type of mandate for federal prosecutors.

## **IV. Recent USSC amendments**

Rescheduling would also be a helpful factor for federal defendants with cannabis-related sentences to apply for compassionate release, essentially the only post-conviction mechanism for a sentence reduction at the federal level apart from executive clemency. Already, a court

may consider “extraordinary and compelling” reasons to reduce a sentence when considering the factors under 18 U.S.C. § 3553, which provides an avenue to point to the change in the legal status of cannabis at the state level and shifting public opinion on cannabis use and consumption. In a recently enacted amendment, the Commission specifically clarified that when deciding on compassionate release motions, judges can consider whether “an intervening change in the law has produced a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed.” This amendment has the potential to be hugely advantageous for those filing for compassionate release for lengthy cannabis-related sentences, and the likelihood of success based on the reliance on this factor greatly increases if cannabis is moved to a lower schedule. (It is worth noting that the USSC also included recently added an [amendment](#) to specifically allow for a downward departure for prior cannabis convictions simply based on the change to cannabis’s legal status at the state level and the change in public policy regarding cannabis federally, signaling the agency’s willingness to take a progressive approach to cannabis-related sentences.)

#### **V. Ending technical violations for cannabis**

Although probation and parole occur at different junctures within the criminal legal system, they both impose a period of mandatory oversight by a combination of a judge, a parole board, and a probation/parole officer. When an individual is sentenced to probation or released on parole, they agree to abide by certain, specified conditions for a given period of time. Conditions of supervision that are common for individuals on probation and parole include reporting to supervisory officers, abiding by a curfew, and abstaining from drugs, including cannabis.

When an individual fails to comply with a condition of supervision, like testing positive for cannabis, they run the risk of having their probation or parole revoked. This means that individuals who test positive for cannabis can lose the ability to serve their sentence in the community and instead be assigned to a correctional facility. Given that individuals on probation or parole are subject to the rules imposed on them by county courts and individual probation officers, there is little uniformity in who, by law, is responsible for deciding whether to drug test—and possibly jail—those who test positive for cannabis. Some states, like Arizona, California, and Colorado, have recognized this disparity and have explicit laws that allow individuals on probation and parole with valid medical marijuana cards to consume for health reasons. However, because cannabis is still considered a Schedule I drug with no currently accepted medical use by law enforcement agencies at both the federal and state levels, most people on probation or parole are not allowed to consume cannabis even if it is otherwise legal.

Rescheduling cannabis to Schedule III provides a strong foundation to amend existing federal and state policies to ensure that the consumption of cannabis for valid medical reasons does not imperil an individual’s probationary or parolee status and to ensure there are no penalties for individuals who are serving a period of probation or parole that test positive for cannabis.

#### **VI. Incentivizing state-level action**

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Since the vast majority of cannabis-related convictions and terms of incarceration occur at the state level, the President had already encouraged state governors to utilize their clemency power to provide retroactive relief for cannabis offenders as a part of his October 6, 2022 proclamation. Rescheduling would give us another opportunity to incentivize states to provide mechanisms for retroactive relief for cannabis offenses under their purview. Despite widespread legalization at the state level, states largely fail to adopt these policies in impactful ways. You can read more about each state's current approach to achieving record clearance and resentencing for cannabis-related offenses in our [State of Cannabis Justice Report](#). The report clearly shows that in most states, there are mechanisms that could be effective at achieving these policy goals if there is an executive and legislative willingness to enact them—which could be incentivized if federal rescheduling is achieved.

Additionally, there is at least one state, Louisiana, that actually ties the criminal enforcement of cannabis to its status as a Schedule I drug under the CSA. So, in at least one state, the rescheduling of cannabis federally would have an impact by lessening or nullifying criminal penalties at the state level in Louisiana. Even in the states without an automatic change to criminal penalties, since a change to Schedule III would necessitate conforming changes to state-level markets and medical programs, it presents an opportunity to push these states to include criminal justice reforms in this legislation.

Though a federal cannabis policy truly grounded in evidence, public health, and justice would necessitate the removal of cannabis from the CSA, given the impending move to reclassify cannabis as Schedule III, we cannot let an imperfect policy solution deter us from seeking broad reforms that will do the most to benefit those impacted by decades of prohibition. Regardless of your stance on the administration's move, this is a moment of progress for the drug policy movement. The question will be, *how much* progress can we achieve in this moment if we push for the right reforms?

*For questions about this memo, please reach out to [info@lastprisonerproject.org](mailto:info@lastprisonerproject.org).*