



IN THE WEEDS: A DEEP DIVE ON CANNABIS & IMMIGRATION

How growing marijuana legalization efforts and an evolving legal landscape still leaves immigrants in unique danger

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On October 6, 2022, President Biden issued a pardon for all prior federal convictions for simple possession of marijuana, stating that **“sending people to prison for possessing marijuana has upended too many lives.”** In particular, he recognized that, despite similar rates of usage to their white counterparts, Black and Brown people are disproportionately targeted and punished for marijuana possession.

To address this, the President sought to “relieve the collateral consequences” stemming from marijuana convictions. When the President announced the pardons, he said that “no one should be in jail just for using or possessing marijuana.”

Unfortunately, however, this guiding sentiment did not extend to *all* individuals. Under existing law, immigrants remain vulnerable to deportation and remain at risk of having their applications for immigration status denied. This is despite **four-fifths of U.S. states now legalizing cannabis to some degree**; with 21 of them and the District of Columbia legalizing it for adult recreational use.



The following FAQ discusses the gaps in President Biden’s current plan, what a sitting President and other sectors of government can do to close them, and how federal drug laws pertaining to cannabis continue creating dangerous consequences for immigrants.

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WHAT DOES THE PRESIDENT'S PARDON OF FEDERAL CONVICTIONS FOR CANNABIS POSSESSION MEAN FOR IMMIGRANTS?

First, in the plain terms of his own proclamation, President Biden's pardon is limited to U.S. Citizens and lawful permanent residents: **"This pardon does not apply to individuals who were non-citizens not lawfully present in the United States at the time of their offense."** This on its face excludes thousands of refugees, asylees, survivors of trafficking and abuse, and undocumented immigrants.

Second, though some may argue that presidential pardons should erase all immigration consequences, these arguments have yet to be decided by courts. Further, courts have typically held that gubernatorial pardons erase *only a small subsection* of deportable offenses and do not eliminate the "controlled substance" ground of removability. This is the ground most often applied to lawful permanent residents (green card holders) with marijuana possession convictions.

None of this is meant to deter arguments that immigrants pardoned for marijuana convictions should no longer suffer immigration consequences. However, we can expect Immigration & Customs Enforcement (ICE) to argue that even lawful permanent residents pardoned under the October 6 proclamation are nevertheless still deportable for their pardoned marijuana convictions.

WHAT CAN THE PRESIDENT DO TO ELIMINATE THE IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION RELATED TO CANNABIS? WHAT ABOUT THE DEPARTMENT OF JUSTICE?




In his proclamation, President Biden **encouraged** all governors to pardon *state* marijuana possession offenses as well. Unfortunately for immigrants, state pardons will also be ineffective at eliminating the immigration consequences of crimes. If the President is truly committed to permitting people a second chance and undoing the harm caused by racist policing and prosecution of marijuana offenses, he would assert his legal power to help *all* people avoid the long-ranging consequences

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that can attach to even low-level marijuana offenses.

Immigration law falls within the authority of the Executive Branch (The President) and there are multiple meaningful and inclusive actions that a sitting President could take to undo the harm caused by racially biased marijuana prosecutions:

NOTE

FEDERAL LAWMAKING IN THE U.S. IS DETERMINED BY THREE SEPARATE BRANCHES OF GOVERNMENT IN ORDER TO PROVIDE “CHECKS & BALANCES” ON EACH OTHER’S POWER. THEY ARE THE **EXECUTIVE** BRANCH (THE PRESIDENT), THE **LEGISLATIVE** BRANCH (CONGRESS), AND THE **JUDICIAL** BRANCH (FEDERAL COURTS).

► **Recognize all record clearance**

as conclusively erasing a “conviction” for immigration purposes. Contrary to plain language, the Department of Homeland Security (DHS)—which oversees immigration enforcement agencies, like ICE—**currently takes the position** that only certain types of criminal record erasure works to eliminate the deportation consequences of crimes. This means that immigrants whose convictions have been sealed, dismissed, expunged, vacated, modified, or pardoned under state or even federal law are nevertheless still treated by DHS as having a “conviction” for immigration purposes. DHS essentially ignores or fights back against most state efforts to clear state records.

This thwarts the efforts of states to undo past harms and creates confusing and devastating impacts for immigrants who are deportable notwithstanding their records being cleared under state law. Under the previous presidential administration, the U.S. Attorney General, who leads the Department of Justice (DOJ), frequently issued binding precedential decisions about immigration issues. The current Attorney General could breathe some much-welcomed common sense into immigration law by issuing a similar precedential decision clarifying that all record clearance will be treated according to its intended plain

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language. Records cleared—be it by pardon, vacatur, expungement, dismissal, sealing, or any other remedy—under state or federal law should never form the basis for life long devastating immigration consequences.

- **Stop criminalizing people who work in the cannabis industry.** DHS deems immigrants who are lawfully employed in the legitimate, multi-billion-dollar cannabis industry, and paying state and federal income taxes on the employment, to be “drug traffickers” for immigration purposes—one of the most severe bars in immigration law. No civil or criminal penalties for “drug trafficking” fall on the executives of these corporations, or even any of the U.S. citizen employees; the only enforcement targets are immigrant workers. DHS must stop defending this destructive and illogical classification of non-citizen employees in the cannabis industry as drug traffickers.
- **Stop trying to elicit damaging “admissions” of marijuana use from immigrants.** In states where marijuana is legalized, DHS officials will aggressively question immigrants as to whether they ever have used marijuana, in order to elicit an “admission” of a federal offense. It is a federal crime to possess and use marijuana anywhere in the United States. Like the rest of us in states where marijuana is legalized, immigrants often assume it is legal to use marijuana. They are surrounded by billboards advertising cannabis, and they have no reason to think this is a federal offense. DHS has the authority to instruct officers to stop eliciting and using these admissions to deny immigration benefits.

WHAT IS “DE-SCHEDULING” AND HOW WOULD REMOVING MARIJUANA FROM THE FEDERAL SCHEDULE HELP IMMIGRANTS?

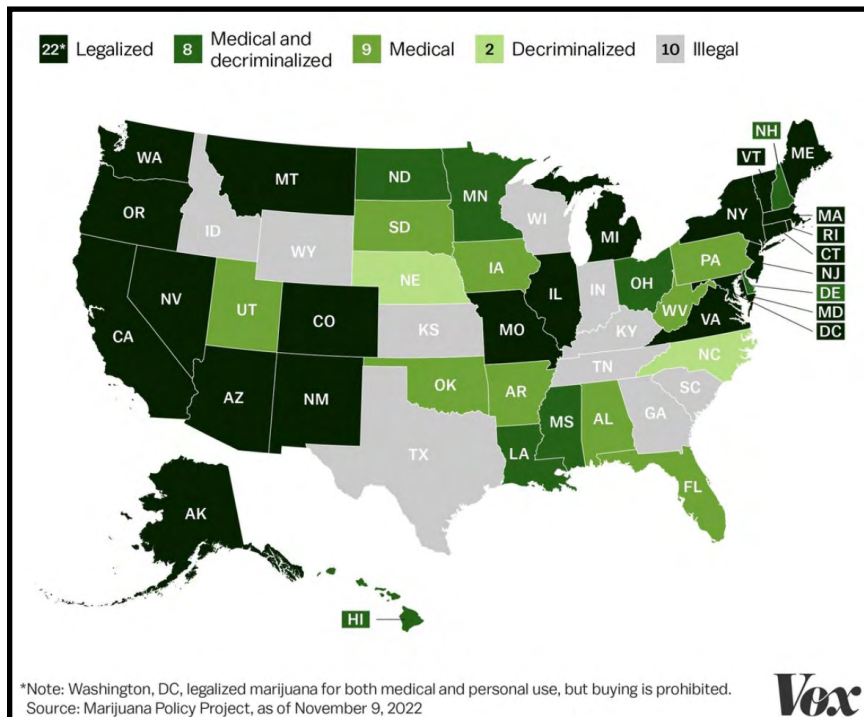
A drug “schedule” is the term used for the list of substances that a federal, state, tribal, or other government criminalizes. The federal drug schedule of the **Controlled Substances Act**, is the list of drugs that the federal government criminalizes. The federal government still criminalizes marijuana in every way: recreational, medical

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treatment, medical research, etc. In fact, marijuana is on “Schedule I,” the schedule for the most dangerous drugs, such as heroin and cocaine. The Biden administration can act to remove marijuana from the federal schedules entirely without an act of Congress. However, since President Biden has directed the Secretary of Health

& Human Services (HHS) to simply “reschedule” cannabis under a different level, it appears that the administration is not going to take this administration-led path.

Unfortunately, the federal drug schedule and criminal laws apply to immigrants even if they live in a state that does not criminalize marijuana in the same way. In 2005, the U.S. Supreme Court asserted that even if a person possesses marijuana legally under their state’s



PICTURED:

A MAP OF U.S. STATES, BASED ON THEIR CURRENT LEGAL RESTRICTIONS ON CANNABIS USE.

SOURCE: VOX.COM

law, they are still committing a federal offense. For immigration purposes, state law does not matter as long as marijuana remains on the federal schedules.

This is why, for example, if a non-citizen admits that they used marijuana—even for medical purposes, in their own home, under a doctor’s supervision, and legally under state law—they can be held to be “admitting” a federal drug offense. Again, it is a *federal* crime to possess marijuana, anywhere in the United States, period.

A critical step forward would be to “**de-schedule**” marijuana, which means to remove

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marijuana entirely from federal drug schedules. In order for a substance to be removed from the federal drug schedule either **1)** Congress must pass legislation or **2)** The administration must take several steps involving both the HHS and the DOJ working together using DOJ rule-making authority. If marijuana were de-scheduled, possession *would no longer be a crime for federal purposes*, including immigration.

Each state still would decide how to treat marijuana: whether to legalize or criminalize it. A non-citizen would not face immigration penalties for possessing marijuana in accordance with their state's laws or for legally working in the regulated cannabis industry. If an immigrant were convicted under a state marijuana law, they would face the state's penalties, but it would not be an immigration offense (because marijuana would no longer be on the federal schedules).

It is vital to remember that “de-scheduling” marijuana is very different from “rescheduling” it. If marijuana were simply “rescheduled” to a different, less serious list of federal controlled substances—for example, moved from Schedule I to Schedule III—*nothing would change for immigrants*. Marijuana would still be a federal controlled substance and all the same penalties would remain for immigration purposes. Unfortunately, the Biden administration currently appears to only be willing to explore rescheduling cannabis, rather than the more effective full de-scheduling.

ARE THERE ANY OTHER OPPORTUNITIES FOR CONGRESS TO MAKE A CHANGE?

Yes! There are many opportunities and pathways for our elected officials in Congress to remove the harms marijuana prohibition imposes on members of our community. This includes immigrants and people of color, generally; the latter of which are historically and disproportionately targeted by law enforcement. Because Congress comprises the Legislative Branch, it has the authority to pass bills that become and/or change federal law.

The Marijuana Opportunity Reinvestment and Expungement Act (MORE) Act, for

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example, is a bill that was reintroduced in 2021 and would de-schedule and decriminalize marijuana. It also includes specific language to make sure that immigration consequences of marijuana related conduct and convictions no longer render people inadmissible and deportable. While this bill has passed the House of

Representatives twice, it has not passed the Senate.

In July 2022, the Senate introduced a similar bill—the Cannabis Administration and Opportunity Act (CAOA)—that would also seek to de-schedule and decriminalize marijuana. Both bills are a step toward decriminalizing cannabis but vary on the costs and compromises offered to lawmakers.

NOTE



FOR A BILL TO BECOME LAW, IT WILL NEED TO PASS BOTH THE HOUSE AND THE SENATE BEFORE REACHING THE PRESIDENT'S DESK. AT THAT POINT, THE PRESIDENT CAN DECIDE TO SIGN THAT BILL INTO LAW OR ISSUE A VETO (AT WHICH POINT IT WOULD FAIL TO BECOME LAW).

The New Way Forward Act, too, was re-introduced in January 2021 and would remove all controlled substance offenses, including marijuana related offenses from the grounds of inadmissibility, or the reasons that a person could be denied an immigration benefit like legal permanent residence.

These bills do not presently have a clear path to passage and will likely encounter continued debate in both houses of Congress. With a new Congress recently taking office in 2023, there is an opportunity for these bills to be reconsidered under a new legislative configuration.

HOW SHOULD IMMIGRANTS APPROACH CANNABIS USE, BOTH MEDICAL AND RECREATIONAL?

Given the dangerous precedent of cannabis related convictions derailing crucial immigration steps for immigrants, the best starting point is to **exercise extreme**

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caution if you are a non-citizen. The simple and obvious action one can take to guarantee that marijuana will not impact their immigration journey is to refrain from marijuana use and employment in the cannabis industry, altogether. This is, we acknowledge, unfairly restrictive, especially as the country appears to be trending toward wider decriminalization of marijuana. So long as the criminal legal system and immigration law remain intertwined the way they are, however, non-citizens will remain uniquely at risk.

For those deciding to take part in cannabis use, here are a general few tips to minimize that risk:

- **Avoid employment in the cannabis industry.** According to the USCIS Policy Manual, employment in the industry is a bar to establishing “good moral character” required for naturalization, even if it is legal under state law. For example, a recent case even denied immigration benefits to an immigrant subcontractor who installed security cameras in a legal cannabusiness. Because immigration is governed by federal law, employment in this industry has also been interpreted as “unlawful activity”, which could be grounds for inadmissibility when entering or re-entering the U.S. These interpretations may further extend to applications for a green card.
- **If you have a medical need and there is no good substitute for medical cannabis, seek a legal consult first.** This will help to at least weigh your options against your risks. You may decide that your medical need is more important.
- **Never leave your home carrying:** marijuana, a medical marijuana card, paraphernalia (e.g., a pipe or cannabis vape pen), or accessories like marijuana branded apparel.
- **Do not save marijuana related photos on your phone or share any on social media.** With the growing surveillance apparatus of local and federal law enforcement, this content is best kept off the internet for now.



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- **Never discuss marijuana use or possession with any immigration or border official,** unless you receive expert legal advice that this is ok. If an officer presses you on it, say that you do not want to talk to them, and you want to speak to a lawyer. Remember, you always have the right to remain silent. Once you admit to anything, you cannot take it back.

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