

# LAST PRISONER PROJECT

## H.R 3617: The Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2021

### BILL TEXT

#### OVERVIEW:

The Marijuana Opportunity, Reinvestment and Expungement (MORE) Act of 2021 was reintroduced in the House of Representatives by Jerrod Nadler (D-NY) in May 2021. The legislation, which would see Congress remove marijuana from the Controlled Substances Act — thus removing most federal penalties for marijuana cultivation, distribution and possession — is most aptly described as a decriminalization bill, not a legalization effort. If the bill were to be signed into law, taxed and regulated adult-use cannabis sales would not automatically be permitted throughout the nation. Individual states would still have to opt-in to state-level decriminalization and/or regulated sales. State-regulated marketplaces would operate under coexisting federal and state regulation and taxation systems.

In addition to removing many federal penalties for cannabis possession and distribution, the MORE Act allows for the expungement/sealing of (some) federal cannabis-related convictions, and gives (some) individuals currently serving federal sentences related to cannabis the opportunity to have their sentences reviewed and potentially vacated. The bill also attempts to provide for reinvestment in individuals and communities adversely impacted by the War on Drugs by directing a portion of federal cannabis tax revenues to a community grant program that would fund job training, reentry services, health education, legal aid, literacy programs, youth recreation and mentoring programs, and health education programs.

#### OUTLOOK:

A slightly different version of the MORE Act passed the House in December 2020 by a vote of 228-164. It failed to advance in the then Republican-controlled Senate before the end of the 116th Congress in January. As of June 2021, it remains unclear whether or not Democrats (and their Republican allies) will try to advance the MORE Act, or put their efforts into the expected Senatorial effort during the 117th Congress.

#### ANALYSIS:

## THE GOOD:

- **Removes marihuana and tetrahydrocannabinols from the Controlled Substances Act.** This descheduling directive, which demands the Attorney General remove the substance no later than 180 days following the Act's passage, would remove many of the federal criminal penalties associated with cannabis cultivation, distribution and possession.
- **Establishes a definition of “individual adversely impacted by the War on Drugs”.** The MORE Act would consider an individual who (a) reports an income below 250% of the federal poverty level for at least 5 of the past 10 years, (b) has been arrested for or convicted of the sale, possession, use, manufacture, or cultivation of cannabis, and/or (c) whose parent, sibling, spouse, or child has been arrested for or convicted of such an offense.<sup>1</sup>
- **Restores access to federal public benefits.** The MORE Act would work to ensure that no person may be denied any federal public benefit on the basis of a conviction or adjudication of juvenile delinquency for a cannabis offense.
- **Prohibits cannabis-related events from denying individuals immigration-related benefits and protections.** The MORE Act would prohibit non-residents from being denied any benefit or protection under the immigration laws based on any event (including conduct, a finding, an admission, addiction or abuse, an arrest, a juvenile adjudication, or a conviction), relating to cannabis — regardless of whether the event occurred before, on, or after the effective date of the MORE Act.
- **Expunges certain federal cannabis-related convictions and/or adjudication of juvenile delinquency.** The MORE Act instructs the federal court system to issue an order expunging each arrest, conviction and/or adjudication of juvenile delinquency for “non-violent” federal cannabis offenses that occurred between May 1, 1971 and the day of the MORE Act's implementation. The Act gives federal courts one year post-passage to expunge these records, but for those seeking relief even earlier, it allows for eligible individuals (not serving a criminal sentence) to file a motion for expungement immediately after the passage of the bill. If the petitioner is indigent, they must be provided a court-appointed attorney to represent them during those proceedings. Furthermore, individuals who have had their arrests, convictions and/or adjudication of juvenile delinquency expunged via the process laid out in the MORE Act are entitled to treat the arrest, conviction, or adjudication as if it never occurred (and respond accordingly when asked or on legal documents).
- **Directs federal courts to notify individuals with expunged records of the expungement process, of their new status and restored rights, protections, and/or benefits.** The Act directs the federal court system to implement a program that would notify expungement recipients of their new status, as well as the effects of such expungement.
- **Seals expunged records.** The MORE Act directs the federal courts to seal all records related to a conviction or adjudication of juvenile delinquency that were expunged via the process set up in the legislation. According to the bill, such records may only be made available by further order of the court. This is a good thing (provided the

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<sup>1</sup> Except for a conviction involving distribution to a minor.

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individual in question is able to access to their own criminal history record, free of charge, without filing a petition), as there may be cases (i.e for background checks, immigration purposes, etc.) where the individual needs to prove they received the expungement. Without a clear mechanism by which individuals could petition the court for access, this leaves open the question as to whether federal agencies or other authorities could also petition the court for such records, undermining the intent of the expungement provision.

- **Incentivization of state-level expungement programs.** The MORE Act would allocate federal funds to states and localities who “develop and implement equitable cannabis licensing programs that minimize barriers to cannabis licensing and employment for individuals adversely impacted by the War on Drugs”. Eligible for said funding would be states and localities who (a) create automated, free-to-the-individual, processes for the expungement, destruction, or sealing of criminal records for cannabis offenses and/or (b) eliminate violations or other penalties for individuals under parole, probation, pre-trial, or other State or local criminal supervision for a cannabis offense.

### NEEDS IMPROVEMENT:

- **Eligibility criteria for automated expungement and resentencing process.** The Act does not enumerate the violations in the Federal penal code that would be considered “nonviolent Federal cannabis offenses” for the purposes of this expungement and/or resentencing process. It also disqualifies otherwise eligible individuals who received an aggravating role adjustment at sentencing in relation to a Federal cannabis offense from having their records expunged via the MORE Act’s automated expungement and/or resentencing processes.

While failing to clearly delineate which penal code violations would be eligible could theoretically lead to an expansive reading of eligibility, we know in practice this is highly unlikely, especially if such discretion is left to the federal sentencing court. More likely, this vague definition would lead to an exclusion of anyone who has a technically “violent” charge such as a weapons offense, even if weapons were never used in the commission of a crime or otherwise.

The Act also defines “Federal cannabis offense” as an offense no longer punishable pursuant to the Act or subsequent amendments made to the Act. This definition, however, would exclude the vast majority, if not all, individuals incarcerated federally for cannabis offenses, who have not just the underlying marijuana offense on their record, but ancillary charges inextricably linked to the marijuana offense that would not be made legal by the Act, such as money laundering or racketeering. If this were to be the case, a negligible portion of the federal prison population would be eligible for resentencing as we know that the vast majority of individuals incarcerated for federal drug offenses will receive additional charges at sentencing.

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Additionally, for automatic expungement to occur in an expeditious fashion, exact offense codes would need to be determined rather than needing to make eligibility determinations on a case by case basis.

- **Procedure for potential resentencing of individuals currently serving criminal sentences for “nonviolent” federal cannabis offenses.** The MORE Act directs federal courts to allow individuals currently serving criminal sentences for nonviolent federal cannabis offenses the opportunity to petition for a sentencing review. It also instructs the court to appoint counsel to indigent defendants. Not only does the legislation fail to define what penal code violations constitute “nonviolent federal cannabis offenses”, it does not clarify whether the review hearings are discretionary or compulsory — nor does it outline a process for determining when and how the motion should be brought by either the individual, the Director of the Bureau of Prisons, the attorney for the Government, or the court. The language does not provide guidelines to the federal judiciary on timeline, case considerations, presumptions, etc. To the extent practicable, those guidelines should ensure there is little—if any—prosecutorial or judicial discretion involved in the eligibility determination process for resentencing.
- **Creation and expansion of substance use disorder services.** The MORE Act would allocate funds to the Department of Health and Human Services to “administer substance use disorder services for individuals adversely impacted by the War on Drugs”. As written, individuals who have been arrested for or convicted of the sale, possession, use, manufacture, or cultivation of non-cannabis controlled substances (except for a conviction involving distribution to a minor) would be eligible for these services, ostensibly in lieu of a traditional criminal justice sentence. While this approach provides a pathway to mitigating the potential health risks of problematic substance use, diversionary programs have been known to poorly treat the underlying disorder while unjustly and unnecessarily prolonging the amount of time an individual is under a criminal justice sentence.
- **Allocation of cannabis tax revenues.** The MORE Act would allocate an unnecessary and disproportionate percentage of the dollars raised by federal cannabis tax revenues to law enforcement efforts. As written, 50% of the funds in the Opportunity Trust Fund would be directed to the Attorney General to “carry out section 3052(a) of part OO of the Omnibus Crime Control and Safe Streets Act of 1968.” An additional 10% would be directed to the Attorney General to carry out section 3052(b) of the same legislation.

### NOT ADDRESSED:

- **Compliance and oversight.** No oversight body is charged with monitoring judicial compliance with the timeline and implementation of the expungement and resentencing procedures laid out in the bill.
- **Data tracking/performance monitoring.** While the MORE Act gives the Comptroller General of the United States two years post-enactment to issue a demographic study

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of individuals convicted for federal cannabis offenses, [something about how other data metrics aren't being mandated for tracking/assigned to be monitored by an existing or new body]

- **Funding for expungement notification campaign.** While the Opportunity Trust Fund is directed to allocate some portion of its proceeds for “legal aid for civil and criminal cases, including expungement of cannabis convictions”, as written there is no funding *explicitly designated* to educate beneficiaries of the expungement proceedings about their restored status and its corresponding civil, legal and economic effects.