Why the Control Model Is Not Workable for Cannabis

Due to federal law, which criminalizes the possession, cultivation, and distribution of cannabis, states cannot implement a control model — whereby the state itself distributes cannabis. Requiring state workers to commit federal felonies creates obvious issues. In addition, federal law would preempt (or nullify) a control-model law if it were challenged in court.[1]

Over the years, several states have tried a "control" approach to medical cannabis — with the state itself growing and/or distributing cannabis in violation of federal law. Those laws have not resulted in workable programs, and they have subsequently been abandoned.

In September 2019 alone:

- Utah revised its medical marijuana law, which had provided that a state-run "central fill pharmacy" would distribute cannabis to county health departments to dispense to patients (this was in addition to private entities being licensed as dispensaries).[2] County attorneys had voiced concern that county employees could be federally prosecuted if they distributed cannabis. At the governor's request, the legislature met for a special session and revised the law to eliminate the state's direct role in distributing marijuana. (The Utah Legislature itself had created the ill-advised provision as part of a substitute to a 2018 voter initiative.)

- In spring 2019, New Mexico's House of Representatives narrowly approved a bill that provided for a "control" system for marijuana — which was necessary to gaining a few votes. The bill died in the Senate Finance Committee, and Gov. Michelle Lujan Grisham (D) appointed a working group charged with examining several issues surrounding legalization. Among them were, "Would state-run cannabis stores expose state workers and property to federal legal liability? If so, is the state willing to take on this risk?" While the official report has not yet been issued, the work group agreed against the control model at a September meeting.[3]

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[1] 21 U.S.C. 903 provides that it is not intended to preempt the field of drug unless "there is a positive conflict" between state and federal law "so that the two cannot consistently stand together." Courts have generally held that a state law is only preempted by the CSA if it is "physically impossible" to comply with both state and federal law or if the state law stands as an obstacle to the CSA. State laws that rely on state workers distributing and growing marijuana would be preempted, as it would be "physically impossible" for state workers to comply with the state law (requiring them to distribute cannabis) and federal law (prohibiting it).

[2] Morgan Smith, "Utah lawmakers approve changes to medical cannabis law," *Associated Press*, September 17, 2019 (available at https://www.orlandosentinel.com/sns-bc-ut--medical-marijuana-utah-20190916-story.html) and "UT

gov signs medical cannabis bill increasing dispensaries, licensing couriers," *Marijuana Business Daily*, September 24, 2019 (available at https://mjbizdaily.com/utah-governor-inks-medical-cannabis-bill-increasing-dispensaries-licensing-couriers/).

[3] Jens Erik Gould, "New Mexico governor task force opposes state-run pot stores, proposes licensing companies," *The Santa Fe New Mexican*, September 11, 2019.