

<p>DISTRICT COURT, MESA COUNTY</p> <p>125 N. Spruce Grand Junction, CO 81502</p> <hr/> <p>Plaintiff: PEOPLE OF THE STATE OF COLORADO,</p> <p style="text-align: center;">vs.</p> <p>Defendant: EUGENE CHRISTENSON.</p> <hr/>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case #: 14CR443</p> <p>Division #: 11</p> <p>Hon. Richard T. Gurley</p>
<p style="text-align: center;">ATTORNEY GENERAL’S RESPONSE TO DEFENDANT’S MOTION TO DECLARE § 18-18-406(2)(a)(I), C.R.S. (2014) UNCONSTITUTIONAL</p>	

The Office of the Attorney General, hereby responds to Defendant’s Motion to declare section 18-18-406(2)(a)(I) unconstitutional as follows:

INTRODUCTION

In interpreting a Constitutional Amendment, this Court begins with the language of the Amendment itself. And here, that is where the analysis ends, because there is no textual support for the defendant’s argument that Amendment 64 permits individuals over 21 to extract butane hash oil in their homes. The defendant’s argument that section 18-18-406 is unconstitutional as-applied rests on his contention that Amendment 64 authorizes personal processing of all forms of marijuana, including oil. But the Amendment’s

intent to exclude personal processing of butane hash oil is obvious from the text itself – the Amendment’s definition of “marijuana” expressly excludes “oil”.

Additionally, the text of the Amendment and its statutory backdrop establish that “processing” does not include extraction. It is well-established that voter-approved Constitutional Amendments are presumed to be framed within existing law. When the Amendment was passed, Colorado law defined “manufacturing” as including processing by extraction. As the defendant is charged with conduct relying on extraction, Amendment 64 does not authorize his conduct.

More fundamentally, nothing in the defendant’s motion diminishes the struggle between his proposed reading of Amendment 64 and its purpose. The only logical way to read the meaning of “process” is that it decriminalizes reasonable use that does not endanger the public. As the Blue Book made clear, the purpose of the Amendment was to allow for the responsible and safe use of marijuana. Under any serious view, reading Amendment 64 to decriminalize dangerous and unreasonable home manufacturing defies the form of reasonable and responsible behavior that the Amendment intended to allow.

APPLICABLE LEGAL STANDARDS AND STATUTORY AUTHORITY

A court reviews a constitutional provision *de novo*. *Danielson v. Dennis*, 139 P.3d 688, 690-91 (Colo. 2006). The constitutionality of a statute is also a question of law that is reviewed *de novo*. *Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007). A party challenging a statute’s validity bears the burden of proving that the statute is unconstitutional beyond a reasonable doubt. *See id.*; *People v. Black*, 915 P.2d 1257, 1261 (Colo. 1996); *see also People v. Dean*, 292 P.3d 1066, 1069-70 (Colo. App. 2012).

Section 18-18-406(2)(a)(1) makes it “unlawful for a person to knowingly process or manufacture any marijuana or marijuana concentrate or knowingly allow to be processed or manufactured on land owned, occupied, or controlled by him or her any marijuana or marijuana concentrate except as authorized pursuant to part 1 of article 42.5 of title 12, C.R.S., or part 2 of article 80 of title 27, C.R.S.”

ARGUMENT

A. The plain language of Amendment 64 specifically excludes marijuana oil.

“Our state ‘constitution derives its force . . . from the people who ratified it, and their understanding of it must control.’” *People v. Rodriguez*, 112 P.3d 693, 696 (Colo. 2005) (quoting *Alexander v. People*, 7 Colo. 155, 167, 2 P. 894, 900 (Colo. 1884)). A reviewing court discerns the voters’ intent “by examining the plain language of the constitutional provision at issue.” *Qwest Corp. v. Colo. Div. of Prop. Taxation*, 2013 CO 39, ¶33; *Bolt v. Arapahoe Cnty. Sch. Dist. No. Six*, 898 P.2d 525, 532 (Colo. 1995). Where a constitutional amendment contains “plain, clear language, [a court] does not resort to rules of construction to construe its meaning.” *Tivolino Teller House v. Fagan*, 926 P.2d 1208, 1211 (Colo. 1996); *Carrara Place, Ltd. v. Arapahoe County Bd. of Equalization*, 761 P.2d 197, 202 (Colo. 1988). Rather, when the language is plain, “constitutional provisions must be enforced as written.” *People v. Clendenin*, 232 P.3d 210, 213 (Colo. App. 2009).

Amendment 64’s provisions regarding personal use of marijuana allow for the “[p]ossessing, growing, processing, or transporting no more than six marijuana plants . . .” See Colo. Const. Art. XVIII, Sec. 16(3)(b). The defendant argues that “[t]he clear and unmistakable language of the Colorado Constitution is that it is legal in Colorado to process marijuana and marijuana concentrate and that such actions shall not be criminal offenses.” In his view, “[t]he prosecution is attempting to charge [him] with conduct that the Colorado Constitution declares shall not be a criminal offense.” But Amendment 64 provides its own definition of marijuana:

“Marijuana” or “marihuana” means all parts of the plant of the genus *cannabis* whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including marihuana concentrate. “Marijuana” or “marihuana” does not include industrial hemp, nor does it include fiber produced from the stalks, oil, or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other product.

Colo. Const. Art. XVIII, Sec. 16(2)(f).

The defendant's argument ignores that he is charged with processing or manufacturing butane hash oil. The Article XVIII, Sec. 16, definition of "marijuana" "does not include industrial hemp, nor does it include fiber produced from the stalks, *oil*, or cake made from the seeds of the plant" (emphasis added). The only natural reading of that provision is that oil is not included in the Amendment's definition of "marijuana".¹ As such, the personal use section of Amendment 64 authorizing the processing of "marijuana" does not decriminalize the processing of hash oil. *See, e.g., Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 35 (Colo. 2000) (in assessing the intent of the voters, a court looks to the language of the text and accord words their plain and ordinary meaning). The defendant's as-applied challenge should be rejected. *Tivolino Teller House v. Fagan*, 926 P.2d 1208, 1211 (Colo. 1996) (holding that where a constitutional amendment contains plain, clear language, a court does not resort to rules of construction to construe its meaning).

Although the defendant argues that hash oil is "marijuana concentrate", his contention is irreconcilable with the plain language of the Amendment. As our supreme court has made clear, a reviewing court must give "effect to every word and term contained therein, whenever possible." *Bd. of County Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1273 (Colo. 2001). Construing the general term of "marijuana concentrate" to include "oil" would make the provision excluding "oil" meaningless. Thus, the defendant's interpretation defeats the plain text because it eliminates a specific provision from the Amendment. *See Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205, 1208 (Colo. 2004) (recognizing that a court must "presume that each phrase of the constitution was included for a purpose.").

Regardless, "[i]n giving effect to a constitutional provision, [a reviewing court] employ[s] the same set of construction rules applicable to statutes." *Danielson v. Dennis*, 139 P.3d 688, 691 (Colo. 2006). Where there is an irreconcilable conflict in statutory language, specific provisions trump

¹ Reading "oil" as one of several independent stand-alone exclusions from the definition of marijuana as it is defined in the Amendment is the only viable reading of the sentence. Following the subordinating conjunction of "nor does it include", the sentence sets forth three independent clauses separated by commas. The three independent clauses do not modify each other; as fiber cannot be produced from oil or cake. Likewise, the phrase "from the seeds of the plants" cannot be read to modify the preceding two clauses because fiber cannot be made from the seeds of a plant. And to the extent the defendant intends to argue that the three clauses are referring to products made from industrial hemp, such a reading would be incorrect because it ignores that industrial hemp is set-off by its own subordinating conjunction of "does not include".

general provisions. *See, e.g., Colo. Mining Ass'n v. Bd. of County Comm'rs*, 199 P.3d 718, 733 (Colo. 2009). The Amendment's specific exclusion of "oil" overcomes its general inclusion of "marijuana concentrate". Amendment 64 does not authorize the extraction of hash oil and this Court should reject the defendant's constitutional challenge.

B. Under Colorado law, processing by extraction is included within the meaning of manufacturing and the Amendment does not authorize manufacturing for personal use.

The defendant's argument also fails on a separate and independent ground. The Amendment authorizes licensed marijuana-related facilities to "process" and "manufacture" marijuana. Accordingly, the terms must have distinct meanings. And unlike manufacturers, the Amendment's provisions regarding personal use allow for processing but not manufacturing.

Although the Amendment does not specifically define the terms "manufacture" and "process", a reviewing court presumes that a Constitutional Amendment is "adopted in the light and understanding of prior and existing laws and with reference to them." *Bickel v. City of Boulder*, 885 P.2d 215, 228-29 (Colo. 1994) (quoting *Carrara Place, Ltd. v. Arapahoe County Bd. of Equalization*, 761 P.2d 197, 202 (Colo. 1988)); *see also Common Sense Alliance v. Davidson*, 995 P.2d 748, 765 (Colo. 2000) ("The electorate, as well as the legislature, must be presumed to know the existing law at the time they amend or clarify that law") (internal citation omitted). In Colorado, before the Amendment was passed (and currently), Colorado law provided that in the context of controlled substances:

"Manufacture" means to produce, prepare, propagate, compound, convert or process a controlled substance, directly or indirectly, *by extraction from substances of natural origin, chemical synthesis, or a combination of extraction and chemical synthesis*

§ 18-18-102(17), C.R.S. (2014) (emphasis added); *see also* DONNELL R. CHRISTIAN, JR., FORENSIC INVESTIGATION OF CLANDESTINE LABORATORIES, §1.2.1 (CRC Press 2005) (discussing how "extraction" manufacturing produces hash oil "by removing the resin from the leaves through the use of solvent extraction").

Under Colorado law, therefore, “manufacture” in the context of drug offenses includes processing “by extraction”. As such, “process” necessarily does not include processing by extraction. Instead, it covers all process except those by extraction. Had the amendment’s authors intended to define “manufacture” and “process” to provide for definitions different than existing law, they would have said so. *See Clendenin*, 232 P.3d at 214 (refusing to create a new definition for “primary care-giver” because, had the authors intended to “define a primary care-giver as someone who had significant responsibility for managing the ‘medical use’ of marijuana by a patient with a debilitating condition,” they “could have done so”); *cf. In re Interrogatories Relating to the Great Outdoors Colorado Trust Fund*, 913 P.2d 533, 540 (Colo. 1996) (intent of initiative proponents not adequately expressed in language of the measure will not govern court’s interpretation of the amendment).

In this case, the defendant is charged with *extracting* hash oil from the plant material. Therefore, he engaged in “manufacturing” and not “processing”. As the personal use provision in the Constitution that he relies on does not allow for personal “manufacturing”, *see* Colo. Const. Art. XVIII, Sec. 16(3)(b), his as-applied challenge fails.

C. The defendant’s interpretation is irreconcilable with the intent behind Amendment 64.

The defendant’s argument is not only at odds with the language of the Amendment, but also with its intent. “When construing a constitutional amendment courts must ascertain and give effect to the intent of the electorate adopting the amendment.” *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996) (citation omitted). To that end, courts “may look to the explanatory publication of the Legislative Council of the Colorado General Assembly, otherwise known as the Blue Book. While not binding, the Blue Book provides important insight into the electorate’s understanding of the amendment when it was passed and also shows the public’s intentions in adopting the amendment.” *Grossman v. Dean*, 80 P.3d 952, 962 (Colo. App. 2003).

Significantly, it bears emphasis that the Blue Book does not provide that the Amendment would legalize hash oil or even mention oil. Rather, the Blue Book provides that it would allow individuals who are 21 years old or older to process up to six marijuana plants “with certain restrictions” (Appx. 1, p. 1).

In explaining the arguments in support of passing the Amendment, the Blue Book provided that the Amendment would require “health and safety standards for marijuana manufacturing.” App. 1, p. 3. In addition, the Blue Book necessarily suggested that it advocated for safe and responsible use to further its intent of “send[ing] a message to the federal government and other states that marijuana should be legal and regulated” App. 1, p. 5.

Here, the defendant agrees that his actions resulted in an explosion, injuries, damage, and “potentially put[] others in danger.” He nevertheless insists that the voters created a constitutional right protecting butane-fueled explosions in kitchens and garages throughout the state. However, this Court should reject the defendant’s interpretation because the voters would not have understood the Amendment to authorize such irresponsible and dangerous use. *See Rodriguez*, 112 P.3d at 696 (recognizing that in interpreting the Constitution, a court must consider whether an interpretation leads to absurd results); *cf., e.g., Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004) (rejecting a defendant’s proposed statutory interpretation, in part, because it would lead to an illogical or absurd result).

CONCLUSION

WHEREFORE, the Attorney General respectfully requests that this Court deny Defendant’s Motion to Declare § 18-18-406(2)(a)(I) Unconstitutional as-applied to his manufacturing of butane hash oil.

Respectfully submitted this 18th day of December, 2014.

JOHN W. SUTHERS
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/s/ John T. Lee

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the **ATTORNEY GENERAL'S RESPONSE TO DEFENDANT'S MOTION TO DECLARE § 18-18-406(2)(a)(I), C.R.S. (2014) UNCONSTITUTIONAL** by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado this 18th day of December, 2014 addressed as follows:

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