



## Oregon Judicial Department

TWENTY-FOURTH JUDICIAL DISTRICT

Robert S. Raschio, Presiding Judge

---

January 3, 2023

Tyler Smith & Associates, P.C.  
Attn: Tyler Smith & Tony L Aiello, Jr  
181 N. Grant Street, Suite 212  
Canby, OR 97013

Oregon Department of Justice  
Attn: Sr. A.G. Brian Marshall  
1162 Court St. NE  
Salem, OR 97301

Markwitz Herbold PC  
Attn: Harry Wilson  
Special Assistant Attorneys General  
145 SW Broadway, Suite 1900  
Portland, OR 97201

Re: Background Check Component Severability: Joseph Arnold, Cliff Asmussen, et al, Plaintiffs v. Kate Brown, Governor of the State of Oregon, et al, Defendants, Harney County Circuit Court case #22CV41008

Parties:

The court has considered the arguments of the parties regarding severing the background check portion of Ballot Measure 114 from the current temporary restraining order (TRO) on a permit-to-purchase program the defendants are not able to deploy at this time.

The argument was raised for the first time at the second hearing on the measure. The court held a timely third hearing to consider the arguments of the parties.

Verified Correct Copy of Original 1/3/2023.

The language the defendants urge the court to use to sever is inexorably linked with the permit-to-purchase program. To find otherwise requires the court to ignore the operative language linking each provision on background checks to the permit-to-purchase program. The court would be separating sentences at commas and considering the phrase "permit holder" surplusage. It is not surplusage. The court declines the defendants' invitation to do so at this preliminary stage.

Further, only if the court holds the permit-to-purchase program unconstitutional will it consider severing the background checks pursuant to section 12 of Ballot Measure 114, which reads, in part, if "any provision of this 2022 Act or its applications to any person or circumstance is held invalid", then the court determines if other portions of the law survive. Since the court has not held "unconstitutionality, invalidity or ineffectiveness of any one of its articles, sections, subsections, sentences or clauses", severability is not triggered by that language or under the operative caselaw. See Bernstein Bros., Inc. v. Department of Revenue, 294 Or 614, 618 (1983) ("However, if [the provision] is in fact constitutional, there would be no reason to address severability. When a party contends the entire act is unconstitutional, as here, severability is not germane until the constitutional claim itself is resolved. See Standard Lbr. Co. v. Pierce et al., 112 Or. 314, 228 P. 812 (1924)").

The court declines to remove the background check provisions from the TRO as the provisions are intertwined with the permit-to-purchase program and the court has made no final determination on constitutionality of the program. The court will address severability only if it finds the permit-to-purchase program unconstitutional at a final declaratory and injunctive hearing on the merits of the complaint.

So Ordered, 1/3/2023 11:21:40 AM



---

Robert S. Raschio, Circuit Court Judge  
24<sup>th</sup> Judicial District (Grant/Harney)  
Presiding Judge