



OREGON STATE SENATE
900 COURT ST NE
SALEM, OR 97301

Oregon Law Commission Project Proposal

TO: Oregon Law Commission
FROM: Senator Doug Whitsett
DATE: April 21, 2014
RE: Proposal for Work Group on Standing Modernization

Senator Whitsett requests that the Oregon Law Commission's Program Committee recommend to the full Commission the formation of a Work Group to consider fixing defects in Oregon's laws on standing. This is an important and complicated issue that would greatly benefit from the nonpartisan expertise of the Commission. The goal of this Work Group will be to propose recommendations to the 2015 legislature.

I. Problem

Oregon has a strong history of robust, direct democracy through the initiative process codified in Article IV, Section 1 of the Oregon Constitution. On numerous occasions, the people of Oregon have turned to the initiative process to fix a perceived failure by Oregon's elected officials on issues ranging from medical marijuana to land use. Unfortunately, current law risks depriving the people of Oregon from the opportunity to defend initiatives in court and may prevent the Oregon Supreme Court from ruling on important constitutional issues.

Each state has the power to give standing to any person for purposes of intervention in state courts to represent state interests. *Hollingsworth*, 133 S. Ct. at 2664, 2267. As such, numerous state statutes allow some form of legislative standing. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-1841; Okla. St. tit. 12, § 2024(D)(2); Tex. Gov't Code § 301.061; N. Car. G.S. § 1-72.2; Cal. Gov't Code § 10246; Wash. Rev. Code § 43.10.045; Ga. Code Ann. § 28-4-3(c)(4); Utah Code Ann. § 63G-7-901(3)(a); Nev. Rev. Stat. § 218F.720. Several other state statutes explicitly allow gubernatorial standing. *See, e.g.*, Ark. Code Ann. § 25-16-702(2)(c); Colo. Rev. Stat. § 24-31-101(1)(e); Kan. Stat. Ann. § 75-108. Also, Arizona gives initiative proponents standing to defend an initiative if it is challenged in state court. Ariz. Rev. Stat. Ann. § 12-921.¹

The Oregon Legislature may grant any citizen standing in state court cases. *Kellas v. Department of Corrections*, 341 Or. 471 (2006). Under ORCP 33(B), any person may intervene in an action if a statute, rule, or common law confers a right to intervene. Currently, Oregon

¹ The Supreme Courts of California, Montana, and Alaska have also given standing to initiative proponents. *Perry v. Brown*, 52 Cal. 4th 1116, 1165 (2011); *Sportsmen for I-143 v. Fifteenth Judicial Court*, 40 P.3d 400 (Mont. 2002); *Alaskans for a Common Language v. Kritz*, 3 P.3d 906 (Alaska 2000).

statutes assign the primary duty to defend state law to the Attorney General. ORS 180.060(1)(a). However, the Governor may also direct the Attorney General to defend a state law. ORS 180.060(1)(b). Further, there is some ambiguity whether ORS 173.135 gives the Legislative Counsel Committee standing to intervene in defense of a state law on behalf of the Legislature.

In federal court, only elected officials acting in their statutorily defined official capacity have standing to represent the state. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013). It is unclear whether ORS 180.060(1)(b) or ORS 173.135 give the governor or legislature standing in federal court.

Oregon statutes would benefit from clarification as to the precise duties of the Attorney General under ORS Chapter 180 and whether ORS 180.060(1)(a) or ORS 173.135 give the governor or legislature standing in all or some cases. In light of the differences between state and federal standing requirements, multiple alternative standing provisions may be needed to protect state interests in both state and federal court.

Most importantly, Oregon's lack of a clear statutory provision giving initiative proponents standing to defend their initiative in state court sets up the awkward situation whereby an initiative may be prompted by the refusal of state officials to act but then be overturned due to the inaction of the very officials who prompted the initiative in the first place. Lack of standing to appeal for initiative sponsors could deprive the Oregon Supreme Court from the opportunity to decide critical legal issues relating to the meaning of Oregon's Constitution. Oregon's legislative and executive branch should not have the power to effectively trump review by the Oregon Supreme Court by declining to defend an initiative. Only the justices of the Oregon Supreme Court are specifically elected by the people to make the final decision as to the constitutionality of a state law. The laws governing standing in state courts should promote this policy, especially in the case of initiatives approved by the people of Oregon.

II. History of Reform Efforts

Senator Whitsett is not aware of any prior effort to fix the problem of standing for initiative proponents and would prefer that the Commission fully vet alternative proposals prior to legislative consideration.

III. Scope of Project

The Commission should examine ORS 173.135 (Legislative Counsel Committee), ORS Chapter 180 (Attorney General), ORCP 33(B) (general standing), and Art. IV, Section 1 of the Oregon Constitution (initiative rights) to determine what rules, statutes, or constitutional changes are needed to clarify and fully protect standing for state officials and initiative proponents. In order to balance the different federal and state constitutional standing requirements, the Commission should specifically study whether individual legislators and chief petitioners should have standing in some cases and whether they should be responsible for the cost of such litigation. However, to avoid unnecessary entanglement in current political debates or personalities, Senator Whitsett recommends that any change in standing rules only apply to court cases filed after January 1, 2017 when the next Legislative and Attorney General terms begin.

IV. Law Commission Involvement

Ensuring that all Oregon laws receive comprehensive scrutiny when challenged in court is in the best interest of the state, all three branches of state government, and the people of Oregon. This request is consistent with the Commission's central mandate in ORS 173.338(1)(a) and (c). The Commission's statutory mission makes it uniquely positioned as a structured, non-partisan forum that brings together the public and private bars, the courts, stakeholders, and academic representatives to build a consensus in the public interest when reforms are necessary. On an issue of this magnitude that involves the procedure in judicial decisions that intimately affect the lives of many Oregonians, the Commission's leadership is essential to a discussion that focuses on the long-term needs of the state rather than temporary partisan or political whims.

V. Project Participants

The Work Group should include a broad range of legal and legislative perspectives, as well as public involvement. Potential Work Group members could include representatives of the Governor, the Attorney General, the Legislature, the Judiciary, the Council on Court Procedures, the Constitutional Law and Appellate Sections of the Oregon State Bar, law professors, and others.