DRAFT
Standing Modernization Work Group

ESTABLISHING PROCESSES FOR EFFECTIVE JUDICIAL REVIEW OF ENACTED INITIATIVES

Prepared by Prof. Jeffrey C. Dobbins
Willamette University College of Law

From the Offices of the Executive Director
Jeffrey C. Dobbins
and
Interim Deputy Director
Philip Schradle

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I. Introduction and Summary of Legislation

Plaintiffs may bring legal challenges to the validity of state laws or Constitutional provisions in either federal or state court. Under existing law, the Attorney General (AG) is the state official tasked with responsibility for appearing as counsel for the state in those lawsuits, see ORS 180.060, and therefore the state official primarily responsible for defending state laws against legal or constitutional challenges.

On rare occasions, however, the AG may choose not to defend the validity of state law. In these circumstances, courts could be left to decide the validity of state law without having the benefit of an advocate defending its legal or constitutional basis. This kind of one-sided advocacy is inconsistent with the usual model of judicial decisionmaking, and – at least with respect to enacted initiative petitions – it risks circumventing the initiative process altogether. Because the initiative process exists, in part, to allow voters to bypass reluctant elected officials, it seems somewhat inconsistent with the purposes of that process to allow a "non-defense" decision by one of those elected officials to potentially undermine an enacted initiative.

This is not to say that laws cannot be defended by parties other than the AG. In both federal and state trial courts, entities who tangibly benefit from enforcement of the law (or who would be specifically harmed if it were to be struck down) may be able to participate in litigation as a co-party, an *amicus*, or an intervenor in order to advocate for the validity of that law. Occasionally, however, it will be difficult to identify individuals who have anything other than a theoretical interest in the validity of state law. Consider, for instance, the Chief Petitioners of an initiative: While they may be particularly interested in the validity of their enacted initiative, the courts generally view these individuals as having no more interest in the validity of that law than any other elector of the state. This kind of "generalized" interest in the validity of state law is usually seen as being held by – and exercised only by – statewide elected officials, rather than by individual members of the public. When the AG declines to defend an enacted initiative in this situation, the courts may conclude that *no one* has "standing" to defend the law.

It is this circumstance on which the Standing Modernization Work Group ("Work Group") was directed to focus. After five meetings, the Work Group members coalesced around a proposal that would permit defense of state law by enacted initiative in nearly all circumstances. While some members remain skeptical about the need for and utility of mechanisms to permit defense of state law when the AG declines to defend, the majority of the members concluded that a narrowly-crafted solution that would ensure at least one vigorous defense of enacted initiatives was justified to give full effect to the initiative process and to ensure that courts reviewing enacted initiatives have the benefit of vigorous advocacy on all sides before determining whether such a law is valid.

As for the legislation itself, it specifies that it only applies to direct facial challenges to enacted initiatives that are brought within 10 years of enactment. The AG is required to provide notice to any court hearing one of these cases if the AG declines to

defend the validity of the enacted initiative, and to send copies of that notice to Chief Petitioners and specified state officials.

In state court proceedings, the proposed legislation makes clear that Chief Petitioners have a statutory right to intervene to defend the enacted initiative if the AG has decided not to defend. Generally speaking, Oregon courts are more flexible on the kind of interests that can be recognized to allow parties to participate in litigation of this sort, and they have indicated that the Oregon Legislature has significant control over standing rules in the state courts. This "right to intervene" for Chief Petitioners should be sufficient to permit defense of state law under almost any circumstances.

The more complicated problem is presented by federal court litigation, because the standing rules – the principles that govern *who* may represent certain interests in federal court – are much stricter under the Federal Constitution than under the Oregon Constitution. The proposed legislation cannot, therefore, rely solely on a right to intervene in federal court because the state has no real control over who has an interest sufficient to permit them to participate in the federal court proceeding. That said, intervention or other participation by interested parties would be the preferred course, and the proposed legislation would require specified parties, including Chief Petitioners, to make an (unsuccessful) effort to intervene before being able to trigger the more significant steps that follow.

If, in fact, no party remains in federal court to defend the validity of the enacted initiative, and if an individual or entity has requested and been denied intervention by the federal court, the legislation permits that party to ask the AG to appoint a private member of the bar as a Special AAG for the sole purpose of defending the enacted initiative in federal court. The proposed legislation circumscribes the scope of this Special AAG's responsibility, and permits the AG to retain control over the Special AAG in the event of significant misbehavior. Finally, the legislation provides that while the Special AAG's costs are to be covered by the state, the state would not – except in particular circumstances – be responsible for any monetary awards or attorney fees assessed against the state as a result of the work of the Special AAG. Rather, the Chief Petitioners would be required to post a bond that would cover the amount of any likely assessments against the state before the Special AAG is appointed. The state would be responsible for these costs only if a state official seeks appointment of the Special AAG.

The Work Group anticipates that the legislation set forth in the -1 amendments to HB2364 will need to be used only rarely; generally speaking, the AG defends almost every enacted law, and a decision not to defend is very unusual. Because it can happen, though, and often does so in high profile situations, the Law Commission believes that having this process in place will help limit confusion when this situation arises in the future, and will ensure that any enacted initiative receives a full hearing before at least one judge before any final decisions are made about the validity of the enactment under state or federal law.

II. History of the Project and Work Group

A. History of Proposal to the Law Commission and Work Group

In 2014, Senator Doug Whitsett sent to the Oregon Law Commission (OLC) a request to consider who would have standing to defend a state law in the event that the AG declined to defend the validity of that law. The proposal was particularly concerned about the circumstance in which an initiative proposal was adopted by a majority of the electors of the state (presumably under circumstances in which state officials had failed to take affirmative steps to address the relevant problem), but where the AG subsequently failed to defend an enacted initiative against a facial challenge brought in federal or state court and the enacted initiative was subsequently struck down. The proposal suggested that such an outcome seemed inconsistent with the overall purposes of the initiative process, and that it prevented careful and comprehensive scrutiny of the validity of these enactments in the reviewing court.

The proposal pointed out that there are some states in which legislative standing is recognized, but there is some question about that doctrine in Oregon, and that legislative standing might be particularly questionable in the case of an enacted initiative, rather than in a case challenging a law enacted through the regular legislative process.

In May of 2014, the OLC heard testimony by Senator Whitsett and others, and unanimously agreed to adopt the project and to create a Work Group on "Standing Modernization" to consider the problems raised by the proposal. Commissioner and former AG Hardy Myers was appointed to chair the Work Group, and in cooperation with OLC staff, he assembled and appointed the Work Group consisting of the members and interested parties set out in subsection B.

The Standing Modernization Work Group met five times:

October 24, 2014
November 21, 2014
December 16, 2014
January 16, 2015
February 13, 2015

As is common practice for OLC bills, staff requested that Legislative Counsel draft a placeholder bill while the Work Group completed its work. That placeholder bill is the current version of HB 2364; the Work Group's substantive amendment with its recommendations for approval is contained within the -1 amendments to that bill.

B. Work Group Membership. The following individuals were part of the Standing Modernization Work Group:

Work Group Members	
Hardy Myers (Chair)	Former AG; Oregon Law Commissioner
Denise G. Fjordbeck	Asst. AG, DOJ Appellate Div.
Justice Jack Landau	Oregon Supreme Court
Bruce Miller	Oregon State Court Administrator's Office
Steve Powers	Governor's Deputy Legal Counsel
Rep. Barbara Smith Warner	Oregon Legislative Assembly; House Democratic Caucus
Rep. Wally Hicks	Oregon Legislative Assembly; House Republican Caucus
Sen. Doug Whitsett	Oregon Legislative Assembly; Senate Republican Caucus
Greg Chaimov	Davis Wright Tremaine, LLP (and OSB Constitutional Law Section)
Misha Isaac	Perkins Coie LLP; ACLU Volunteer Atty.
Margaret Olney	Bennett Hartman Morris & Kaplan LLP (and Senate Democratic Caucus Rep.)
Prof. Bill Funk	Lewis and Clark Law School
Jas Adams	Adjunct Prof., Willamette U. College of Law & former AAG
Prof. Steve Green	Willamette U. College of Law

Advisors & Interested Parties	
Stephen Elzinga	Policy Analyst, Senate Republican Caucus
Judge Meagan Flynn	Oregon Court of Appeals
Susan Grabe	OSB Director of Public Affairs
Channa Newell	Judiciary Counsel Committee, Oregon Legislative Assembly
Becky Straus	Legislative Director, ACLU
Staff	
Prof. Jeff Dobbins	Exec. Director, OLC; Willamette U. College of Law
Wendy Johnson (to 1/2015)	Deputy Director and General Counsel, Oregon Law Commission
Philip Schradle	Interim Deputy Director, OLC
Dan Gilbert	Deputy Legislative Counsel
Brett Smith	Law Clerk, OLC
Corey Driscoll	Law Clerk, OLC
Caitlynn Dahlquist	Legislative Coordinator & Law Clerk, OLC
Jenna Jones	Office Asst., OLC
Chris Strum	Administrative Asst., OLC

III. Statement of the Problem Area and Proposed Solutions

"Standing," as a legal doctrine, asks whether a particular litigant has a right to pursue relief in court from a legal wrong committed by another. As a general matter, when one hears about "standing," the discussion is generally focused on the standing of a *plaintiff* to allege a right to relief under a particular cause of action. Constraints on the

ability of a plaintiff to pursue relief can arise out of structural and substantive constitutional rights, statutory language, and prudential considerations developed by courts.

The circumstance addressed by this legislation is a little different, because it does not involve the "standing" of a *plaintiff*. Because the concern in this case is focused on circumstances in which a plaintiff has decided to *challenge* the validity of an enacted initiative, the Work Group presumed that plaintiff will usually have little difficulty demonstrating why they are particularly and adversely affected by the provision of state law that they are challenging. The real issue presented to the Work Group is how to deal with the problem of who has an interest sufficient to participate in *defending* the validity of the state law at issue. This is a matter of both ensuring that procedures exist to permit such participation, and a matter of ensuring that any external constraints – such as constitutional limits on the ability of federal courts to hear claims by parties that do not have concrete and particularlized interests – can be addressed in appropriate circumstances.

A. Trial Court "Standing" and Intervention in Federal and State Trial Courts

At the trial court level, the procedural problem is best characterized as one regarding who has the right to participate in the case on the side of the defendant. Generally speaking, a facial challenge to the validity of state law will be filed against the State or state officers (collectively, the State)[1]; if there are other defendants named in the suit who seek to defend the validity of the act, this legislation will likely be of only limited relevance. More important is a circumstance in which the State is the only defendant, but in which the AG decides not to defend the enacted initiative in state court.

In this situation, the primary issue is whether anyone else may join the litigation to defend the initiative. Under Oregon law, this is an issue that is governed by the Oregon Rule of Civil Procedure (ORCP) 33, which addresses intervention in civil proceedings in our trial courts.[2] If a party has a sufficiently tangible interest (i.e., if they can show that they will be harmed in a tangible way if the relevant law is struck down),

[1] In federal court, the State is permitted to intervene in any case where a party's claim or defense is based on "a statute … administered by the officer or agency." Fed. R. Civ. P. 24(b)(2)(A).

[2] ORCP 33 provides, in relevant part:

> A Definition. Intervention takes place when a third person is permitted to become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the complaint, by uniting with the defendant in resisting the claims of the plaintiff, or by demanding something adversely to both the plaintiff and defendant.
>
> B Intervention of right. At any time before trial, any person shall be permitted to intervene in an action when a statute of this state, these rules, or the common law, confers an unconditional right to intervene.
>
> C Permissive intervention. At any time before trial, any person who has an interest in the matter in litigation may, by leave of court, intervene. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

then that party may be able to intervene "as of right" under common law principles incorporated into ORCP 33B. If they do not have a tangible interest, however, then the only option is "permissive intervention" under ORCP 33C. Federal law, though not identical, is very similar; FRCP 24 provides for intervention as of right if the party seeking to intervene is able to show that they have an interest that would be impeded by the litigation (as long as existing parties do not adequately represent the potential intervenor's interests), FRCP 24(A), and provides for permissive intervention by anyone else that has a "defense that shares with the main action a common question of law or fact," FRCP 24(B).

During our Work Group discussions, members of the group agreed that the AG is generally amenable to allowing interested third parties – and, particularly, Chief Petitioners of an initiative – to intervene in trial court proceedings of the sort at issue here. It was also the view of the Work Group that, in general, trial courts are willing to permit parties like Chief Petitioners to intervene, even permissively, if that intervention is sought in a timely manner that would not prejudice the interest of the parties already in the litigation. That said, members of the Work Group recognized that (a) this is no guarantee, in that trial courts – and particularly federal courts, which tend to have a stricter view about the appropriate role of merely interested (rather than potentially injured) individuals – are (at least in the circumstances of primary concern to the Work Group) under no obligation to permit intervention, and (b) there were at least some anecdotal circumstances in which trial courts denied motions by Chief Petitioners to participate. Given the uncertain application of permissive intervention law, the Work Group concluded that any solution that sought to take advantage of this option would have to be focused through adjustments to the rules regarding intervention as of right.

1. State Courts

In state court, it is a straightforward proposition for the Legislative Assembly to provide that proponents of an initiative (for instance) should be permitted to intervene in any suit seeking to challenge the validity of their enacted initiative in state court (particularly if the AG or other officials have declined to defend). First, the legislature retains control (subject to certain limits) over the Oregon Rules of Civil Procedure (*cf. State v. Vanornum*, 354 Or. 615 (2013) (noting superiority of legislative control over Rules of Civil Procedure, as compared to role of Council on Court Procedures)). Second, the Oregon courts have been quite flexible in concluding that the legislature has authority to define interests in a way that permits standing, even for parties that might have difficulty establishing standing in federal court. See, *e.g.*, *Kellas v. Department of Corrections*, 341 Or. 471, 145 P.3d 139 (2006). The proposed solution takes advantage of this authority by granting Chief Petitioners a right to intervene pursuant to ORCP 33.

2. Federal Courts

This course of action (redefining rules regarding intervention) is much more difficult – and arguably impossible – to implement in federal court because, of course, the Oregon Legislative Assembly cannot create a federal statutory right to intervene. Second, even if the Oregon Legislative Assembly *could* do that, specific federal constitutional constraints limit the ability of courts to hear litigation in which one side is

represented only by citizens with a generalized interest in the validity of state (or federal) law. While the US Supreme Court has recognized that a *state government* has a cognizable interest in generally defending the validity of any laws, that interest *cannot* be exercised by a citizen of the state – and initiative petitioners fit into this role once an initiative goes into effect.

Thus, while the Oregon Legislative Assembly might draft a law that provides that "Chief petitioners have a tangible interest in defending the validity of the enacted initiative that they proposed," and while Oregon's courts might be willing to give effect to that legislative statement, the federal courts would not – at least not if that is the only basis upon which the Legislative Assembly sought to confer standing on Chief Petitioners.

For this reason, Oregon cannot simply seek to shoehorn Chief Petitioners – or any other abstractly interested citizen – into the intervention rules of federal courts. If Oregon wants to guarantee participation by someone who is charged with defending an enacted initiative, Oregon will need to take a different approach. The Work Group concluded that the approach most consistent with federal law constraints and our own state's interests would involve the limited ability of certain individuals to trigger appointment of a Special Assistant AG ("Special AAG") who would step into the shoes of the AG if the AG declines to defend an initiative petition.

B. Other Considerations: Role of Permissive Intervenors and Standing to Appeal

Before discussing why the Work Group chose Special AAG appointment as the preferred federal court route, however, there are two other points worth making.

First, while federal courts cannot be *required* by state law to permit abstractly interested parties to intervene, they may nevertheless *choose* to permit intervention by such parties. Because the plaintiff has filed the lawsuit, permissive intervention by these parties at the trial court stage is a potentially valuable tool for achieving the objectives presented by the Project Proposal and considered by the OLC in advancing this proposal. Once suit is joined at the trial court level, and if intervention by (say) Chief Petitioners is permitted by a federal court, those Chief Petitioners will be able to participate in the litigation – and to defend the validity of state law – even if the AG decides, during the course of that litigation, not to defend the validity of state law.

This is precisely what happened in federal district court in California with respect to the challenges filed by same-sex couples regarding California's initiative-enacted ban on same-sex marriage. Once the case was filed, the state (in the form of the AG) declined to defend the validity of the enacted initiative. Nevertheless, the federal district court permitted the Chief Petitioners of the initiative to participate in the trial court proceedings, and the Chief Petitioners vigorously defended the validity of that initiative.

Which brings us to the second point preliminary to discussing the Special AAG process: Intervention and participation in the trial court *does not* guarantee that the intervening party will be able to maintain the litigation in an appeal from an adverse

judgment if the State itself is unwilling to seek that appeal. This principle is best illustrated by the subsequent history of the challenge to the California same-sex initiative, which ultimately reached the U.S. Supreme Court in the case of *Hollingsworth v. Perry*, 133 S.Ct. 2652 (1993). As noted above, while the state decided that it would not defend the validity of the enacted initiative, the trial court allowed the Chief Petitioners of the initiative to defend the law's validity. After trial, the federal judge concluded that the initiative was invalid under the federal Equal Protection clause, and the losing party (nominally the state, but in practice the Chief Petitioners) sought to appeal to the Ninth Circuit.

It was at this point that the strict federal rules regarding constitutional standing proved a particularly difficult hurdle. Because members of the public are not generally viewed for federal law purposes as having a sufficiently particularlized interest in the validity of state laws, and because the *state* had decided to abandon defense of the initiative, the Ninth Circuit found itself facing the question of whether the case continued to present a constitutional "Case or Controversy," which is a prerequisite for federal court jurisdiction under Article III of the Constitution. Because the state was not defending the law, and because the Chief Petitioners were arguably "just citizens" with no more interest in the validity of the law than anyone else, there was a significant question about whether there was standing on the part of the chief petitioners *to file the appeal*. The Ninth Circuit referred the case to the California Supreme Court, asking that court to articulate the precise interest held by Chief Petitioners in a circumstance like this. The California Supreme Court concluded that Chief Petitioners had a specific interest as a matter of state law, and the Ninth Circuit proceeded to affirm the judgment of the federal district court.

When the case reached the U.S. Supreme Court, however, the Court rejected the Ninth Circuit's conclusion, and found that despite the role of Chief Petitioners in the trial court, despite the decision by the state not to defend, and despite the California Supreme Court's decision that Chief Petitioners had a particularized interest under California Law, none of those propositions changed the fact that Chief Petitioners had no more significant an interest in the validity of the law than did any other citizen. *Perry*, *id.* at 2662. As for the California Supreme Court's decision that they did, "the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the contrary…..[States cannot] issu[e] to private parties who otherwise lack standing a ticket to the federal courthouse." *Id.* at 2667.[3] The Court vacated the Ninth Circuit's decision as having decided a case where there was no longer constitutional standing, and thereby left the district court's decision in place.

C. Appointment of a Special AAG

The decision in *Perry* therefore significantly limits the scope of what the Oregon Legislative Assembly could do to define the interests of Chief Petitioners (or any other

[3] "[I]ntervenors in lower federal courts may seek review in this Court on their own, so long as they have "a sufficient stake in the outcome of the controversy" to satisfy the constitutional requirement of genuine adversity." *Maine v. Taylor*, 477 U.S. 131, 136-37, 106 S. Ct. 2440, 2446, 91 L. Ed. 2d 110 (1986)

general citizens) in a way that would lead to standing in federal court. The only remaining option – and the one on which the Work Group focused in drafting Section 3 and 4 of the proposed legislation – is to create a process by which a particular state officer is charged with defending the validity of the Act. The Work Group considered a wide range of alternative entities that might be vested with this authority, but settled upon the appointment – at the request of certain parties – of a Special AAG.

Such an appointment is, of course, somewhat awkward. The AG is charged with defending the State in litigation, see ORS 180.060, and to identify a separate private counsel as a Special AAG "representing the interest of the state" with respect to the validity of a statute when the AG has already declined to defend creates an inherent tension between the AG's role and the idea that the interest in defending the law can outlive that kind of determination. In fact, this inherent conflict seemed, to at least a few Work Group members, to be inherently impossible to resolve. Those members remained unconvinced about the need for the proposed legislation; they viewed it as solving a problem that would present itself only rarely – if ever – and they noted that the most recent example of a case like this in Oregon – the *Geiger* litigation in which the AG ultimately decided not to defend the validity of the initiative that led to a bar on same sex marriage in the state, and in which belated intervention by a national advocacy group was denied by the federal court – resulted only because there had been no particular effort to intervene earlier in the litigation. Even if there had been such an effort (and if the effort had been futile), these Work Group members indicated their belief that it is entirely appropriate that the AG effectively have the final and unchallenged authority to decide whether the state will defend an approved initiative measure. These members were ultimately uncomfortable with the idea of a Special AAG, and believed that it was appropriate to leave the decision not to defend in the hands of the AG who is, after all, the state's chief attorney and an elected representative of the electorate of the entire state.

Though the Work Group and Commission recognized and respected this position, they also concluded that, even if rarely used, this process for ensuring a defense in these circumstances would prove enough of a benefit to the courts and initiative process that it would outweigh any adverse effect it might have on the role of the AG as the state's lead attorney; this perspective seemed particularly justified in light of a former AG's presence as Chair and the presence of current and former DOJ attorneys on the Work Group.

The Work Group, therefore, chose to approach the question of federal court standing via the only door that *Perry v. Hollingsworth* appeared to leave open: By creating a process by which not the AG, but another appointed individual, would represent the state for purposes of defending the enacted initiative when the AG decided not to do so. As *Perry* concluded,

> [n]o one doubts that a State has a cognizable interest 'in the continued enforceability of its laws' that is harmed by a judicial decision declaring a state law unconstitutional. To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court. That agent is typically the state's attorney general. But state law may provide for other officials to speak for the State in federal court.

Id. at 2664, 2666. In its discussion about the characteristics of this state "agent," the *Perry* court suggested that the agent needed to be subject to some overarching state authority, and effectively acting as an official of the state. *Id.* at 2664-67. In considering the U.S. Supreme Court's guidance on this issue, the Work Group set out several constraints on the scope of the Special AAG's authority, subjected the Special AAG to the regulatory and removal authority of the AG, and required the Special AAG to take the same oath of office required of any other AAG for the State. In this way, the Work Group hoped, the legislation would establish a process that would satisfy the federal court's concerns regarding the status of this temporary appointee as a state official and agent.

IV. Review of legal solutions existing or proposed elsewhere

As noted above, Oregon law is relatively flexible on matters of standing, and even under existing law, parties may well be able to intervene as (at least) permissive intervenors under ORCP 33 in state court cases of the sort presented here. Such intervention may be plagued by timing concerns, however (*i.e.*, a late decision by the AG not to defend may preclude an effective intervention motion), and, more important, Work Group members suggested that while they believed that state trial courts would generally permit intervention by Chief Petitioners in these kinds of cases, members also heard anecdotes about situations in which trial court judges have refused to permit intervention by Chief Petitioners. That risk, along with the perceived need for *some* kind of defense if the AG declines to defend, led the Work Group to propose legislation that would guarantee a right to intervene in state court on behalf of an initiative's Chief Petitioners. (See *infra* (discussing section 3 of the proposed legislation)).

Other than a possible right to intervene in state court, however, the Work Group identified no provisions in Oregon law that would address the circumstance in which the AG declines to defend an initiative provision and no other statewide officials are able to intervene to defend the enacted initiative. There is one possible exception: ORS 173.135[4] does appear to give Legislative Counsel some authority to participate in litigation when "deemed necessary or advisable to protect the official interests" of the Legislative Assembly, a committee, or a member of the Legislative Assembly. To our knowledge, this provision has never been relied upon to appoint counsel in a case like the

[4] **173.135 Participation in legal proceedings to protect legislative interests.** When deemed necessary or advisable to protect the official interests of the Legislative Assembly, one or more legislative committees, or one or more members of the Legislative Assembly, the Legislative Counsel Committee may direct the Legislative Counsel and the staff of the Legislative Counsel, or may retain any member of the Oregon State Bar, to appear in, commence, prosecute or defend any action, suit, matter, cause or proceeding in any court or agency of this state or of the United States. Expenses and costs incurred pursuant to this section may be paid by the committee from any funds available to the committee. [1961 c.167 §32; 2005 c.22 §119]

one under consideration here, and whether (and how) it could be used for that purpose is not entirely clear. In any event, because the primary concern presented to the Work Group involved circumstances in which elected officials are unwilling to defend the validity of an enacted initiative, the Work Group did not focus its attention on expanding or clarifying this provision in existing law.

The Commission is not aware of other legislation, whether in this or prior sessions, that would address the issues under consideration here. We do understand, however, that past legislative sessions have considered proposals that would require initiative petitions to be submitted to the AG for review before being placed on the ballot, but that such proposals have not been enacted by the Legislative Assembly.

Similarly, the Commission is not aware of any positive law in state or federal court that might bear on the ability of parties to participate in the defense of state law being challenged in federal court proceedings.

V. Summary of Sections

The following section-by-section analysis should be read in conjunction with the preceding descriptions of the general approach and purpose of HB 2364. Because the Work Group suggested, and the OLC recommends, approval of the legislation only with the -1 amendments, this discussion assumes adoption of the -1 amendments, and is numbered based on the amended version of the bill.

Section 1:

The substance of the bill would be added to the ORS chapter governing provisions involving initiative processes. Because many of the procedures being created through this legislation would be enacted with an eye on the role of Chief Petitioners in representing (in state court) or triggering (in federal court) the defense of the enacted initiative, the Work Group agreed that locating the provisions in Chapter 250 made sense.

Section 2:

The Work Group debated whether it was necessary or productive to include a specific statement of intent in the proposed legislation. Ultimately, the group concluded that such a statement was unlikely to cause harm, and it might prove useful to courts in considering interpretations of the legislation, as well as in articulating the state interest that the Work Group generally felt was a consensus ground upon which these processes would be justified. The section therefore confirms that there is a particular importance, in judicial decisionmaking, to having vigorous advocacy regarding both the invalidity *and* validity of an enacted initiative. In the Work Group's view, if vigorous advocacy was guaranteed, such a guarantee would also serve to protect the integrity of the underlying initiative process by ensuring an active participant who would advocate in favor of the validity of enacted initiatives.

Section 3:

Section 3 defines the types of litigation to which the following provisions (and procedural options) apply. The legislation is focused solely on statutes or constitutional provisions that were enacted into law through an initiative process. While the Work Group considered whether to extend these protections to other enactments – i.e., legislative referrals, or statutes adopted through the regular course of legislative enactment – the group concluded that a decision by the AG not to defend those provisions of law would likely be met by an effort on the part of the Governor, legislative leaders, or other statewide officers to defend the validity of the law. Because existing law includes (as noted above) authority for the Legislative Assembly and the Governor to appoint counsel[5] – and because such parties would be likely to have standing in both state *and* federal court (as well as be more likely to be granted the right to intervene) -- the Work Group believed that decisions not to defend these types of enactments did not require immediate attention by the Work Group.

On the other hand, because initiatives are often undertaken in the face of resistance (or inaction) by other statewide or legislative actors, and because that resistance seemed likely to also manifest itself through a decision not to defend by the AG, the Work Group decided to focus its attention on challenges to enacted initiatives.

This section also limits the legislation's application to litigation in which the relevant law is being challenge *on its face*, whether procedurally or substantively. Because an as-applied challenge would result only in a holding that a provision of law is not permitted as applied to a particular regulated party, it did not seem necessary to invoke the bill's procedural protections for the sole benefit of a particular party to whom the enacted initiative had been applied. Similarly, the provisions of the bill do not apply to circumstances in which an argument about the validity of an enactment is challenged only in a responsive pleading or by a defendant, see section 3(1)(b); the theory here is that it seems particularly unlikely that the State would seek to enforce an enacted initiative against a party, but then abandon that effort and decline to defend the validity of the initiative once its validity was challenged. For those reasons the focus of this legislation is on facial challenges filed by plaintiffs seeking to invalidate an enacted initiative.

For that kind of facial challenge, the Work Group believed it important that the legislation apply to both substantive challenges (*i.e.*, arguments that a state statute is invalid as a matter of federal or state constitutional law) and procedural challenges (*i.e.*, arguments that the enacted initiative is invalid because some fundamental requirement of initiative procedure had been violated in the leadup to its enactment). See section 3(1)(a)(A).

Finally, the section provides that these processes should apply only to challenges brought to enacted initiatives *if* the challenge is brought within 10 years of the effective date of the enactment. Section 3(1)(a)(B). This limitation is intended to recognize that as time goes by, legal, factual, and political circumstances may change so substantially that a different balance should be struck between respecting the professional judgment of the

[5] *Cf.* State ex rel Adams v. Powell, 171 Or.App. 81, 15 P.3d 54 (2000), *rev. allowed*, 332 Or. 239, 28 P.3d 1174 (2001) (in which Legislative Counsel and Counsel representing the governor appeared on opposite sides).

AG and the sense that a vigorous defense is necessary to strengthen the utility of judicial review and bolster the initiative process itself. At some point after enactment, the Work Group felt, this balance finally tipped in favor of allowing the AG the final word on the state's role in defending the validity of such enactments. It was not the intent of the Work Group to permit the additional procedures set out in the legislation to be used to mount a meritless defense of statutory or constitutional provisions that have been outstripped by the passage of time, significant subsequent legal developments, or substantial changes in the political and factual calculus that motivated enactment of the initiative in the first instance. While individuals interested in the continued validity of "old" initiatives can still seek to defend those initiatives under the existing law of intervention and standing, which would not be changed through this legislation, the Work Group believed that it was unnecessary to extend these unique protections to initiatives that went into effect more than a decade ago.

Section 3(2) establishes a process by which the AG is required to notify the court if the AG "declines to defend" the enacted initiative. The Work Group assumes that a determination about whether the AG is "declining to defend" will be made in good faith by the AG. Obviously, there may be circumstances in which the AG is taking a position with respect to the enacted initiative that is not a wholesale concession as to its invalidity, but something less than unconditional defense. We assume that as long as the fundamental provisions of the enacted initiative are being defended by the AG, the notice is not necessary.

The section encourages the AG to make the decision about non-defense as early in the case as possible, and sets out some guiding timelines within which the AG should make this decision, if at all possible. A decision not to defend that comes after these deadlines is not ineffective, and the provisions of the legislation would still apply under those circumstances; the provision is simply intended to encourage as early a decision as possible by the AG.

Section 3(3) provides that the notice provided to the court when the AG decides not to defend must be provided to certain executive state officials and certain members of the Legislative Assembly (in particular, notice is to be given to the Governor, Secretary of State, President of the Senate, Speaker of the House, and minority leaders of the House and Senate). As noted further below, this notice does not have an operational effect when provided in state court proceedings; it is primarily for the official's information. The notice does make a difference when it comes to federal court proceedings, however, since it is the predicate upon which those officials can rest an effort to intervene and (if the motion to intervene is denied) a request to appoint a Special AAG.

Section 3(4) provides that the AG who has declined to defend must also undertake reasonable efforts to notify the Chief Petitioners of the initiative of that decision. The goal here is to ensure that Chief Petitioners are aware of their rights to seek to participate in defending the enacted initiative under Sections 4 and 5 of the legislation. The Work Group recognized that once a period of time passes after enactment, however, the Chief Petitioners may be difficult to locate. For that reason, the bill requires the AG to send notice to the last known address of the Petitioners – presumably the address held by the Secretary of State incident to the initiative process (as updated, if at all, by the Chief Petitioners). The AG should also make other reasonable efforts to locate and notify the

Chief Petitioners, particularly if the AG learns that they are no longer at the last known address connected with the initiative process.

The Work Group recognizes that it is possible that the Chief Petitioners cannot be located, or that they may have died or otherwise moved to a location where they cannot be located. If this is true, it is possible that Section 4, which grants intervention as of right to the Chief Petitioners, would have no effect. Even under those circumstances, however, we expect that trial courts will be willing to permit intervention by individuals who can identify a tangible interest in the continued validity of the enacted initiative, or to state officials who are otherwise able to establish a right to intervene.

In order to ensure that all relevant participants are aware of the processes set out under this legislation, section 3(5) requires the relevant notice to the court, and to the parties in (3) and (4), to include copies of the legislation, as well as of any rules and regulations subsequently adopted by the AG regarding the appointment of a Special AAG.

Section 4:

Section 4 of the proposed legislation sets out the only substantive change that the Work Group believed necessary under state law. As noted above, the Work Group concluded that it was possible that trial courts would permit intervention by interested citizens, and particularly Chief Petitioners, under the kind of circumstances that the legislation is intended to address. The Department of Justice indicated that it would generally not challenge an effort to intervene by Chief Petitioners, and most members of the Work Group concluded that trial courts – particularly state trial courts -- were quite likely to acquiesce to such an effort. As section (3) notes, the additional intervention rights granted by section (2) are not intended to change in any way the willingness of courts to permit intervention by any party – whether a citizen or state official – under existing law. Section (2) is intended only to expand and guarantee those rights in particular circumstances.

Section (2), then, is in the bill because the Work Group recognized that it was possible that an effort to intervene under existing law might not be successful, and there was anecdotal evidence that intervention might be denied by a trial court even if not opposed by the state. For this reason, and to effectuate the goals of the legislation, the Work Group decided that Chief Petitioners should receive an "unconditional right" to intervene under ORCP 33 if the AG decides not to defend the validity of a particular enacted initiative.

The Work Group assumes, based on the appeal rights of parties to a case under Oregon law, that once the intervenor is admitted to the case and made a party, that intervenor also has the ability to appeal from an adverse judgment. (*i.e.*, a decision striking down the enacted provision). ORS 19.245 ("any party to a judgment may appeal from the judgment"). It is worth noting that if the AG defends the enacted initiative in the trial court, but then decides not to defend after losing, this provision would *not* create any mechanism to permit Chief Petitioners or others to seek a right to appeal. While this may seem inconsistent with the overall goal of the Work Group, the members of the Work Group believed that as long as at least one good defense was mounted to the validity of state law – in this case, the defense in state court by the AG before deciding

not to appeal – the overall purposes of the advocacy system and initiative process had been met.

The Work Group considered allowing intervention as of right in every case, but believed that such a change to existing law was not necessary; given the charge of the Work Group – to ensure defense when the AG decides not to defend – the primary goal is achieved by limiting this new right to the particular circumstances set forth in the proposal. The Work Group also considered using the Special AAG appointment process for state law, but concluded that it was a more significant departure from existing law than was the enhanced intervention right and that, in any event, the legislature's control over intervention law limited the need for a Special AAG provision in state court.

Section 5:

Section 5 of the proposed legislation sets forth the process that the Work Group recommends for purposes of establishing a defense in federal court when the AG declines to defend. While the ultimate solution involves – if necessary – the appointment of a Special AAG, the legislation also reflects the Work Group's belief that this appointment should be rare, indeed, and effectively a "last chance" for defending the state law when no other better option has presented itself. This belief is reflected in the various preconditions, set out in section 5(2), which must be met before appointment can occur.

As an initial matter, the Work Group believed that it would be best if parties that are already participating in the litigation be primarily responsible for defending state law. The first precondition, then, in 5(2)(a), allows the AG to refuse to appoint a Special AAG if there are other parties or intervenors already in the action who are defending the validity of the enacted initiative. Depending on the parties involved in the case, this may be something of a judgment call by the AG, for the position of the parties may not be perfectly clear when this judgment needs to be made. We assume, however, as we do throughout the proposed legislation, that the AG is acting in good faith with respect to any discretionary decisions that need to be made.

The section also indicates the Work Group's preference that the defense of state law take place through intervention by the Chief Petitioners or certain other state officials; indeed, subsection (2)(b) makes mandatory a request to intervene by one of the parties to whom the AG sent the notice of the decision not to defend. The assumption is that this will likely be Chief Petitioners, but if the Chief Petitioners cannot be located, or are not interested in participating, the relevant state officials may instead seek intervention. We recognize, as is true when Chief Petitioners are missing for purposes of state court proceedings, that there may be circumstances in which the AG declines to defend, but neither Chief Petitioners nor the relevant state officials are interested in seeking intervention. In those cases, there can be no appointment of a Special AAG, and no defense occurs. While less than ideal, the Work Group assumed that if there is sufficient interest to justify appointment of a Special AAG, there should also be sufficient interest for someone on the list of notified parties to seek intervention.

The Work Group recognizes that for the state officials, in particular, taking on a motion to intervene – as well as the potential costs of participation if the motion is granted – may deter any efforts to seek intervention. Again, however, the Work Group was trying to strike a balance between ensuring that *some* defense occurs, and making it

too easy to allow what should be the rare circumstance of appointing a Special AAG. The point is to ensure that the Special AAG is only appointed if the unique and strict nature of federal court standing rules leaves no other option, and even then, only if the parties interested in appointment "put their money where their mouth is," so to speak.

Finally, this subsection allows appointment of a Special AAG only if the federal court *denies* the motion to intervene. If the federal court allows one of these additional parties to intervene in order to defend the state law – as was true in the District Court in *Perry* – then the purposes of this process have been achieved, because there will be at least one good defense before at least one judge. Thus, even if the intervening party is later found in federal court to not have standing to *appeal* from an adverse judgment in federal court, the overall purposes of this legislation have been met, because there will have been at least one solid defense of the enacted initiative in court. Given this approach, the proposed legislation would never have applied to the circumstances in *Perry*. There, the federal court allowed Chief Petitioners to intervene, they mounted a vigorous defense to the validity of the enacted initiative, and the judge concluded, based on solid advocacy on both sides, that the initiative was unconstitutional. When they attempted to appeal, the US Supreme Court concluded that they did not have standing to do so. Under our proposed process, as in *Perry*, the trial court loss would be the end of the matter.

If, however, the federal court does not allow intervention by Chief Petitioners or others, the final hurdle to appointment of a Special AAG is for the party who sought intervention to seek that appointment from the AG. Section 5(2)(c). The statute has to negotiate several complicated timing issues with respect to the filing of a motion to intervene, the timing of a request with respect to the denial of that motion, and the subsequent appointment of a Special AAG. Sections 3(a), 3(b), 4. Suffice it to say that the intent is for this process to move to its conclusion – appointment of the Special AAG – as quickly as possible while giving all relevant parties an opportunity to participate in a manner intended by the statute. Assuming that relevant preconditions have been met, the legislation would require the AG to appoint a Special AAG within seven days of receipt of the relevant request. Appointment is made "for the sole purpose of defending the legality and constitutionality of the challenged" enacted initiative.

Section 5(5) of the bill sets out in further detail the nature of the Special AAG's duties and limitations on his or her appointment. Under the bill, the AG has discretion with respect to who should be appointed Special AAG, as long as that individual is a member of the Oregon State Bar and takes the oath of office required of Assistant Attorneys General. The Work Group assumes, once again, that the AG will act in good faith to seek out interested individuals, and take into account the quality of potential appointees and, where appropriate, the interests of the requesting party. The AG may choose to promulgate rules under section 5(8) to define the process for appointment in further detail.

The Special AAG is an agent of the state – he or she must be in order to meet the US Supreme Court's preconditions for the standing of an agent appointed to represent the State in these circumstances. The agency is limited, however, to defending the validity of the enacted initiative. Section 5(5). The Special AAG does not have authority to settle the litigation or take any other voluntary steps to resolve the litigation, but may pursue defense of the enacted initiative through direct appeal and a petition for certiorari to the

U.S. Supreme Court. The Work Group considered adopting language that explicitly provided that the Special AAG could not bind the state to legal positions in subsequent litigation, but concluded that such a provision was not necessary given the accepted ability of an AG to change her or his legal position from case to case, not to mention the ability of a newly elected AG to take a different position from his or her predecessor.

The final complication associated with appointment of a Special AAG is the question of costs and expenses, which are addressed by Section 5(6) and (7). The Work Group ultimately settled on a middle ground under which any award of damages or attorney fees to plaintiffs that are ascribable to the appointment of the Special AAG should be borne by the Chief Petitioners – *unless* there are also state actors that choose to seek appointment, in which case those costs would be borne by the state. On the other hand, the Work Group decided that the basic costs of defense – the Special AAG's fees, costs of filing, etc. – would *always* be paid by the state, subject to reasonable oversight by the AG, perhaps pursuant to rules adopted under section 5(8). The Work Group believed that this cost of defense was not an unreasonable obligation to take on in these rare circumstances – it was, in effect, a showing of "good faith" in the initiative process, and a cost that would have to be borne by the state if the AG decided to stay in the case. The Work Group also believed that if a party other than the state were required to pay the basic costs of defense, such an obligation would undermine the argument that the Special AAG was an agent of the state for purposes of federal standing principles, and limit the Special AAG's ability to seek an appeal in the event of an adverse judgment.

The Work Group also assumes – but leaves this unstated – that any fees or money damages incurred by the State up *until* the appointment of the Special AAG are costs that the state would have had to bear even in the absence of this legislation, and that any obligation to pay those pre-appointment damages or fees will be borne by the State.

As noted above, however, under this proposed legislation, the appointment of the Special AAG may incur *additional* costs that would not have been incurred but for the appointment of the Special AAG. Those costs – the additional attorney fees incurred by plaintiffs, for instance, if they are ultimately victorious and entitled to an award of fees, or any additional money damages that are suffered by plaintiffs during the continuation of the case that follows the appointment of Special AAG – are dealt with differently under the statute than are the costs of defense. In essence, the statute requires Chief Petitioners to bear those costs by providing the AG with a bond to cover the likely extent of those fees, costs, and damages. (The AG, we again presume, will act reasonably in evaluating whether the amount of the bond that is posted is sufficient.) Section 5(7).

If the Chief Petitioners are *not* the only party seeking appointment, however – if, in other words, one of the named state officials sought appointment instead of or in addition to the Chief Petitioners, then those additional costs would be borne by the State. Section 5(6).

With this division of responsibility for costs, the Work Group intended to require Chief Petitioners – or the relevant state officials – to "put their money where their mouth is." If the Chief Petitioners believe that their position is justified and merits an active defense, they should be willing to risk the costs associated with losing. If they are not, and are therefore unwilling to seek appointment, then it is entirely appropriate that the AG's determination not to defend be left in place. If the relevant state actors think it

improper that the Chief Petitioners have to bear this cost alone, that is their decision, but they must be willing to seek intervention (and possibly be granted the right to intervene), or if denied intervention, they will need to bear the political costs of exposing the state to that additional liability.

Section 5(8) of the proposed legislation provides mechanisms for additional oversight by the AG over the Special AAG's activities. While the basic legal decision in the case are necessarily going to be in the hands of the Special AAG, the legislation anticipates that the AG will continue to have oversight responsibilities with respect, for instance, to the costs of defense being incurred by the Special AAG. The legislation permits the AG to draft rules and regulations governing that oversight as well as the appointment process itself. Finally, the section permits the AG to remove the Special AAG in the event of malfeasance in office or dereliction of duty, but requires appointment of a replacement shortly thereafter. While some Work Group members expressed concern that this left too much authority with respect to legal decisions in the hands of the Special AAG, the consensus was that (a) the AG's power of appointment, (b) the AG's removal authority, (c) the AG's oversight responsibilities over financial and other practical matters, and (d) the basic obligations faced by the Special AAG pursuant to the rules of professional responsibility and Fed. R. Civ. P. 11 (prohibiting the assertion of frivolous or unfounded legal arguments) were sufficient controls to ensure that this "Special" agent of the state did not go inappropriately far in exercising his or her responsibilities to defend the enacted initiative.

Section 6:

This section provides that the legislation would apply only to cases filed after the general election in November 2016. Note that this would permit the process to be used for initiatives that were enacted after the same date in 2006; the Work Group believed that this effective date would permit initiative petitioners time to evaluate the effect of this provision on their initiatives, and would give the AG time to draft rules or regulations deemed necessary to implement the legislation.

VI. Conclusion

The bill, with the -1 amendments, should be adopted because it will effectuate the initiative process and ensure effective judicial review in the rare circumstances when the AG concludes that the AG will be unable to defend an enacted initiative. By exercising legislative authority over State Court standing rules to ensure that Chief Petitioners can defend the validity of initiatives they helped to get enacted, and by creating a process by which a special counsel can defend the validity of initiatives in Federal court when the AG decides not to do so, the bill will ensure that any decision related to the validity of an enacted initiative is made by a judge assessing the strongest possible arguments on both sides of the issue, instead of by default. While the OLC believes that this unique process will be exercised very rarely, it believes that its enactment will benefit the rule of law in the state in the long term.

VII. Appendix (TBD: may include Kaffker & Russcol article from W&L Law Rev.)