

Analysis

Item 11: Department of Justice

Preparation of Ballot Titles

Analyst: John Borden

Request: Allocate \$65,000 from the Emergency Fund to the Department of Justice, Appellate Division, to supplement funding for the preparation of ballot titles.

Analysis: The Department of Justice - Appellate Division is statutorily responsible for the preparation of ballot titles other than those authored by the Legislature, which may choose to enact legislation either adopting a ballot title or provide an alternative process for preparing a ballot title (ORS 250.035, 250.065, and 250.067).

Voter-sponsored initiatives must receive a certified ballot title from the Secretary of State - Elections Division (SOS) before an initiative can be circulated for signature gathering. After receiving the text of the initiative, and researching the related law, the Appellate Division prepares a draft ballot title, which is filed with SOS. There is then a period whereby comments on the legal sufficiency of the draft ballot title are received by SOS. The Appellate Division, after taking into consideration any comments, prepares a certified ballot title, which is then filed with SOS. Statute allows for a registered voter who submitted written comments on the draft ballot title, and who is dissatisfied with the certified ballot title, to petition the Oregon Supreme Court for a review of the title (ORS 250.085). The Supreme Court may either affirm the ballot title, modify the title, or refer the title back to the Appellate Division for modification. The final certified ballot title is then approved for circulation to voters by SOS. At any point throughout the process, a ballot title may be dismissed or withdrawn by the initiative's sponsor(s). An estimated one-third of initiative petitions are withdrawn prior to the Appellate Division undertaking work on preparing a ballot title while a small subset are withdrawn during the ballot title preparation and review process.

DOJ's Appellate Division prepares approximate 30 to 50 ballot titles each biennium. The average over the last two biennia has been 42 with an average of 61% being petitioned for Oregon Supreme Court review. For the current 2019-21 biennium, the Division has processed 38 ballot titles through October 31, 2020 and estimates an additional (net) 14 more ballot titles will need to be reviewed over the remainder of the biennium for a total of 52 ballot titles. On average, Appellate Division staff spend 34 hours on each ballot title, which is billed at DOJ's hourly billing rate(s). DOJ's current biennium's attorney billing rate is \$214 per hour.

The 2019-21 legislatively approved budget for the Appellate Division's ballot title related work totals \$307,761 General Fund, which reflects a \$28,590 General Fund reduction from the 2020 2nd Special Session (HB 5723). Through October 31, 2020, the Division has expended \$270,873 or 88% of the approved budget and is projecting a deficit of \$64,976 General Fund for the remainder of the biennium.

This request is complicated by the fact that the Emergency Board has historically had a deference to legislative decision-making, especially those related to reductions. There exists, however, no legal authority for the Appellate Division to refuse to draft, certify, or defend a ballot title nor does the

Division have the ability to extend statutory deadlines for ballot title work. Additionally, the Division does not have the ability to defer work on a ballot measure even if the ballot measure is scheduled for an election next biennium.

Legislative Fiscal Office Recommendation: The Legislative Fiscal Office recommends that the Emergency Board allocate \$65,000 from the Emergency Fund to the Department of Justice, Appellate Division, to supplement funding for the preparation of ballot titles.

11
Department of Justice
Lisper

Request: Allocate \$65,000 from the State Emergency Fund to the Department of Justice, Appellate Division to address a shortfall in funding the expenses for ballot title review.

Recommendation: Approve the request.

Discussion: The Appellate Division in the Department of Justice is responsible for making sure the ballot titles, which appear on the ballot, explain to the voters what they are being asked to decide. The title must have a brief statement explaining the results of what a yes or no vote mean on the proposed measure. All voter initiatives must receive an approved ballot title before being circulated for signature. The Department has five business days to produce a draft ballot title for the initiative, and has no authority to extend the statutory deadline.

Additionally, the Department has no control on the number of initiatives submitted for ballot titles, nor do they have control over the draft titles challenged in court. The amount of hours to produce the ballot title short statements is driven by the complexity of the initiative submitted.

In the 2019-21 biennium, the Appellate Division received approximately 1,330 initiatives requiring ballot titles, which is an increase from 1,230 in the prior biennium. The Division receives initiatives all year and, based on past trends, is anticipating a \$65,000 shortfall for the current biennium.

Legal Reference: Allocation of \$65,000 from the State Emergency Fund to supplement the appropriation by chapter 692, section 1(2), Oregon Laws 2019, for the Department of Justice, Appellate Division for the 2019-21 biennium.



DEPARTMENT OF JUSTICE

November 4, 2020

The Honorable Senator Peter Courtney, Co-Chair
The Honorable Representative Tina Kotek, Co-Chair
2019-21 Joint Interim Emergency Board
900 Court Street NE
H-178 State Capitol
Salem, OR 97301-4048

Dear Co-Chairpersons:

Nature of the Request

The Department of Justice – Appellate Division requests \$65,000 in General Fund support for Ballot Titles work.

Agency Action

When the legislature refers a measure to the voters or individuals gather enough signatures to place a voter initiative on the ballot, a “ballot title” appears on the ballot to explain to the voters what they are being asked to decide. The ballot title has a short caption (e.g., “Amends Constitution: Eliminates mandatory retirement age for state judges”), brief statements explaining the results of voting “yes” or “no” on the measure, and a slightly longer summary describing current law on the subject and explaining the major effects the measure would have if passed. Voter initiatives must receive an approved ballot title before they can be circulated to obtain the signatures required to put the measure on the ballot.

Except when the legislature itself prepares the ballot title; the Legislature has made it the Department of Justice’s responsibility to do so. Attorneys and paralegals in the Department’s Appellate Division handle the work, and the legislature has appropriated General Funds to pay for the work. The assigned attorneys study the measure and research the current law on the subject, draft a ballot title for the public to comment on, review any comments received and determine whether to make changes to the ballot title, and then respond to court challenges to the certified ballot title. The legislature has set strict deadlines for many of those activities—for example, the Department of Justice has just five business days to produce a draft ballot title for initiatives.

While the Department tries to predict how much ballot title funding will be needed in the biennium, the Department has no control over how many ballot titles are requested during any election cycle or how complex they are. The Department also has no authority to refuse to draft

The Honorable Senator Peter Courtney, Co-Chair
The Honorable Representative Tina Kotek, Co-Chair
November 4, 2020
Page 2

or certify a ballot title for a measure that qualifies for one, and it has no authority to extend the statutory deadlines for the work.

The net \$307,761 current appropriation to the Appellate Division for ballot titles is not enough to cover the mandated work that we project for the rest of the 2019-2021 biennium. Even before the recent budget cuts, we projected that there would be a shortfall of nearly \$40,000, due to the unusually heavy workload in FY 2020. And then during the second special session, the legislature imposed a cut of \$28,590. But there has been no corresponding decrease in the work that the Department is required to perform for ballot titles.

Our most recent projections reflect that we will need about \$65,000 in additional funding for the rest of the biennium, which reflects about 300 hours of attorney time. We cannot predict how many ballot titles will be requested between now and the end of the biennium, but any excess funding will be returned to the General Fund if not used.

Action Requested

The Department of Justice – Appellate Division requests \$65,000 in General Fund support for Ballot Titles work.

Legislation Affected

Oregon Laws 2019, chapter 692, sections 1(2); Oregon Laws 2020 Second Special Session, chapter 9, section 20.

Sincerely,



FREDERICK M. BOSS
Deputy Attorney General

cc: Benjamin Gutman, Solicitor General, DOJ Appellate Division
William O'Donnell, DOJ Chief Financial Officer
Jennifer Friesen, DOJ Senior Budget Analyst
Dao Vue, DOJ Budget Analyst
John Borden, Principal Legislative Analyst, LFO
Michelle Lisper, Policy and Budget Analyst, BAM