

**S M I T H
D I A M O N D
& O L N E Y**
ATTORNEYS AT LAW

Barbara J. Diamond
Margaret S. Olney*
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January 27, 2005

**VIA FACSIMILE (503) 373-7414
AND REGULAR MAIL**

John Lindback
Director of Elections
Office of the Secretary of State
141 State Capitol
Salem, Oregon 97310-0722

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SECRETARY OF THE STATE

Re: Initiative Petition 16 (2006) - Draft Ballot Title Comments
Our File No. 328

Dear Mr. Lindback:

This firm represents Kris Kain, an Oregon elector and President of the Oregon Education Association, and Chip Terhune, an Oregon elector and Assistant Executive Director for Public Affairs for the Oregon Education Association. We write in response to your News Release dated January 13, 2005 which invites comments to the draft ballot title for Initiative Petition 16 (2006).

1. INTRODUCTION

Initiative Petition 16 is a statutory proposal that radically seeks to alter public employee collective bargaining.¹ Current law (the Public Employees Collective Bargaining Act or "PECBA") allows public employees in Oregon to choose union representation through an election system that is run by the state Employment Relations Board. Once the employees choose union representation, that representation continues until the employees decide that they want to have an election to change their union representative or to get rid of ("decertify") their union. The law designates certain periods of time, known as "open periods" for filing

¹ This proposal is similar to IP 117 (2004) and the certified ballot title for that measure should be the starting point for this measure.



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petitions. *See*, OAR 115-25-015. The choice of whether to seek an election during an open period lies in the hands of the affected employees: any petition seeking a representation or decertification election must be supported by a “showing of interest” of at least 30% of the affected employees. *See*, OAR 115-25-000. Absent a showing of interest to support a petition for an election, employees cannot be forced to undergo an election. This statutory scheme allows for labor stability and equality of bargaining power between public employers and public employees. ORS 243.656. Employees and their chosen labor organizations are able to focus their organization’s time and energy on bargaining and resolving workplace disputes, rather than worrying about whether their union will remain in place.

IP 16 (2006) fundamentally alters this balance, severely tying the hands of both public employers and public employee unions. The operative provision reads:

A public employer, for purposes of public sector collective bargaining *or grievance disputes*, shall not recognize a labor union or other employee association, *unless it is known* that a majority of the current employees in the bargaining unit *have voted* in favor of union representation. (Emphasis added).

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What does this mean in practical terms? First, the measure would require new elections – conducted by the Bureau of Labor and Industries (BOLI) in which non-voters count as votes against union representation – whenever the public employer has reason to question whether a majority of current employees has voted for the union. In effect, the employer has to assume that new employees or non-voters are “no” votes – i.e., do not support the union.

Moreover, while the question of current union support is unresolved, the measure prohibits the employer from either bargaining with the union, or resolving “grievance disputes.” In effect, before the employer deals with the union in bargaining or in resolving a grievance, it must ask whether it is certain that a majority of current employees support the union. If there is any question, then it cannot deal with the union. This means that for all intents and purposes, the union ceases to exist. The impact on the government and its employees would be staggering. All employment related matters would be put on hold until the election is held. If the union is re-elected, then the employer would be obligated to resolve the held

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grievances and negotiate with the union. And of course, the loss of employee choice and labor stability would be profound.

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SECRETARY OF THE STATE

The proposal also radically changes other aspects of current labor law. The PECBA places jurisdiction over all matters of public employee representation in the hands of a single state agency, the Oregon Employment Relations Board ("ERB"). In the 30 years that the PECBA has existed, the ERB has developed an expertise in public sector labor relations, and a body of case law that interprets the existing law. According to the last annual report published by the ERB (1998), ERB conducts approximately 30 elections per year.

IP 16 (2006) significantly expands the role of government in determining whether public employees have union representation. The measure requires that a new election bureaucracy be created within BOLI, which currently has no jurisdiction over union elections. The bureaucracy will have to be of significant size because hundreds of elections will be required every year. ERB's annual report in 1998 indicates that approximately 3,000 Oregon employers are under ERB jurisdiction. The bureaucracy will also be duplicative because the measure leaves in place ERB's jurisdiction over elections conducted under the PECBA. It is critical that voters be informed that the measure requires an expansion of government services and of government involvement in the system governing union representation. In addition, voters should be informed that the proposal provides no mechanism for funding.

Finally, and perhaps most importantly, the proposal changes the rules of the election. Currently, a labor organization is certified if it receives "the majority of the votes cast in an election." ORS 243.686(4). This is the traditional rule governing elections in the United States. People who are eligible to vote but chose not to do so are not counted as either for or against a particular candidate or result. This proposal changes that rule. Because the proposal requires proof that a majority of employees support the union in order to continue representation (as opposed to a majority of employees who cast a vote), IP 16 effectively treats non-voters as a vote against union representation.²

This change in the elector process is virtually identical to that addressed by the Oregon Supreme Court in *Crumpton v. Kulongoski*, 321 Or 279, 896 P2d 1211 (1995). There, the court held that the ballot title for a proposal requiring the

² Ironically, it only takes a majority of votes cast against union representation to reject union representation.

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majority of registered voters to approve of any tax measure had to clearly and unambiguously alert voters to the fact that not voting has the same effect as a "no" vote. The same analysis must apply here.

With this background, we will discuss the specific portions of the ballot title below.

2. CAPTION

The draft caption fails to accurately identify the subject of the measure in simple and understandable terms. ORS 250.035(2)(a). It reads:

Prohibits Public Employer from Recognizing Employees'
Labor Union Unless Majority of Current Employees
Elected Representation

There are a number of serious deficiencies with this proposal. First, as discussed above, *Crumpton v. Kulongoski, supra* makes clear that the change in the electoral process at work in this measure is significant and must be clearly identified for voters in all portions of the ballot title. The failure of the draft caption to do so renders it impermissibly misleading.

Second, the focus of the draft caption is wrong. The measure is fundamentally about union elections, and not about public employer relations with the union. Voters must understand that the proposal adds a new election requirement, that is triggered by the public employer not being able to say with certainty that a majority of current employees support the union.

Third, the term "recognizing" should not be used in the caption. It is a term of art in labor law that is not commonly understood by the public. Labor practitioners may understand that it means a public employer cannot bargain or resolve grievances with the union, but that is not how the term is commonly used.

To correct these deficiencies, we propose the following alternative:

**REQUIRES NEW ELECTION WHENEVER PUBLIC
EMPLOYER QUESTIONS CURRENT UNION
SUPPORT; NON-VOTERS COUNT AS "NO" VOTE**

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OFFICE OF THE STATE

This alternative accurately and more completely identifies the subject of the proposal. We urge that it be adopted.

3. RESULT OF "YES" VOTE

The draft "yes" result statement, like the draft caption, fails to accurately and simply tell voters what will happen if they vote "yes" on this proposal. Again, the focus on what the public employer does is misplaced. The proposal is about union elections. Voters need to understand as much as possible about what triggers the election, what happens when there is a question of current support, and how the elections work. We propose the following:

RESULT OF "YES" VOTE: "Yes" vote requires new election to maintain union representation for bargaining, grievance resolution, whenever public employer questions union support; treats non-voters as votes against union.

4. SUMMARY

ORS 250.035(2)(d) requires that the ballot title contain a summary which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what will happen if the measure is approved and the "breadth of its impact." *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The draft ballot title generally does a good job of describing current law and how the measure works. However, in order to fully describe how the proposal works and its major effects, it must more clearly explain that a non-vote is treated as a vote against the union. It must also avoid using the term "recognize" and instead focus on the prohibited activities: negotiating and resolving grievances with the union. Finally, it should alert voters to the fact that the proposal creates a new public employee election bureaucracy within BOLI. To do so, we have added an explanation of ERB's current role overseeing public employee collective bargaining, and then referring to BOLI as a "different state agency."

We have made space for these additions and changes primarily by editorial changes. In addition, we have omitted the second to last sentence describing what happens when a majority of voting employees reject representation. That result is

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obvious and sufficiently conveyed by the last sentence that now reads: "Bars election for 24 months if union representation is rejected."

DILL BRIDGEMAN
SECRETARY OF THE STATE

We propose the following alternative summary:

Currently, public employers must negotiate with employees' chosen labor organization in collective bargaining and grievance disputes. Unless a sufficient percentage of affected employees petition Employment Relations Board (state agency overseeing public employee collective bargaining) for an election to terminate union representation and a majority vote for change, union representation continues. No election may occur within 12 month of previous election. Measure bars public employer from negotiating, resolving grievances with existing union unless public employer knows that majority of current employees have voted for representation. New employees and non-voters must be considered votes against the union. Elections required by measure are conducted by different state agency, Bureau of Labor and Industries. Provides no funding. Bars election for 24 months if union representation is rejected. Other provisions.

Thank you for your careful consideration of these comments. Please send a copy of the certified ballot title as soon as it is available.

Sincerely,

EMILY DIAMOND & OLNEY

Margaret S. Olney

MSO/lck

cc: Chip Terhune
Mark Toledo

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January 27, 2005

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John Lindback
Director of Elections
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Salem, Oregon 97310-0722

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2005 JAN 27 PM 4:56
OFFICE OF THE
SECRETARY OF THE STATE

Re: Full Text Challenges for Initiative Petitions 16, 19, 21 (2006)
Our File No. 328

Dear Mr. Lindback:

This firm represents Kris Kain, an Oregon elector and President of the Oregon Education Association, and Chip Terhune, an Oregon elector and Assistant Executive Director for Public Affairs for the Oregon Education Association. We write in response to your News Release dated January 13, 2005 which invites comments on whether the initiatives filed by Bill Sizemore on January 4, 2005 meet the procedural requirements contained in the Oregon Constitution.

As set forth in this letter, we do not believe that IP 16, 19 or 21 comply with the "full text" requirements contained in Article IV, section 1(2)(d). Accordingly, the proposed initiative cannot appear on the ballot and certified ballot titles should not be issued for them. Please note that we understand that others will be submitting comments on the procedural constitutionality of other initiatives, and that our lack of comments should in no way be interpreted as meaning that we believe those initiatives are constitutionally presented.

Because the legal arguments are similar about why each of the above initiatives fails to comply with the full text requirement, we are submitting comments on the

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initiatives jointly. To the extent necessary, please consider this letter as a separate comment on IP 16, 19 and 21 and place a separate copy in each file.

1. Full Text Requirement

Article IV, section 1(2)(d) of the Oregon constitution provides: "An initiative petition shall include the full text of the proposed law or amendment to the Constitution." In *Kerr v. Bradbury*, 193 Or App 304, 325, 89 P3d 1227 (2004), the Court of Appeals held that Article IV, section 1(2)(d) requires that, in any proposed initiative petition, the initiative include the "full text of the statute as it would appear if amended." In other words, the proposed amendment must set out not only its own text, but also the text of any statutory provision that it amends. 193 Or App at 325-26. The purpose for this requirement is to be sure that voters (and legislators, in the case of bills) are not being asked to vote on a proposal "in the dark," that is, without knowing the effect of the proposed enactment on existing statutes."

2. IP 16 Violates the Full Text Requirement

IP 16 (2006) is a statutory proposal concerning public employee representation. Commenters refer your office to our ballot title comments for a more complete description of what the proposal does. Suffice it to say that IP 16 would radically change existing law concerning public employee collective bargaining. It would prohibit public employers from negotiating or resolving grievances with an existing union, unless it can be certain that a majority of current employees has voted for the union. It gives the Bureau of Labor and Industry (BOLI) jurisdiction over certain types of union elections, and changes the elector process to make non-voters count as "no" votes.

While IP 16 does not expressly amend current law, it by necessity makes numerous changes to it. The Public Employee Collective Bargaining Act ("PECBA") is set forth in ORS 243.650 through ORS 243.782. The laws more specifically relating to representation elections are found in ORS 243.682 and ORS 243.686. IP 16 proposes to make numerous changes to these. For example, under the proposal, BOLI would conduct certain elections, not ERB, thus revising ORS 243.686. Similarly, IP 16 requires that a double-majority of the eligible voters (a majority of all voters, not just those who vote) vote in favor of union representation

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in order for the public employer to be authorized to bargain with the union. Section 1. This would amend ORS 243.686(4), which refers to "the majority of the votes cast in an election shall be certified." ORS 243.682 requires a sufficient "showing of interest" before ERB holds a decertification election. IP 16 would delete this requirement. ORS 243.692 bans new elections for 12 months; IP 16 would do so for 24 months, where a union is rejected.

The list of changes could continue. The point is that the proposal necessarily amends existing law. Under *Kerr*, this means that the full texts of those laws and the changes must be presented to the voters. This is true, even when the initiative is presented as a "stand-alone" piece of legislation. Chief Petitioner cannot "end run" the full text requirements by simply enacting a stand-alone statute that makes those changes. The Attorney General should reject IP 21.

3. IP 19 Violates the Full Text Requirement

IP 19 (2006) seeks to change the laws on how signatures petition signatures are counted by the Secretary of State. Like IP 16 discussed above, this proposal purports to "stand-alone." It does not expressly amend any existing statutes, but it necessarily does so. For example, ORS 250.095 authorizes the use of statistical samples for purposes of verifying initiative signatures. IP 19 bars that practice. ORS 247.013(6) defines when an voter's registration is active, and therefore valid for purposes of petition signatures. IP 19 would amend those provisions. Because the full text of the statutes that are necessarily changed by IP 19 are not set forth in the initiative, it violates the full text requirement and must be rejected.

4. IP 21 Violates the Full Text Requirement

IP 21 (2006) is a statutory proposal that seeks to change current law set out in ORS 342.984 regarding teacher layoffs. It too is presented as a "stand-alone" initiative, with no specific references to current law. However, it plainly amends current law. Indeed, it is possible to see those changes by simply referring to IP 22. That initiative accomplishes the identical goal. However, IP 22 correctly makes the changes in the text of the teacher layoff statute, so that voters can know exactly what the changes are. The failure of IP 21 do so renders it constitutionally deficient and no certified ballot title should be issued.

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5. Conclusion

In *Kerr v. Bradbury, supra*, the Court of Appeals reaffirmed the importance of the full-text constitutional requirement set forth in Article IV, section 1(2)(d) of the Oregon Constitution. During a time when voters are increasingly being asked to pass legislation on complex matters, it is critically important that they have all of the information in front of them. They need to see how the proposed changes interact with existing law in order to cast an informed vote. Here, IP 16, 19 and 21 fail to pass the test and should be rejected. The fact that they are "stand-alone" pieces of legislation does not mean that voters should be left "in the dark" about how the legislation amends other directly relevant law. If that is the case, then chief petitioners could easily evade the full text requirement, and create even more confusion for voters and, subsequently, for the public in interpreting any law passed by initiative.

Thank you for your consideration of these comments.

Sincerely,

SMITH, DIAMOND & OLNEY

Margaret S. Olney

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SECRETARY OF THE STATE

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MSO/lck
cc: Chip Terhune
Mark Toledo

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STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

LAWYERS

Steven C. Berman
of Counsel

January 27, 2005

Via Facsimile and Regular Mail

Bill Bradbury
Secretary of State
Elections Division
Room 141 State Capitol
Salem, OR 97310-0722

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2005 JAN 27 PM 3:30
BILL BRADBURY
SECRETARY OF THE STATE

Re: **Draft Ballot Title for Initiative Petition No. 16**

Dear Secretary Bradbury:

This firm represents Art Towers, Political Director of SEIU Local 503, regarding the ballot title for Initiative Petition No. 16 for the general election of November 7, 2006. Mr. Towers is an elector in the State of Oregon. This letter is written in response to your office's press release, dated January 5, 2005, which invites comments on the draft ballot title to Initiative Petition No. 16.

Art Towers joins in the comments on Initiative Petition No. 16 submitted today by Margaret Olney on the behalf of electors Kris Kain and Chip Terhune. Those comments herein are incorporated by reference.

Thank you for your consideration of these comments. Please notify me immediately when a certified ballot title is issued.

Very truly yours,

Steven C. Berman

SCB:ab
cc: client

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The Honorable Bill Bradbury
Secretary of State
Elections Division
141 State Capitol
Salem, OR 97310-0722
Fax: (503) 373-7414

BILL BRADBURY
SECRETARY OF THE STATE

Re: November 2006 Initiative Petition #16 (treats non-voters as "No" voters in public employee union elections) (Ballot title comments)

Dear Secretary of State Bradbury:

I am an Oregon elector, and submit these comments in response to the Secretary of State's request for comments on the draft ballot title for this proposed initiative.

The Draft Caption

The draft Caption does not reasonably identify the subject matter of the measure, as required by ORS 250.035(2)(a).

Under current law, public employees may join a union through an election in which a majority of those voting in a bargaining unit election vote to join a union, or under certain other circumstances. Also under current law, once public employees have selected a union, representation continues until employees have chosen to discontinue representation through an election in which a majority of those voting vote to discontinue the union.

The proposed initiative replaces this system with a dramatically different system. The proposal states that "A public employer, for purposes of public sector collective bargaining or grievance disputes, shall not recognize a labor union or other employee association, unless it is known that *a majority of the current employees in the bargaining unit* have voted in favor of union representation."

This opening portion of the measure makes at least two dramatic changes to the law. First, it replaces a system where a majority of *those voting* in a union election may select a union with a system where a majority of *employees* is necessary. Thus, in any election with less than 100% turnout, all non-voters are in effect treated as "no" votes.

The measure is multi-faceted, and contains two other provisions that at first glance might seem inconsistent with the first sentence, but in fact, are not. Subsection (d) states that "if a majority ... participating in the election vote not to be represented by a union, union representation of that bargaining unit shall cease at midnight on the date the existing collective bargaining contract expires." This subsection seems unnecessary and duplicative in light of the measure's first sentence -- but it does not contradict the first

sentence. Subsection (e) adds that “the employees in a bargaining unit in which a majority of employees” (as opposed to a majority of voters) “has voted not to be represented by a union may not be represented by a union thereafter, unless a majority of the employees vote in a ... election held not earlier than two years after the last election”; in other words, a supermajority “no” vote serves to prohibit any new union representation for two years. But neither subsection (d) nor (e) contradicts – nor make such dramatic changes to existing law – as the first sentence.

The ballot title Caption does not effectively convey the dramatic changes to existing law that the first sentence would make. It will not occur to many readers that “majority of current employees” goes beyond the normal concept of majority rule and does not mean a “majority of those voting.” The draft Caption here is very similar to the Attorney General’s Caption in Crumpton v. Kulongoski, 321 Or 279, 282 (1995), where the measure required a majority of *registered voters* – not just a majority of those voting – to approve tax increase. The Court found that the Attorney General’s reference to a “registered voters’ majority” did not effectively convey the change in existing law, and replaced it with a Caption that specified that for purposes of tax measures, non-voters would be treated as “no” voters. This measure imposes exactly the same condition on votes by public employee union representation, and the Caption should be equally clear.

The second major change that the measure makes to existing law is that it goes beyond the requirement that a majority of employees elect a union to prohibit an employer from “recognizing” a union – and thus, depriving workers of union representation -- *at any time* unless it can be shown, as of that time, that a majority of *current* employees voted to select a union. Whenever a new grievance arises, or a new contract is presented, the measure requires a new “showing,” and if the showing is not made, the employer cannot recognize the union. In other words, if the showing cannot be made, the union ceases to exist. This is a dramatic change in the existing law, which requires employers to recognize the chosen union until employees request an election to discontinue that representation. Thus:

- If there are 100 workers in a workplace;
- And one year before, when there were 90 workers voters, there was a 60-20 secret ballot vote in favor of union representation;
- But, since that time, ten of the original workers have left and been replaced,

the union could not be recognized unless there was a new “showing” that 51 of the original 60 pro-union workers were still in the workplace ... because the possibility would exist that all 10 of the departed workers were union voters, and therefore only 50 – short of a majority – of current workers did not vote to select the union.

The measure is equivalent to a measure requiring that “No person shall serve as Governor unless it can be shown that a majority of current registered voters voted to elect him.” Thus, if a Governor won election with 60% of the actual vote, but only 50.5% of registered voters, and if, subsequently, 0.51% of registered voters who participated in that election dropped off the rolls, and were replaced by an equal number of new voters, the

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Governor would have to resign ... because, given the secrecy of the ballot, it could not be "shown" that the 0.51% who departed were not all "his" voters.

It is probably impossible to fully convey the bizarre structure the measure would impose in 15 words. The undersigned submits the following:

TREATS NON-VOTERS AS VOTES AGAINST PUBLIC EMPLOYEE UNION REPRESENTATION; PROHIBITS/ELIMINATES REPRESENTATION IN CERTAIN CIRCUMSTANCES

It is important to note that the measure treats non-voters as "No" voters in both the initial representation election and in subsequent "showings." Whenever a new "showing" is necessary, non-voters (new workers and workers who did not vote in the election) are effectively treated as votes against representation. The current system, in which an actual election is required to decertify a union, is replaced with a system of repeated, hypothetical elections in which non-voters in the original election are treated as "no" voters in the hypothetical ones.

The Draft "Result of 'Yes' Vote"

The draft does not provide a "simple and understandable" description of the result of passage of the measure, as required by ORS 250.035(2)(b).

The draft "Result of 'Yes' Vote" suffers from the same deficiencies as the Caption. It does not "simply and understandably" convey that the measure turns non-voters into "no" voters for purposes of public employee union elections (or post-election "showings"). And it does not "simply and understandably" convey the fact that the measure changes current law by replacing a system where an election is necessary to end union representation with a system where representation is terminated whenever a certain 'showing' cannot be made. A normal voter, reading this section, might very well think: "Well, for goodness' sake, why would an employer recognize a union if a majority of employees didn't support it?!"

The undersigned submits that the simplest way to convey these facts is to explain that at any and all times, all new employees and all non-voters are treated as voters against union representation, as follows:

RESULT OF "YES" VOTE: "Yes" vote prohibits / terminates public employee union representation under certain circumstances; treats all non-voters and employees added since union formed as votes against union.

The undersigned notes that the above formulation - "certain circumstances" - would indicate to the voter that there are other provisions of the measure prohibiting union representation, such as section (e), which imposes a two-year prohibition on representation in certain circumstances.

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An alternate wording, which would be inferior to the above but would convey more information that the draft, would be:

RESULT OF "YES" VOTE: "Yes" vote prohibits/ terminates public employees' union representation any time it cannot be shown majority of current employees (including new employees, non-voters) voted for union.

Thank you for your consideration of these comments.

Sincerely,

Steven Novick
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Portland OR 97202
(503) 233-1429

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SIL BARNBURY
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