

IN THE SUPREME COURT OF THE STATE OF OREGON

GEORGE WITTEMYER,  
Plaintiff-Petitioner,  
on Review,

v.

CITY OF PORTLAND,  
Defendant-Respondent,  
on Review.

Multnomah County Circuit Court  
Case No. 130304234

CA A154844

SC S064205

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**BRIEF OF *AMICUS CURIAE* LEAGUE OF OREGON CITIES IN  
SUPPORT OF RESPONDENT CITY OF PORTLAND**

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On Review of the Decision of the Court of Appeals  
on Appeal from a Judgment of the Circuit Court for Multnomah County,  
the Honorable Kelly Skye, Judge.

Opinion Filed: June 8, 2016  
Author of Opinion: Haselton, Presiding Judge

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## **INTEREST OF AMICUS CURIAE**

The League of Oregon Cities (“LOC”) is a consolidated department of all of Oregon’s 241 incorporated cities. Established in 1925 by 25 home rule cities, the League’s purpose is to defend city home rule authority and to be, among other things, the effective and collective voice of Oregon’s cities before the state courts. LOC and its members have a substantial interest in the outcome of this case because it will significantly impact local government revenue raising measures.

## **STATEMENT OF THE CASE**

In 2012, the City of Portland’s City Council enacted the Arts Education and Access Income Tax (“Arts Tax”), which is codified in Chapter 5.73 of the Portland City Code. (Respondent’s Answering Brief, Court of Appeals, Appendix 1-7). The Arts Tax requires persons who are over the age of 18, who earn at least \$1,000.00 of income in a given tax year, and who do not reside in a household that is at or below the federal poverty level to pay a tax of \$35.00 on said income. *Id.* Taxable income, for purposes of the Arts Tax, does not include income that is considered tax-exempt under state or federal law; for example, Social Security benefits and PERS benefits are not considered income for purposes of the Arts Tax. *Id.*

Plaintiff filed suit against the City of Portland (“the City”) alleging the Arts Tax is an unlawful “poll or head tax” under Article IX, section 1a, of the Oregon Constitution. (SER 18-29). The parties filed cross-motions for summary judgment on this sole issue, and after a hearing, the trial court found the Arts Tax legally permissible, concluding it is not a “poll or head tax” prohibited by the Oregon Constitution because “it is not assessed per capita.” (Tr 2-34 & ER 18).

Plaintiff appealed the trial court’s decision to the Oregon Court of Appeals (ER 19-20), which affirmed the trial court. *Wittemyer v. Portland*, 278 Or App 746 (2016). In its ruling, the Court of Appeals noted that historically a “poll or head tax” was a “tax in a single, fixed amount imposed *per capita*, sometimes subject to limited exclusions, without reference to an individuals’ income or property” and further found that the “very limited ‘legislative history’ of the 1910 initiative corroborates—or, at the very least, does not contradict—that understanding.” *Wittemyer* at 753 (2016).

Plaintiff sought review by this court, which this court granted, resulting in the present appeal.

### **SUMMARY OF THE ARGUMENT**

Plaintiff alleges the Arts Tax is a “poll or head tax” in violation of Article IX, section 1a, of the Oregon Constitution because the Arts Tax establishes a class of individuals who are “uniformly taxed per capita at \$35” regardless of each class

member's individual ability to pay the \$35.00. (Petitioner's Br 12). Joining the Plaintiff are two *amici curiae* who seek to further solidify Plaintiff's contention that the Arts Tax offends the Oregon Constitution by providing the Court with a historical analysis of "poll or head taxes" in Oregon, other parts of the United States and Europe. (See generally Bogdanski Br and Fruits Br). In reviewing the historical context of the "poll or head tax", *amici curiae* imply that the Arts Tax is a "poll or head taxes" in "its classic form" – thereby rendering the Arts Tax an unconstitutional tax. (Bogdanski Br 11).

Plaintiff and *amici curiae* take an exceedingly narrow view of the Arts Tax and ask this court to adopt an overly expansive view of Article IX, section 1a, of the Oregon Constitution that ignores both the text and historical context of that constitutional amendment. As the City argues, the Arts Tax is not a tax which is imposed on "the head of each person without regard to income, property, or resources," but is rather imposed on a segment of the population that earns income, and earns income at a certain specified level. (Respondent's Answering Brief, Court of Appeals, Appendix 1-7). Consequently, even under Plaintiff's reading of the Oregon Constitution, the Arts Tax is lawful. However, Plaintiff's understanding of a "head or poll" tax is fundamentally flawed, and this court should reject it. As the City argues, neither the text nor historical context of

Article IX, section 1a supports a finding that the Arts Tax is a “poll or head tax” for purposes of that constitutional provision.

LOC joins Portland as *amicus curiae* to offer additional textual and historical reasons why the Arts Tax does not fall within the prohibition of Article IX, section 1a, of the Oregon Constitution, and to also highlight the dangers of accepting Plaintiff’s unfounded and extreme interpretation. Consequently, for the reasons stated in the City’s brief, and herein, this court should affirm the Court of Appeals.

### **ARGUMENT**

In 1910, the voters of Oregon amended the Oregon Constitution establishing Article IX, section 1a, which provides, in relevant part, “No poll or head tax shall be levied or collected in Oregon.” In interpreting a voter initiated constitutional provision, the Court attempts “to discern the intent of the voters.” *Flavorland Foods v. Washington County Assessor*, 334 Or 562, 567, 54 P3d 582, 585 (2002) (quoting, *Stranaham v. Fred Meyer, Inc.*, 331 Or 38, 56-57, 11 P3d 228 (2000)). “The best evidence of the voters’ intent is the text of the provision itself.” *Flavorland Foods* at 567, 585 (quoting, *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994)). If the intent of the voters is clear after reviewing the text of the constitutional provision, the court will consider the matter resolved. *Id.* However, if the intent is not clear, or if doubt



remains, “the court will consider the history of an initiated or referred constitutional provision in an effort to resolve the matter.” *Id.*

**A. The Portland Arts Tax is not an unlawful “Poll or Head Tax” under the text of Article IX, section 1a, of the Oregon Constitution.**

The text of the prohibition on “poll or head tax[es]” in Article IX, section 1a, of the Oregon Constitution does not reach the Arts Tax. Article IX, section 1a, uses the phrase “poll or head tax” without defining those words. When interpreting the undefined words of a constitutional amendment, the court will presume “that the voters intended those terms to be given their ordinary meanings.” *Kerr v. Bradbury*, 193 Or App 304, 311, 89 P3d 1227, 1230 (2004). In order to determine the ordinary meaning of a “poll or head tax” as the voters would have understood those terms, this court should look to the dictionary definition of those terms at the time the voters adopted the amendment.

The Court of Appeals rightly, in its textual analysis of the intent of Article IX, section 1a, referred to the 1907 *Webster’s Int’l Dictionary* and 1910 *Black’s Law Dictionary* to determine what the voters intended with the use of the terms “poll or head tax.” According to the 1907 *Webster’s Int’l Dictionary* a “poll tax” was “a tax levied by the head or poll; a capitation tax.” *Wittemyer* at 751 (2016). The *Black’s Law Dictionary*, at the time, defined a “poll tax” as a “capitation tax; a tax of a specific sum levied against each person with the jurisdiction of the taxing

power and within a certain class (as, all males of a certain age, etc.) without reference to his property or lack of it.”<sup>1</sup> *Id.*

The two dictionary definitions in circulation at the time the voters adopted Article IX, section 1a, show that a “poll or head tax” is a tax which must meet the following four criteria: (1) be a specific sum; (2) levied against each person within the taxing jurisdiction; (3) who is within a certain identified class; and (4) without reference to the person’s property or lack of it. These are the four criteria necessary for a tax to qualify as a “poll or head tax;” if this criterion is not met, then the tax is not a constitutionally prohibited tax for purposes of Article IX, section 1a.

Plaintiff does not disagree that the above four criteria are necessary for a tax to equal a “poll or head tax.” In Plaintiff’s Brief on the Merits he notes that his problem with the Arts Tax is that it is a “flat tax,” assessed upon each “eligible person” in Portland, and does not take into account “income, property or other resources.” (*See* Petitioner’s Br 12-14). Both Plaintiff and Portland agree that the Court’s analysis of what constitutes a poll tax should be based on those four criteria. The parties differ on how this criteria applies to the Arts Tax.

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<sup>1</sup> The Court of Appeals noted that neither it nor the parties to the litigation were able to identify a definition of “head tax” in effect at the time of the initiatives adoption. However, the Court of Appeals held that “the two terms were closely synonymous and probably interchangeable.” *Wittemyer* at 751, FN7.

Portland's Art Tax does not meet all of the four criteria necessary to be considered a "poll or head tax" under the required textual analysis. Although it is true that the Arts Tax meets some of the criteria necessary to be considered an unlawful "poll or head tax" (it is a specified flat amount of \$35.00), it is equally true that the Arts Tax does not meet *all* of the criteria necessary to be considered a "poll or head tax." Plaintiff, and the *amici curiae* supportive of his position, attempt to argue that all four criteria are met because the tax applies to a discrete group of individuals (income earners) without regard to whether or not they own property or are of the same financial stature. The problem with Plaintiff's argument and that of its supporting *amici curiae* is that they place form over substance.

To be certain, the City's Arts Tax does not apply to every individual within the city. The Arts Tax only applies to certain individuals earning over a certain amount. Plaintiff and its supporting *amici curiae* disregard those persons exempt from the tax, and instead attempt to define the "class" as those who are already subject to the tax. Thus the logic Plaintiff and its *amici curiae* employ is a logical tautology: *viz.*, because certain persons must pay the tax, they alone create an exclusive class. Under such reasoning, any tax imposed on a select group of people is constitutionally suspect. However, as noted above, to fall within the constitutional prohibition, the tax must apply to all persons, regardless of

condition. Here, Portland has placed four conditions before someone must pay the tax: first, the tax payer must be an income earner; second, the tax payer's income must exceed \$1,000 per year; third, the income must not be from an exempted source; and finally that the total household income be above the poverty line. Such is hardly an indiscriminate class of all residents, which is what the text of the Oregon Constitution requires before this court can hold the Arts Tax unconstitutional.

Additionally, Plaintiff and its *amici curiae* attempt to impose an ability to pay requirement into the constitutional standard under Article IX, section 1a. Specifically, Plaintiff repeatedly asserts that since all members of the "class" must pay a flat \$35.00 annual fee, the Arts Tax does not give due regard to the tax payer's financial ability to pay the tax. Even assuming there is room within the text and historical context for this court to conclude that a poll or head tax is one that is imposed without regard to the taxpayer's ability to pay, Plaintiff's arguments fail under the very same standard he asserts. The same conditions that demonstrate why the tax does not apply to an indiscriminate class, also show that the City considered the taxpayer's ability to pay the new tax by exempting the following persons from paying the tax: (1) anyone who receives less than a \$1,000.00 a year income; (2) anyone who receives more than a \$1,000.00 a year income if the source of the income is from social security or certain federal/state

pension funds; and (3) anyone, regardless of their income level or source of the income, who resides in a household that is at or below the federal poverty level. (Respondent’s Answering Brief, Court of Appeals, Appendix 1-7).

In summary, the ordinary and plain reading of the text of Article IX, section 1a, of the Oregon Constitution -- when considering the meaning of the text at the time of its introduction into the Oregon Constitution – supports the City’s assertion that the Arts Tax is not a constitutionally prohibited “poll or head tax.” The Arts Tax does not apply indiscriminately to all residents in Portland. Additionally, the Arts Tax clearly and meaningfully takes into account “income, property or other resources” by imposing the tax only on income earners that exceed both individual and family income thresholds, and takes into account sources of that income. Consequently, this court should affirm the Court of Appeals opinion in this case.

**B. The historical context in which the voters adopted Article IX, section 1a, of the Oregon Constitution supports the conclusion that the Portland Arts Tax is not a “Poll or Head Tax.”**

In addition to the text, the historical context of Article IX, section 1a, of the Oregon Constitution equally requires this court to conclude that the Arts Tax does not qualify as an unlawful “poll or head tax.” As the Court of Appeals correctly noted, there was only one statewide poll tax in effect when the constitutional prohibition was adopted. *Wittmyer* at 752. Specifically, in 1910, Oregon had a statewide poll tax that required “[e]very male inhabitant of this state over twenty-

one years of age and under fifty years of age, unless by law exempt, to annually pay a road tax of \$3.00.” Lord’s Oregon Laws, Title XLII, ch III, § 6326 (1910). The only persons exempted by law from paying this \$3.00 road tax were firefighters. *Id.* Consequently, this tax was nearly uniformly assessed against all persons, without regard to their financial status or ability to pay and was the target of the Constitutional provision at issue here. As the Court of Appeals correctly noted, the “context” of what constituted a “poll or head tax” in 1910 “had a precise and particular meaning that did *not* include measures and with exemptions based on the amount or source of individual or household income.” *Wittemyer* at 754-755. Put differently, the Court of Appeals concluded that the “poll or head tax” prohibition applied to taxes that lacked a “financial exemption.” *Id.* at 755.

From that analysis, Plaintiff, and the *amici curiae* supporting Plaintiff’s position, inexplicably extrapolate and conclude that to be constitutional under Article IX, section 1a, a tax must account for an individual’s ability to pay the tax. To support their position, Plaintiff, and the *amici curiae* supporting him, point to the voter’s pamphlet explaining the constitutional amendment at issue, which provides in part that:

“The tax is unjust not only because it is collected from very few of the men who are supposed to pay, but also because it bears so unequally on men in proportion to their ability to pay. The laborer supporting a family on \$2 a day pays exactly the same poll tax as the corporation manager with a salary of ten thousand dollars a year. If

the laborer can starve his family into saving fifty cents a day, the savings of six days' labor will just pay his poll tax; the corporation manager can easily save enough to pay his poll tax from his salary for two hours' work. One man lives easily and saves enough to pay his share of the tax with two hours' work; the other lives hard and save enough on sixty hours' work to pay his share of the tax. The odds are thirty to one in favor of the rich man. Is it possible to imagine a more outrageously unjust tax than this?"

Official Voters' Pamphlet, General Election, Nov 8, 1910, 24-25.

To be certain, the Court of Appeals requirement of a "financial exemption" is not the same thing as to require either exact means testing or progressivity in all government imposed taxes. The assertion that the above wording from the Voter's Pamphlet somehow mandates the Court read into the Constitution a requirement that any tax assessed by the government be proportionally based is an overstatement of what the Voter Pamphlet articulated. Nothing in the Voter Pamphlet demands that taxes be percentage based or proportional to a person's income, rather the language mirrors the language found in dictionary definitions of the day – poll taxes are taxes that do not account for a person's financial resources. The difference is one of degree. At the time that the voters adopted Article IX, section 1a, the "offending" tax imposed a burden that was equal to 25% of the lowest wage earner's income – as set out in the example of the voter's pamphlet. Consequently, the voter's concern wasn't that the tax match and adjust to the taxpayer's ability to pay as Plaintiff and its *amicus curiae* suggest. Rather the

concern was far more fundamental: whether the tax imposed was so great as to make it impossible, or nearly impossible, to pay.

When the voters amended the Constitution to prohibit “poll or head taxes,” every single male, except firefighters, had to pay a \$3.00 road tax. (Respondent’s Answering Brief, Court of Appeals, Appendix 8-9). The tax was required by every “man,” regardless of: whether or not he earned income; the amount of income he earned; the source of his income; or the financial status of the household in which he resided. *Id.* Such a tax was rightly deemed “odious and unjust.” (Respondent’s Answering Brief, Court of Appeals, Appendix 10-13).

By comparison, the Arts Tax is neither odious nor unjust as it accounts for each of the things the 1900’s era poll tax failed to acknowledge. To be clear, not every person in Portland pays the Arts Tax, nor does the City require every person of a particular gender. The tax applies only to those earning more than \$1,000.00 a year, and even some people who receive more than a \$1,000.00 a year do not pay the Arts Tax because their income is from an exempted source. Furthermore, individuals who receive more than a \$1,000.00 a year from a non-exempted source are still not required to pay the Arts Tax if they reside in a household that is at or below the federal poverty level.

In summary, the history of Article IX, section 1a, of the Oregon Constitution demonstrates that the type of taxes the voters of Oregon sought to permanently



prohibit were those taxes that were assessed against every person, regardless of whether they earned income. It was a prohibition that the voters intended to guard against government taxing someone out of existence entirely. To be certain, the City's Arts Tax does not come close to either of those concerns. Consequently, this court should affirm the Court of Appeals.

**C. Plaintiff's broad interpretation of Article IX, section 1a, of the Oregon Constitution could result in the wholesale dismantling of government funding in Oregon.**

Plaintiff's request that this Court broadly interpret Article IX, Section 1a of the Constitution to require that all taxes imposed by a governmental entity in Oregon be proportionally related to each individual person's income has the potential to utterly dismantle how government in Oregon is funded. If Plaintiff is correct, and the Court overturns the decision rendered by the Court of Appeals, any tax which (1) establishes a class of persons who must pay the tax; and (2) fails to impose the tax proportionally against each member of the class based on their respective income, will be unconstitutional. Such a ruling has the potential to be catastrophic.

Take for example the State's gas tax. In establishing the gas tax, the State created a specific class of persons who must pay the tax - every person who drives a vehicle that requires fuel to operate. Each driver of a fuel-powered vehicle is subject to the exact same tax rate as the next, in no instance is a driver's "income,

property or other resources” taken into consideration when the gas tax is assessed and collected. A broad interpretation, as suggested by Plaintiff, of Article IX, section 1a could lead one to conclude that the State’s gas tax is an unlawful “poll or head tax.”

If Plaintiff’s assertion is legally correct and this court interprets the Constitution in the manner he suggests, what is to become of state and local taxes on marijuana and hotels, or other transactional based taxes? Those taxes arguably establish a class of persons in the same way the Arts Tax establishes a class of persons. For marijuana, the class established is any person who purchases marijuana. The class established for lodging tax purposes is any person who needs to spend the night in a hotel or motel. Once a person becomes a member of either of these established classes, the tax they pay is one which fails to account for their particular “income, property or other resources.”<sup>2</sup> Similarly, what will become of

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<sup>2</sup> To be clear, these three taxes and so many like them, are voluntary taxes in the sense that a person is not required to pay the tax unless the person chooses to purchase gas, marijuana, or a hotel room. By their voluntary nature, they become arguably discretionary taxes. However, Plaintiff’s argument does not distinguish between taxes that are imposed upon discretionary transactions vs. those that are mandatory. Moreover, even if Plaintiff were to draw such a distinction, in rural Oregon, where public transportation may not be available, the act of filling one’s gas tank and thereby paying the state gas tax may be the only reasonable and available means of transportation, making such a choice to fill the gas tank not all that discretionary.

privilege taxes that the state and local governments impose on businesses for the privilege of doing business in the city or state?

To be certain, Plaintiff's broad interpretation of Article IX, section 1a of the Constitution carries far reaching consequences that goes beyond the voter's original intent of the provision. Plaintiff's position, if accepted, may threaten the way government, both state and local, fund the myriad of services necessary to serve the public. Surely the voters of 1910 did not intend for such a broad and extreme interpretation. Consequently this court should uphold the Court of Appeals decision in this case.

### **CONCLUSION**

The Arts Tax adopted by the City is not a "poll or head tax" prohibited by Article IX, section 1a, of the Oregon Constitution. A straightforward analysis of both the text and the historical context of the voter initiative that resulted in this section of the Constitution should lead this court to only one conclusion: that the Arts Tax is not a "poll or head" tax as that term is understood. The City's Art Tax is not an indiscriminate tax on all residents of Portland. It applies only to certain wage earners, from specific sources and above a particular threshold. Even then, the City's tax contains an exemption. Moreover, to adopt the theory set out by Plaintiff and his supporting *amicus curiae*, dangerously calls into question sources of both state and federal revenue that this court has already upheld. For these

reasons, LOC requests this court to uphold the Court of Appeals decision in this matter.

Respectfully submitted this 7<sup>th</sup> day of December, 2016.

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE  
SIZE REQUIREMENTS**

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,909 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

*s/ Sean E. O'Day*

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## CERTIFICATE OF FILING AND SERVICE

I certify that on December 7, 2016, I directed to be electronically filed the foregoing **Brief of *Amici Curiae* League of Oregon Cities in Support of Respondent City of Portland** with the Appellate Court Administrator, Appellate Court Records Section, by using the Oregon Appellate eFiling System, and I served the following parties by using the electronic service function of the eFiling system or by mail as noted below:

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