

IN THE SUPREME COURT
OF THE STATE OF OREGON

GEORGE WITTEMYER,

Plaintiff-Appellant-Petitioner
on Review,

v.

CITY OF PORTLAND,

Defendant-Respondent-
Respondent on Review.

Supreme Court Case No. S064205

Court of Appeals Case No.
A154844

Multnomah County Circuit Court
Case No. 1303-04234

MERITS BRIEF OF *AMICUS CURIAE*
ERIC FRUITS, Ph.D.

Appeal from the Final Judgment of the Circuit Court of Multnomah County,
dated July 12, 2013, Hon. Kelly Skye, Judge.

Review of the Decision of the Oregon Court of Appeals
Opinion Filed: June 8, 2016
Author: Hon. Rick T. Haselton, S.J.

Kristian Roggendorf, OSB #013990
ROGGENDORF LAW LLC
kr@roggendorf-law.com
5200 Meadows Road, Suite 150
Lake Oswego, OR 97035
Telephone: (503) 726-5927

*Attorney for Prospective Amicus
Curiae Eric Fruits, Ph.D.*

George Wittemyer, Esq.
Pro Se
4930 NW Cornell Road
Portland, OR 97210
Telephone: (503) 292-4830

*Plaintiff-Appellant-Petitioner on
Review*

(counsel continued on reverse)

Dennis M. Vannier, OSB # 044406

CITY OF PORTLAND

Deputy City Attorney

1221 SW 4th Avenue, Suite 430

Portland, OR 97201

Telephone: (503) 823-4047

Of Attorneys for Defendant-

Respondent-Respondent on Review

John A. Bogdanski, OSB # 800028

3227 NE 23rd Avenue

Portland, OR 97212

Telephone: (503) 493-8030

bojack@lclark.edu

Pro Se Amicus *Below*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii-iii
INTRODUCTION.....	1
I. HISTORY SHOWS THAT POLL TAXES OFTEN EXEMPTED THE POOR AND DISABLED.	2
II. DESPITE ITS CREATIVE WORDING, THE STRUCTURE OF THE ARTS TAX IS INDEED THAT OF A “POLL OR HEAD TAX.”	6
III. THE ARTS TAX IS ARBITRARY, ILLOGICAL AND UNWORKABLE, AND THUS CANNOT BE ENFORCED CONSISTENT WITH ANY NOTION OF A RATIONAL LAW.....	10
IV. AMICUS BELOW IS CORRECT THAT FORCING A CHOICE ON WHETHER THE ARTS TAX IS AN INCOME TAX OR A PER CAPITA TAX PRESENTS A FALSE DICHOTOMY.	11
CONCLUSION.....	12

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

US Const, Amend XIII	2
Or Const Art IX, § 1a	<i>passim</i>

STATUTES

Lord's Oregon Laws, title XLII, ch III, § 6326 (1910)	7
Or Laws 1903, ch XIII, § 81	1
Public Laws of the State of North Carolina, chap 440 § 11 (1909)	5-6

CASES

<i>Wittemyer v. City of Portland</i> , 278 Or App 746, 377 P3d 589 (2016) ...	1, 2, 7, 9
<i>City of Portland v. Cook</i> , 170 Or App 245, 12 P3d 70 (2000)	3, 6, 7, 8
<i>Oregon City v. Moore</i> , 30 Or 215, 217, 46 P 1017 (1896)	6, 7
<i>Salem v. Marion County</i> , 25 Or 449, 451-52, 36 P 163 (1894)	6

LOCAL ORDINANCES

City of Portland, <i>Arts Tax Administrative Rules</i> https://www.portlandoregon.gov/revenue/article/434547	7, 9
---	------

OTHER AUTHORITIES

Carolyn C. Fenwick, 1 <i>The Poll Taxes of 1377, 1379, and 1381</i> (1998)	4
David Schultz & Sarah Clark, <i>Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment</i> , 29 QUINNIPIAC L REV 375 (2011)	4
C.T. Malan, A History of the Poll-Tax in Indiana, 31 INDIANA QUARTERLY MAGAZINE OF HISTORY 324 (1935)	4, 6
Carl C. Pehn, Introduction to Public Finance (1911)	4-5
Robert M. Kozuh, <i>Antecedents of the Income Tax in Colonial America</i> , 10 THE ACCOUNTING HISTORIANS' JOURNAL 99 (1983)	5
Erica King, <i>Tax Exemptions and the Establishment Clause</i> , 49 SYRACUSE L REV 971 (1999)	5
Carolyn Weber, <i>A History of Taxation and Expenditure in the Western World</i> (1986)	5
University of Oregon, Life Expectancy Graphs, http://mappinghistory.uoregon.edu/english/US/US39-01.html	8

INTRODUCTION

Given how ingrained the income tax has become in our lives, modern American citizens run into difficulties thinking about taxation methods that operate apart from government's knowledge of personal financial means or recorded transactions. Yet for most of Western history, governments had no idea exactly how much one made or how much one owned (outside of land). For this reason, taxation was based upon an individual's existence, and often upon their station in life. From the knowledge of the individual's existence, the "poll" or "head" tax¹ was developed in which (1) a fixed amount was assessed (2) on each person (3) assuming certain income for certain jobs.

Nevertheless, historically throughout the West, such poll taxes would exempt the destitute and disabled. Thus, a consideration of personal financial means is not antithetical to the concept of a poll tax, nor does such consideration morph a poll tax into a different kind of legal animal. *Amicus curiae* Dr. Fruits offers this Court a brief historical background showing that poll taxes often considered income or wealth, and a logical examination of how

¹ While disagreeing that poll or head taxes must be imposed without regard to income at all, *Amicus* Dr. Fruits agrees that the terms "poll tax" and "head tax" are functionally synonymous as a matter of history. *Wittmyer v. City of Portland*, 278 Or App 746, 751, 377 P3d 589 (2016). This brief will use "poll tax" or "per capita tax" for simplicity.

the Portland Arts Tax cannot be considered anything but a poll tax—one that violates of Article IX, Section 1a of the Oregon Constitution.

I. HISTORY SHOWS THAT POLL TAXES OFTEN EXEMPTED THE POOR AND DISABLED.

The Court of Appeals’ opinion in this case rests wholly upon the theory that poll or head taxes can only exist where they apply to all citizens without exemption for those with limited financial means. *Wittemyer v. City of Portland*, 278 Or App 746, 752-53, 377 P3d 589 (2016). However, the history of per capita taxation in the Western legal tradition, even from the earliest times, shows a frequent use of exemptions or stratification to ameliorate the sometimes harsh effects of a flat, per person tax scheme.

“No poll or head tax shall be levied or collected in Oregon.” Or Const Art XI sec 1a. The uniquely absolute language of the proscription, possibly inspired by the Thirteenth Amendment to the United States Constitution,² means that in Oregon no poll or head tax of *any* sort shall exist, period. The Court of Appeals and Defendant City in this case concede that the Arts Tax presents one necessary aspect of a poll tax—a uniform, fixed amount—but not

² “Neither slavery nor involuntary servitude ... shall exist within the United States.” Because a poll tax might be paid in “like-kind exchange,” for those of limited means, the tax could be viewed at least by the less fortunate citizenry as a form of “legal” involuntary servitude. See *Wittemyer*, 278 Or App at 753 n10, citing Or Laws 1903, ch XIII, § 81.

the other—i.e., an assessment “per capita.” 278 Or App at 756, *citing City of Portland v. Cook*, 170 Or App 245, 12 P3d 70 (2000) (“the only exemptions from the uniform, per capita imposition of such taxes were based on substantial public service”). That turns out to be historically unsupportable, as will be discussed, *infra*.

To avoid the unequivocal prohibition on poll taxes set out in Article IX, Section 1a, the panel below reads into the constitutional provision a limitation whereby a “financial exemption” destroys the “per capita” nature of the assessment, rendering the Arts Tax something other than a “poll tax.” 278 Or App at 756 (“the only exemptions from the uniform, per capita imposition of such taxes were based on substantial public service”). The Court of Appeals’ opinion allows for “limited exclusions” to poll taxes if they are not tied to individual ability to pay (278 Or App at 753), but any poll tax that limits or qualifies the obligated population “based on absolute or relative, ability (or inability) to pay” putatively cannot be considered to be assessed “per capita,” and accordingly cannot be a poll tax—or so it is claimed. *Id.*

History is not on the side of the Court of Appeals. Poll taxes are of ancient origin. In England, per capita taxation was a revenue raiser in days when few people owned taxable property, and served as a substitute for mandatory, uncompensated labor on the public roads. In 1377-1381, during the reigns of King Edward III and Richard II, Parliament instituted the first

English poll taxes. “There were established principles about who was eligible for taxation and who was not.”¹ Carolyn C. Fenwick, *The Poll Taxes of 1377, 1379, and 1381* at xxiii (1998). “Every poll tax *specifically excluded the poor*.” *Id.* (emphasis added). Significantly, the “names of taxpayers erased for poverty always use the phrase ‘*quia pauper*,’ never ‘*quia mendicans*’ [those living by begging] ... negat[ing] the idea that only beggars were not to be taxed.” *Id.* Importantly, tools of trade and essentials were exempted from taxation, thus providing a minimum level of wealth not subject to the poll tax.

Outside of England, poll taxes were often graduated according to the socio-economic class of the person assessed. “Poll taxes trace their history back to ... the Roman Empire and Republic. ... [I]n Ancient Rome there were several classes or levels of fees, with different political rights associated with the type and amount of fee paid.” David Schultz & Sarah Clark, *Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment*, 29 QUINNIPIAC L REV 375, 378-379 (2011). Similar systems existed in France, Russia, and Prussia in the 17th through 19th centuries. C.T. Malan, *A History of the Poll-Tax in Indiana*, 31 INDIANA QUARTERLY MAGAZINE OF HISTORY 324 (1935) (“In France, the “capitation” levy of 1695, radically altered in 1701, established twenty classes, with rates from twenty sous to two thousand livres”). The Prussian poll tax, seen an example of how public taxes became more fair in the 19th century, provided that “all persons were grouped

according to rank, profession, and general prosperity, [and] then taxed *per capita* at different rates for each class.” Carl C. Pehn, *Introduction to Public Finance* at 182 (1911). Everything old is new again.

America has had a long history with poll taxes as well, far beyond the typical context of the Jim Crow South. Poll taxes were a feature of colonial American finance, and likewise, an individual’s ability to pay was considered:

“Eventually [in New England], the property tax was supplemented by a classified poll tax on various classes of town people who earned their subsistence on their labors and not on the produce of property. This classified poll tax was graduated on a subjective appraisal of the faculty [income] of each class.”

Robert M. Kozuh, *Antecedents of the Income Tax in Colonial America*, 10 THE ACCOUNTING HISTORIANS’ JOURNAL 99, 106 (1983). To illustrate, “colonial New England ... imposed the poll tax with a considerable number of exemptions; ... for instance, governors, schoolteachers, ministers, invalids, and Harvard College students were exempt.” Erica King, *Tax Exemptions and The Establishment Clause*, 49 SYRACUSE L REV 971, 976 (1999), citing Carolyn Weber, *A History of Taxation and Expenditure in the Western World* 363 (1986).

When Oregon passed Article IX, Section 1a, other states had poll taxes that exempted individuals based on financial means. For example, a 1909 North Carolina law provided that “The board of commissioners of the several counties shall have the power to exempt any person from the payment of poll

tax *on account of poverty and infirmity*.” Public Laws of the State of North Carolina, Session of 1909, chap 440 § 11 (1909) (emphasis added). In 1935 the State of Indiana levied poll taxes by statute, and a commentator observed that “The law makes provision for exemptions as follows: ‘Such county commissioners may exempt from paying poll tax a person who, from any cause, they may deem unable to pay it.’” Malan, *History of the Poll-Tax in Indiana* at 325-326. Indeed, nothing in the long history of poll or capitation taxation suggests that financial exemptions were unusual, or that including such exemptions legally transforms the poll tax into something else.

II. DESPITE ITS CREATIVE WORDING, THE STRUCTURE OF THE ARTS TAX IS INDEED THAT OF A “POLL OR HEAD TAX.”

“A poll or head tax is *a fixed tax assessed on each eligible person*. See *Oregon City v. Moore*, 30 Or 215, 217, 46 P 1017 (1896) (describing ‘a poll tax of \$2 upon each and every person liable therefor’); *Salem v. Marion County*, 25 Or 449, 451-52, 36 P 163 (1894) (same).” *City of Portland v. Cook*, 170 Or App at 250 (emphasis added). The Portland Arts Tax, which sorts classes of people on the basis of age and ability to pay, and assesses each class a fixed, ungraduated sum (\$35 or zero), fits this clear, historic definition of a poll tax.

First, irrespective of exemptions applied later in the process, the Arts Tax is in fact imposed upon all Portland residents over age 18. All persons over that age must file *something*. With the Arts Tax, every resident of Portland is required to file either a tax return or a “request” for exemption—in other words, no person is categorically exempt, an exemption must be proven. City of Portland, *Arts Tax Administrative Rules*.³ Thus, the basic structure of the Arts Tax shows that it applies to *every Portland resident*. Moreover, even if the income exemption is considered, those exemptions fail to distinguish the Arts Tax from the admittedly tautological *Cook* definition of a poll tax applying to “each eligible person,” and *Moore*’s similar formulation of “each and every person liable therefor.” Only those with a sufficient income are “eligible” to pay the tax, and they are the ones who are “liable therefor.”

Pointedly, the Court of Appeals elides over the cap on age used in the statewide poll tax from 1910 that it cites itself in the *Wittemyer* opinion. “The only statewide poll tax extant in 1910 was a provision requiring ‘[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).” *Wittemyer*, 278 Or App at 752. An age cap of 50 in the Oregon statewide 1910 poll tax has nothing to do

³ <https://www.portlandoregon.gov/revenue/article/434547> (last accessed October 9, 2016).

with “volunteer community service,” but does stand in as a reasonable approximation of the top end of earning years in 1910, when the male life expectancy was about 52 at birth. University of Oregon, *Life Expectancy Graphs*, <http://mappinghistory.uoregon.edu/english/US/US39-01.html> (last accessed October 11, 2016).

Second (and apparently uncontroverted here), the Arts Tax is indeed a set fee, regardless of income level, and it must be paid so long as one resides above the poverty limit or, alternatively, cannot prove that they fall below it. Whether factors exist such as the rate being “fair” to low income payers, or whether alternatives to paying the tax exist in the City’s scheme such as “like kind” work as substitute payment, are irrelevant and not required in any case. The rate is fixed for all those who must pay. Thus, the Arts Tax is unlike that in *Cook*, where “although there [was] a minimum tax, the tax [was] proportional. The amount of the tax [was] generally a function of the income a licensee earns.” 170 Or App at 251.

Finally, the Arts Tax is in no way “voluntary,” as was the tax at issue in *Cook*. The tax in *Cook* was “assessed only on those persons or corporations who choose to do business within the city.” *Id.* This reason, as well as the graduated rates of the tax, were determining factors in the Court of Appeals rejecting an argument that it was a poll tax at issue in *Cook*. Contrast that to the Arts Tax, which is imposed on all residents of the City, making exceptions

only for those earning less than \$1,000 in “income.” Given the breadth of the definition of the term “income” in the City’s regulations, there is scarcely a person in Portland who would fail to clear so low a bar:

‘Income’ includes, but is not limited to, all income earned or received from any source. Examples of income include, but are not limited to, interest from individual or joint savings accounts or other interest bearing accounts, child support payments, alimony, ***unemployment assistance, disability income***, sales of stocks and other property (***even if sold at a loss***), dividends, gross receipts from a business and wages as an employee. ‘Income’ does not include benefits payable under the federal old age and survivors insurance program or benefits under section 3(a), 4(a) or 4(f) of the federal Railroad Retirement Act of 1974, as amended, or their successors, or any other income a city or local municipality is prohibited from taxing pursuant to applicable state or federal law.

Wittemyer, 278 Or App at 748, quoting Arts Tax Administrative Rules

(emphasis added). Ironically for a “progressive” city such as Portland, the Arts Tax is in practice even more regressive than Medieval English poll taxes, which at least exempted the proceeds of begging and charity. Nevertheless, after casting such a broad net for “income,” it would be ludicrous to claim that the Arts Tax can be in any way “voluntarily” incurred (or by the same token voluntarily avoided) by any adult residents of the City.

Rather, the Arts Tax is a pure capitation tax, clumsily sprinkled with thinly reasoned exemptions and overbroad terms like the City-defined “income,” with all of these ornaments used in what appears to be a facile attempt to make the

Arts Tax appear less blatantly unconstitutional. Yet as a poll tax, it is forbidden by Article IX, Section 1a, and this Court should strike it down.

**III. THE ARTS TAX IS ARBITRARY, ILLOGICAL AND UNWORKABLE, AND
THUS CANNOT BE ENFORCED CONSISTENT WITH ANY NOTION OF A
RATIONAL LAW.**

In addition to the historical and legal failings of the Arts Tax, it also fails as a matter of basic logic in two significant ways. First, the Arts Tax counts as “income” money that isn’t there. For instance, in counting the proceeds of joint banking accounts as income, the Arts Tax in theory could require a couple to pay the tax where neither of the partners would be required to do so individually. This is similar to the definition of income as including the proceeds of the sale of property “even if sold at a loss.” Where property is sold at a loss, there flatly is no income.

Second, the Arts Tax requires residents to prove a negative. For instance, where one person is part of a marriage or domestic partnership and that individual does not have an income, there is no way to substantiate that lack of income if taxes are filed jointly. This is not an unlikely hypothetical, as having one partner in a relationship stay home without income is hardly an unusual situation, even in the Twenty-First Century.

These failures are indicative of the practical difficulties attendant to the Arts Tax, and are not independent bases of claiming unconstitutionality.

Nonetheless, these problems also evidence the lack of consideration given to drafting the ordinance, and go to the weight that this Court should afford the presumption of constitutionality for the Arts Tax.

IV. AMICUS BELOW IS CORRECT THAT FORCING A CHOICE ON WHETHER THE ARTS TAX IS AN INCOME TAX OR A PER CAPITA TAX PRESENTS A FALSE DICHOTOMY.

Amicus curiae at the Court of Appeals, tax law Professor Jack

Bogdanski, made a most salient and inescapable point: it does not matter if there are income-based elements in the Arts Tax, if it is a poll tax then it must be struck down. The restrictive, exclusionary, stretched-to-the-breaking-point definition of “poll tax” offered by Defendant City and the Court of Appeals fails to account for the idea that a per capita tax is still assessed per head even if there is an exemption of a particular class, be it age or certain income level.

Amicus Dr. Fruits adopts and incorporates the arguments presented by Professor Bogdanski at the Court of Appeals, and should Professor Bogdanski file those arguments again in this Court, Dr. Fruits incorporates those arguments by reference as well.

////

////

////

////

CONCLUSION

The trial court and court of appeals should be reversed, and the Arts Tax declared unconstitutional for violating Article IX, Section 1a.

RESPECTFULLY SUBMITTED this 11th day of October, 2016.

ROGGENDORF LAW LLC

/s/ *Kristian Roggendorf*

Kristian Roggendorf, OSB #013990
(503) 726-5927

Counsel for prospective *Amicus*

CERTIFICATE OF FILING AND SERVICE

I certify that on October 12, 2016, I filed **AMICUS BRIEF ON THE MERITS** by electronic filing with the State Court Administrator at this address:

<https://appellate-efile.ojd.state.or.us/filing>

I also certify that on October 12, 2016, I served the following counsel through the Court's electronic filing system:

Denis M Vannier, Esq.
Portland Ofc of City Attorney
1221 SW 4th Ave Ste 430
Portland, OR 97204
denis.vannier@portlandoregon.gov

Respondent on Review City of
Portland

John A Bogdanski, Esq.
Lewis & Clark Law School
10015 SW Terwilliger Blvd
Portland, OR 97219
bojack@lclark.edu

Amicus Curiae - *Pro Se*

I further certify that the following party was served conventionally by mail:

George Wittemyer, Esq.
4930 NW Cornell Rd
Portland OR 97210

Petitioner on Review - *Pro Se*

by depositing 2 copies of this brief, postage paid, in the U.S. mail on October 12, 2016.

DATED this 12th day of October, 2016.

ROGGENDORF LAW LLC

/s/ *Kristian Roggendorf*

Kristian Roggendorf, OSB #013990
(503) 726-5927

Counsel for prospective *Amicus Curiae*
Eric Fruits, Ph.D.