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IN THE SUPREME COURT OF THE
STATE OF OREGON— SUPREME COURT
— COURT OF APPEALS
— DEPUTY — FILED

GEORGE WITTEMYER)	Mult. County Case No. 1303-04234
)	
Plaintiff-Appellant)	Court of Appeals No A154844
)	
v.)	Supreme Court No: S064205
)	
CITY OF PORTLAND,)	This Petition is an ORAP 5/12
)	constitutional challenge to Portland
)	City Code Chapter 5.73 as a prohibited
Defendant-Respondent)	poll or head tax under Article IX, Section
)	1a of the Oregon Constitution

PLAINTIFF-APPELLANT'S OPENING BRIEF ON THE MERITS AND
EXCERPT OF THE RECORD

Appeal from a decision of the Court of Appeals on appeal affirming the Limited Judgment of the Mult. County Circuit Court, Hon. Kelly Skye, Judge. Opinion Filed: June 8, 2016. Author of Opinion: Haselton, S.J.; Concurring Judges: Duncan, Presiding Judge; Lagesen, Judge

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APPELLANT'S OPENING BRIEF AND EXCERPT OF RECORD

STATEMENT OF THE CASE

1. NATURE OF THE ACTION AND RELIEF SOUGHT

A. Legal Issues

This is an action against the City of Portland for imposing a fixed tax of \$35.00 per year upon each eligible person within the limits of the City. Appellant is a resident of Portland and subject to the "Portland Arts Tax"¹ ("Arts Tax"), which is a head tax masquerading as an "income tax". The parties agree this action is a challenge directed to PCC 5.73.020's face and the only question of law or fact is whether the Arts Tax violates Article IX, Section 1a of the Oregon Constitution.²

The Arts Tax is unconstitutional under Article IX, Section 1a of the Oregon Constitution, which provides:

"No poll or head tax shall be levied or collected in Oregon. The Legislative Assembly shall not declare an emergency in any act regulating taxation or exemption."³

¹ Portland Arts Tax, Portland City Code (PCC) 5.73.020: "A tax of \$35 is imposed on the income of each income-earning resident of the City of Portland, Oregon who is at least eighteen years old. No tax will be imposed on filer(s) within any household that is at or below the federal poverty guidelines established by the Federal Department of Health and Human Services for that tax year."

² Order Granting Defendant's Motion for Partial Summary Judgment ("Order") p.1, lines 4-7; Proceedings of June 21, 2013, ("Proceedings") p.3, lines 3-6.

³ This section of Oregon's Constitution was created by initiative Petition, filed June 23, 1910 and adopted by the populace on November 8, 1910. See note following Or Const, Art IX, Sec 1a.

B. Statement of Facts

Defendant City of Portland, Multnomah County, Oregon enacted by vote of the populace on November 6, 2012, the Arts Tax, PCC 5.73.010 through 5.73.110, and amended same on December 19, 2012 and April 3, 2013. Administrative rules to implement collection of the Arts Tax were adopted February 20, 2013 and amended on March 19, 2013. Thereafter, an "Arts Tax Return" Form ARX 2012, with a demand for payment was mailed by Defendant to all Portland residents over age 18, including Plaintiff, demanding payment of \$35.00 or "proof of exemption", by close of business on May 15, 2013⁴, which date was later delayed by defendant to July 15, 2013. Plaintiff filed this lawsuit on March 22, 2013. Plaintiff's First and Second Claims for Relief were settled before the Court of Appeals appeal was filed.

This Appeal is from the Trial Court's action and the affirmation thereof by the Court of Appeals of the dismissal of Plaintiff's Cross-Motion for Partial Summary Judgment on the ground that the pleadings, declarations, admissions, and other evidence on file show that there is no genuine issue as to any material fact and that Plaintiff is not entitled to prevail on his Third Claim for Relief, as a matter of law that the Arts Tax is an unconstitutional head tax but instead is a valid income tax. Further results from the improper granting of said Order by the Trial

⁴ *Amicus Fruits* Merits Brief - 7

Court, and the affirmation thereof by the Court of Appeals, on Defendant's Motion for Partial Summary Judgment was the entry of an ORCP 67B Limited Judgment, dismissing Plaintiff's Third Claim for Relief in favor of Defendant and against Plaintiff, and declaring the Arts Tax is not a head tax, prohibited by Article IX, Section 1a of the Oregon Constitution, but instead is a valid income tax.

C. Political Issue

This case is political because a portion of the head tax is designated (and used) by Multnomah County Schools for music education (not Jefferson, apparently). I am a musician, and I believe music is as important as sports and must be taught in our public schools. My grandson, Kevin Gochee, is learning to play the trumpet from a fine teacher at West Sylvan Middle School. I do not believe music, or anything, should be financed by an unconstitutional head tax.

The political aspect seems to have impacted the Trial and Court of Appeals Judges' decision because both decisions appear to be more political than analytical.

According to the Trial Judge:

"The Arts Tax is not a head or poll tax because it is not assessed per capita. In assessing the tax, the City considers a persons' income in three distinct provisions: the tax applies only to (1) income exceeding \$1000, (2) non-exempt income sources, and (3) income of individuals residing in households with income above the federal poverty guidelines. Taxpayers who are under the age of 18 are exempt from the tax. The practical effect of the tax is to tax income of certain City residents within a

certain income range and is therefore not a poll or head tax." (ftnt 2, Order, p. 2, lines 1-7).⁵

The Court of Appeals echoed this with no new insight.

Nature of the Judgment and Effective Date

The nature of the ORCP 67B Limited Judgment is the dismissal of Plaintiff's Cross-Motion for Partial Summary Judgment on his Third Claim for Relief, granting Defendant's Motion for Partial Summary Judgment, dismissing said Third Claim for Relief; and thereby declaring the Arts Tax is not a head tax, therefore unconstitutional and void, but was deemed to be an income tax. The Order granting Defendant's Motion for Partial Summary Judgment and denying Plaintiff's Cross-Motion for Partial Summary Judgment was dated June 21, 2013, the day of the argument. The Rule 67B Limited Judgment on Plaintiff's Third Claim for Relief is dated July 12, 2013. The Court of Appeal's opinion, affirming the Arts Tax is an income tax, was filed on June 8, 2016.

Basis of Appellate Jurisdiction

Appellate jurisdiction is based upon ORS 2.516, 19.205, and ORCP 67B.

Effective Date for Appellate Purposes

The ORCP 67B Limited Judgment on Plaintiff's Third Claim for Relief was signed on July 12, 2013, by Circuit Judge Kelly Skye and was entered in the Register of

⁵ Page 1 hereof.

the Circuit Court of Multnomah County, State of Oregon, on July 17, 2013. The Notice of Appeal was served on August 5, 2013 and filed on August 6, 2013. The Court of Appeals affirmed by opinion, filed June 8, 2016, Haselton, SJ; concurring Judges Duncan, Presiding Judge; Lagesen Judge. Appellant's Petition for Review to the Oregon Supreme Court was granted on September 15, 2016.

Questions Presented on Appeal

A. Did the Trial Court, and the Court of Appeals affirming the Trial Court, err in dismissing Plaintiff's Cross-Motion for Partial Summary Judgment on Plaintiff's Third Claim for Relief, alleging that the Arts Tax is an unconstitutional head tax, prohibited by Article IX, Section 1a of the Oregon Constitution, and ruling as a matter of law that the Arts Tax is not a head tax but an income tax?

B. Did the Trial Court, and the Court of Appeals' affirmation of the Trial Court's Order, err in granting Defendant's Motion for Partial Summary Judgment to dismiss Plaintiff's Third Claim for Relief, alleging that Defendant's Arts Tax is an unconstitutional head tax, prohibited by Article IX, Section 1a of the Oregon Constitution, and ruling as a matter of law that the Arts Tax is not a head tax but an income tax?

Summary of Argument

The Circuit Court Trial Judge, and the Court of Appeals by affirming her Order, incorrectly and contrary to the Oregon Constitution, dismissed Plaintiff's

Cross-Motion for Partial Summary Judgment on Plaintiff's Third Claim for Relief, and incorrectly and unlawfully granted Defendant's Motion for Partial Summary Judgment dismissing Plaintiff's Third Claim for Relief by declaring that the Arts Tax is not a head tax but an income tax.

Both Courts make an issue that the Arts Tax is not per capita, i.e. covers ALL persons in Portland.⁶ That is because the exemptions to the Arts Tax are, in part, based upon amount and type of income. Historically,⁷ especially in Oregon before 1910, all head taxes had criteria to determine on whom falls the burden of paying it. The Arts Tax does NOT yield diverse income predicated applications through its financial exceptions. Once those of lower income and those who receive income of a certain character are excluded, the Arts Tax is applied per capita across the population with NO exceptions.

Both the Trial Court and the Court of Appeals judges ignore the almost TOTAL exclusions of every person in the State of Oregon in the pre-1910 head taxes. Everybody except male residents between the ages of 21 and 50 are excluded. Instead, those Courts focus upon the itty-bitty sub-exclusions to the males 21 to 50 age group, such as members of the Oregon National Guard and firefighters. Only by ignoring the almost total exclusions and focusing on the tiny

⁶ *Wittemyer* - p.753, 755 + ftnts 8, 9, & 10

⁷ *Amicus Fruits* Merits Brief - 7

sub-exclusions can the Court of Appeals come up with a convoluted statement to "claim" the Arts Tax is an income tax:

"The Portland Arts Tax incorporates such financial exceptions yielding diverse, income-predicated complications that contradict the fundamental *per capita* character of a "poll or head tax". Accordingly, the Arts Tax does not violate Article IX, section 1a".

This is a wrong statement, a false statement, and an incorrect statement both factually and legally. It makes no sense. It is not legal analysis. It is political obfuscation of the worst kind.

There are other, equally silly assertions from Defendant-Respondent and the four judges regarding "graduated tax—\$0 to \$35"; the "issue" the lower courts try to make that the Arts Tax is not *per capita*, which is totally irrelevant. As noted in *Amicus Fruits Merits Brief*⁸ (p.3), not only is history against the Court of Appeals and Trial Court's opinions, but they are also incorrect factually. Form ARX 2012 (*Fruits* - p.7)⁹ is mailed to ALL Portland residents, so, the Arts Tax is per capita on all Portlanders. Moreover, the Oregon City Case¹⁰ and *Cook*¹¹ unequivocally state ALL Oregon poll taxes had substantial exemptions.

In all of Defendant's Memos, and during Defendant's argument and brief before the Trial Judge on June 21, 2013, Defendant and both of the Courts have

⁸ *Amicus Fruits Merits Brief* - 3

⁹ *Amicus Fruits Merits Brief* - 7

¹⁰ *Oregon City v. Moore*, 30 Or 215, 217, 46 P1017 (1896).

¹¹ *City of Portland v. Cook*, 170 Or App 245, 12 P.3d 70 (2000).

ignored the fact that every head tax **IN OREGON**, cited in those Memos, Orders and opinions, including the Arts Tax, defines those persons who will be eligible to pay the assessed head tax, and only then assesses the flat tax on each person (head) with no relation to that eligible person's income or other financial resources.

Several Oregon cases have defined who is eligible to pay a poll or head tax under Oregon Law: Before the Constitutional Amendment of November 8, 1910, one case defined eligibility to pay a head tax, and that head tax, together with other head taxes thereafter imposed, contributed to the passage of the Amendment.¹² Another case¹³, involving Attorney Vern Cook of Gresham, decided eligibility 90 years after the Amendment and is the definitive case under which the present case must be decided. This eligibility, together with Defendant's own definition¹⁴ of who is the eligible person for assessment of the \$35.00 per year Arts Tax, make it obvious just how wrong the Trial Court's and the Court of Appeals' decisions were. Given the position taken by Defendant in this case, any attempt to renege on, or recant, that definition would be precluded by judicial estoppel (judicial preclusion).

ASSIGNMENT OF ERROR

¹² *Oregon City v. Moore*, 30 Or 215, 217, 46 P1017 (1896). *Salem v. Marion County*, 250 R 449, 451-52, 36 P 163 (1894).

¹³ *City of Portland v. "Cook"*, 170 Or App 245, 249, 12 P.3d 70 (2000).

¹⁴ *Wittemyer* - 752-753, Trial Court Order

Plaintiff assigns as error the Trial Court's Order, dated June 21, 2013, and the affirmation thereof by the Court of Appeals on June 8, 2016, which granted Defendant's Motion for Partial Summary Judgment and denied Plaintiff's Cross-Motion for Partial Summary Judgment, the Rule 67B Limited Judgment on Plaintiff's Third Claim for Relief, dated July 12, 2013, granting a Limited Judgment in favor of Defendant and against Plaintiff on his Third Claim for Relief - Unconstitutional Taxation - and the adjudging that Portland City Code Chapter 5.73 is not a head tax, within the meaning of Article IX, Section 1a of the Oregon Constitution, but is an income tax.

A. Preservation of Error

Plaintiff preserved his claim of error by opposing Defendant's Motion for Partial Summary Judgment and filing Plaintiff's Cross-Motion for Partial Summary Judgment to dismiss Defendant's Motion and declare Portland City Code Chapter 5.73 a head tax, within the meaning of Article IX, Section 1a of the Oregon Constitution.

B. Standard of Review

This Court reviews the Trial Court's Order, and the Court of Appeals affirmation thereof, of Defendant's Motion for Partial Summary Judgment and the dismissal of Plaintiff's Motion for Partial Summary Judgment, resulting in the ORCP 67B Limited Judgment on Plaintiff's Third Claim for Relief, dated July 12,

2013, declaring the Arts Tax is not a head tax but is, instead, an income tax for errors of law.

ARGUMENT

A. Historical Position of Poll Tax in Oregon — See generally *Amicus Curiae* Fruits Merits Brief.

Before November 8, 1910, the poll tax was alive and well in Oregon and the Arts Tax would have found friendly turf in this state.¹⁵ The Road Poll Tax in the *Oregon City Case* read:

"Every male inhabitant of the state over twenty-one years and under fifty years of age, unless by law exempt, shall annually pay a road poll tax of two dollars, which shall be collected by the road supervisor of the district in which any person liable therefore resides, and which must be collected by the road supervisor on or before the first day of December of the year for which such poll tax is due. Such road poll tax must be paid on demand to the road supervisor as hereinafter provided."

⁵ Subdivision 4 of sec. 4085, Hills Code, as amended, (Laws 1893).

The pre-1910 poll taxes determined who, as an inhabitant of Oregon, was eligible to pay the fixed annual tax based upon an exclusionary formula—only men of a certain age were "eligible" to pay the tax. All women, children, and men under 21 and over 50 were excluded. The pre-1910 poll taxes **NEVER** were

¹⁵ *Oregon City v. Moore*, 30 Or 215, 217, 218, 46 P 1017 (1897) "*Oregon City Case*"

imposed upon every person or nearly every person in the taxing district, or per capita, as the lower courts are wont to say. (Emphasis added)

B. *Per Capita*

None of the pre-November 8, 1910 head taxes in Oregon were per capita. They usually had more exemptions than payers (Oregon City Case). The Trial Court seemed unable to grasp this concept. The Court of Appeals, apparently also confused, disingenuously repeats several times "...the Arts Tax is not imposed on all Portland residents..."¹⁶ and pretends to analyze the historical intent of the Amendment to the Oregon Constitution, citing *Webster's International* and *Black's Law Dictionary*¹⁷, but not the Cook Case¹⁸. The Court of Appeals quotes:

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 individual's income or property.

The "...sometimes subject to limited exclusions,..." is nonsense in Oregon. The *Oregon City Case*, *Salem v. Marion County*, and other cases and laws CITED BY THE COURT OF APPEALS¹⁹ (p. 751-754), and related footnotes. Each and every case, comment, and law cited by the Court of Appeals discusses enormous exceptions usually **ALL** citizens EXCEPT males between ages of 21 and 50. That

¹⁶ *Wittemyer v. City of Portland*, 278 Or App 746, 748, 751, 753-757, 377 P.3d 589 (2011) (*Wittemyer*).

¹⁷ *Black's Law Dictionary*.

¹⁸ *City of Portland v. Cook*, 170 Or App 245, 249, 12 P.3d 70 (2000).

¹⁹ *Wittemyer* 751-754

is the bulk of the population of Oregon who are excepted. Where the confusion appears to lie is the concept of initial exclusion.

C. Eligibility to Pay the Arts Tax

The gravamen of this case is eligibility to pay the Arts Tax. *Cook*²⁰ did not explore eligibility, because the Portland business license tax is not a fixed tax on all payers; but a graduated tax, the base of which is the amount of income earned by the business transactions in Portland during the year. With the Arts Tax, we have an agreed²¹ flat tax of \$35 per year assessed upon the class of taxpayers created by the five (5) eligibility criteria. Then each eligible person is taxed the \$35 per year, regardless of their income, property, or resources. The determination of the class of who is taxed **DOES NOT** and cannot exempt the \$35 flat annual tax from being a head tax. The Arts Tax does not "yield diverse income-predicated applications through its financial exceptions", as the Court of Appeals incorrectly assumes. Once those of lower income and those who receive certain types of income are excluded, the \$35 Arts Tax is applied *per capita* across the population of eligible taxpayers, without **ANY** exceptions.

²⁰ *City of Portland v. Cook*, 170 Or App 245, 12 P.3d 70 (2000).

²¹ Respondent-Defendant's Motion for Summary Judgment (Trail Court level) p. 12, lines 13-15.

Cook²², though important to this matter, correctly ruled the business license tax was based (or measured) upon income earned and therefore did not explore eligibility.

Eligibility is exactly what this case is exploring. Eligibility creates a class. The Arts Tax creates a class of citizens eligible to be assessed the \$35 tax, based upon the fact they made more than poverty-level income. Then those in that class of citizens are uniformly taxed *per capita* at \$35, regardless of those individuals (in that class) amount of income earned, value of property owned, or value of other financial resources.

The most telling statement of the Court of Appeals is on page 757.²³

"However, because of the exemption predicated on level and source of individual and household income, the tax is not "assessed (sic) on each eligible person."

"Each eligible person" is defined in the Arts Tax, just as it is in the Oregon City Case. To say it is "not assessed on each eligible person" defies logic. The Arts Tax defines who is eligible, and then assesses a \$35 head tax on each of the eligible persons.

²² *Cook Case*

²³ *Wittemyer v. City of Portland*, 278 Or App 746, 748, 751, 753-757, 377 P.3d 589 (2011) (*Wittemyer*).

The Court of Appeals (and the Trial Court) misinterpreted the language "without regard to income, property or other resources." (p.10ff hereof). The meaning of that phrase is simply that the \$35 annual, fixed Arts Tax itself does not distinguish between what one head (person) in the class pays versus what another head (person) in the class pays, based upon any person in the class's income, property, or other resources. The Arts Tax remains \$35 per head for everyone in the qualifying class, no matter what they earn, or how wealthy (or not) they may be. The fact that the Arts Tax uses amount of income, character of income, and level of income, together with residency and age as the basis of who initially is in the class (or group) that is taxed \$35 per head per annum, does NOT disqualify the Arts Tax as an unconstitutional head or poll tax.²⁴ The basis for determining who is within the class or group to be taxed the annual \$35 is NOT a part of the analysis as to whether the tax itself is a head tax.

Thus, every person (head) within the five-element selection for eligibility is taxed \$35 *per capita*, and Defendant-Respondent pretty much admits this in its Motion for Summary Judgment.²⁵

In this case, the fact that those subject to the tax *based on their level of income* pay a flat rate of \$35 likewise does not turn the Arts Income Tax into as poll or head tax.

²⁴ "Taxation of Mining", James L. Wadhams, Nevada Lawyer, April 2013, Vol. 21, Issue 4

²⁵ Defendant Respondent's Motion and Memorandum Motion for Partial Summary Judgment (DMSJ), page 12, lines 13-15.

Thus, those who qualify for eligibility, each (per capita) is taxed the flat \$35.00: (Whether they own property, a \$300.00 Mercedes or a \$110,000.00 Mercedes, they will still pay \$35.00); employment (such eligible person may earn \$1,000 a year, or she may earn \$100,000.00 a year, but she will still pay only the \$35.00 head tax). Once an eligible person, the Arts head Tax of \$35.00 is imposed on that eligible person, regardless of his or her income, properties, or other moneymaking activities. The Arts Tax is a head tax and is assessed on a per capita basis on each eligible person. As such, it is unconstitutional in Oregon. The Arts Tax does NOT yield diverse income predicated application through its financial exception as the Court of Appeals incorrectly assumes.²⁶ Once those of lower income and those who receive income of a certain character are excluded, the Arts Tax is applied *per capita* across the population of eligible taxpayers with NO exceptions.

D. Court of Appeals try, but fail, to use a two-step process.

The Court of Appeals' opinion did stumble upon an important truth about a head tax: **"IT MUST HAVE TWO CONJUNCTIVE FEATURES"** (emphasis added).²⁷ The Cook Case discussed a bifurcated method for determining what is a head tax, i.e. is it "a fixed tax assessed on each eligible person". Though some

²⁶ *Wittemyer - 753*

²⁷ *Wittemyer - 756.*

have criticized this analysis, a two-step approach, as suggested by the Court of Appeals, could work, although it did not for them.

a. The second step of the Court of Appeals is to determine if the head tax is indeed a flat rate tax. This process is easy in this matter, as both Appellant and Respondent agree per Defendant's Memo for Summary Judgment at page 12, lines 13-15:

"In this case, the fact that those subject to the tax *based on their level of income* pay a flat rate of \$35 likewise does not turn the Arts Income Tax into a poll or head tax."

b. The first step is the \$35 flat tax:

"must be assessed per capita; "...on each member of the putative affected class—without limitation on qualification based on absolute, or relative, ability (or inability) to pay".²⁸

Appellant in his Trial Court response to Respondent's Motion for Partial Summary Judgment and his own Motion for Partial Summary Judgment (AMSJ), at page 8, cites where Respondent admits:

"...those subject to the tax, *based on their level of income*, pay a flat rate of \$35, likewise does not turn the Arts Income Tax in a poll or head tax."²⁹

²⁸ *Wittemyer* - 756.

²⁹ Defendant Respondent's Motion and Memorandum Motion for Partial Summary Judgment (DMSJ) -page 12 (lines 13-15)

The issue of the Arts Tax as a flat \$35.00 tax, then, is well settled in this matter, as both Appellant and Respondent agree. Therefore, the first "conjunctive feature" the Court of Appeals sought is stipulated in that BOTH Plaintiff-Appellant and Defendant-Respondent agree the Arts Tax is a flat, fixed \$35 tax "(i.e. it must be for a uniform, fixed amount)"³⁰.

The "second conjunctive" is where the Court of Appeals got confused by agreeing with the Trial Court that "... the Arts Tax is not imposed per capita". This seems to be code for "the Arts Tax MUST apply to each and every Portland resident 18 or over". As noted, *Amicus Fruits* Brief asserts it does.³¹ Appellant agrees. However, NO poll tax in Oregon has ever applied to each and every person within the taxing district.³² In the *Moore* case, at p. 218, the Court stated:

"...a poll tax of \$2 be assessed UPON EVERY PERSON WHO SHALL BE LIABLE TO PAY A STATE POLL TAX".

The Arts Tax is no different from all previous Oregon poll or head taxes enacted in Oregon before November of 1910. As noted above, all parties to this action agree it is a uniform, fixed amount of a \$35 tax (one of two conjunctives). The second conjunct, as explained by the Court of Appeals³³, they (head taxes) must be:

³⁰ *Wittemyer* - 756.

³¹ *Amicus Fruits* Brief - 7.

³² *Oregon City v. Moore*, infra 218, *Salem v. Marion County*, infra; *Livesley v. Litchfield*, 47 Or 248, 249-50, 83 P 142 (1905); Sec 4858. Hills Laws, page 108, Sec 1 (*Laws* 1901).

³³ *Wittemyer* - 756.

"assessed *per capita*—that is on each member of the putative affected class—without limitation or qualification based on absolute, or relative ability or inability to pay."³⁴

The Court of Appeals went on to state that "eligible" taxpayers, as used in *Cook*, "comports exactly with the historical construct of "poll or head tax". In short, the Court of Appeals struggled with how to determine who might inhabit the "putative affected class".

The *Cook* Case,³⁵ the lodestar case to decide this matter, discussed a bifurcated method for determining what is a head tax, i.e. is it "a (1) fixed tax (2) assessed on each eligible person".

Defendant-Respondent, at p. 11 of its MSJ Memo, p.11 sets forth how to determine "the putative affected class" or "each eligible person" on whom the burden to pay the Arts Tax falls:

"The City's Tax is not assessed on every individual but {is assessed}**only on every individual** 1) who resides in the City, 2) who is over 18 years of age, 3) who has income of at least \$1,000, 4) from sources that the City is not prohibited from taking, and 5) who lives in a household with income above federal poverty guidelines." (emphasis added)

³⁴

³⁵ *City of Portland v. Cook*, 170 Or App 245, 249, 12 P.3d 70 (2000).

Defendant-Respondent admits the Arts Tax is to be collected from an 18 year old Portland resident who has minimum income of \$1000 of non-prohibited income living in an above federal poverty guidelines household is a flat, fixed \$35 tax imposed upon the "eligible group" of Portland citizens 18 and over, with a minimum amount of income of a certain character and level. As with all pre-1910 head taxes, the Arts Tax has an exclusionary formula to determine who pays the fixed \$35 tax, which Arts Tax exclusions are far fewer than the head taxes in the Oregon City Case,³⁶ *Salem v. Marion County*,³⁷ and the general head tax laws of the time.³⁸

The basis for determining who is within the class or group to be taxed the \$35 is NOT a part of the analysis as to whether the tax itself is a head.

E. What is the "Income Tax" The Court of Appeals Purportedly Upheld

Extremely unimportant is the appellation of "income tax", given the Arts Tax by the City Attorney drafters of it. As this Court so succinctly stated in *Redfield v. Norblad*, 135 OR 180, 196, 292 P 813 818 (1931), the legal effect (as

³⁶ *City of Oregon City v. Moore*, 30 Or. 215, 217, 46 P 1017 (1896).

³⁷ *City of Salem v. Marion County*, 25 Or. 449, 450, 36 P 163 (1894) (describing "a poll tax of two dollars upon every person who was liable to pay a state poll tax within said county")

³⁸ Lord's Oregon Laws, title XLII, ch III, § 6326 (1910).

opposed to the "practical effect" found by the trial court) of the Arts Tax is its substance, not necessarily what it calls itself, its form:

"Legislative declarations that the act is an income tax statute,...while entitled to serious consideration, are NOT controlling upon the courts. It is our duty to determine for ourselves the true nature of this tax."

Oregon has an income tax assessed through ORS Chapter 316. As Judge Cooley notes³⁹, the subject of most (Oregon's) income tax is the income received or accrued from property or labor over the period of a year by the person being taxed. The subject of the Arts Tax is the person (head) within the defined group. The measure of an income tax (i.e. the yardstick or base to which the tax rate is applied) is that same earned or accrued income over a period of a year -gross, adjusted gross, or net. The Arts Tax is a fixed \$35 flat amount applied per capita on the head of the defined class of taxpayers. It has no rate as it is a flat, annual \$35 tax. The rate of the (Oregon) income tax is applied on an ascending scale (2% to 9.9%) to the "measure", adjusted gross income.

Defendant-Respondent's feeble argument that the Arts Tax is "graduated from 0 to \$35" is nonsense. 0 is zero - nothing. \$35 is the only amount of the Arts Tax. You are either eligible to pay it or you are excluded from paying it. Even the Court of Appeals ignored that argument realizing the Arts Tax is NOT graduated,

³⁹ Thomas Cooley, The Law of Taxation, Sec. 38 & 45 (4th Ed. 1924)

but a flat \$35 annual tax. The failure of the pre-1910 head taxes to be graduated at varying rates for different incomes, different property values or different "other financial resources" was a major factor in outlawing head taxes like the Arts Tax.⁴⁰

F. Incorrect Analysis

Both lower courts are confusing how to determine whether a tax is an income tax or a head tax. On purpose, and cleverly done, the City Attorneys pretended to have an "income tax" which is NOT levied on any of the income of the class of persons who must pay the \$35 annual Arts Tax. The Arts Tax has NOTHING to do with anyone's income. But with more dissembling, the City Attorney cleverly further (and effectively on the lower courts) confused the deciders by making 3 of the 5 determinants of the class who is taxed the annual \$35 relate to amount, character and level of the income that class or the households in which potential class members reside. It worked. The trial judge was totally confused. The Court of Appeals confusedly wrote:⁴¹

"However, because of the exemptions predicated on level and source of individual and household income, the tax is not "assessed on each eligible person."

As previously noted, The Arts tax creates a class of citizens eligible to pay the \$35 annual tax using 5 separate elements. Once by definition you are within that class,

⁴⁰ *Amicus* Fruits Merits Brief generally, 7.

⁴¹ *Wittemyer* 757

it is logically impossible that the \$35 is not assessed on the head of each member within the class.

Neither the trial court nor the Court of Appeals understood that the basis for determining WHO is within the class or group to be taxed the \$35 annual tax is in no way (or NOT) a part of the analysis as to whether the tax itself is a head tax.

G. Final Thoughts

This case and the head tax issues raised by it are exclusively and specific (*sui generis*) to Oregon. Outside authorities as cited by Defendant-Respondent are irrelevant. ALL of us are limited to the Oregon Constitution and its Article IX, section 1a. Judge Robert Jones in *State of Oregon v. Henry*⁴² declared the Oregon Supreme Court interprets the Oregon Constitution independent of outside of Oregon interpretations (ftnt 14, at p. 515).

The Oregon Constitution was written as a bulwark against government abuse and power. It is the basic norm against which ALL government action: including written statutes, as well as incorrect Court of Appeals decisions, are judged.

CONCLUSION

The lower courts decided the Arts Tax was an income tax with no part of their respective decisions devoted to analyzing how or why the Arts Tax could be an income tax rather than an unconstitutional head tax. Both the trial court and the

⁴² *State of Oregon v. Henry*, 302 Or 510, 515, 732 P2d 9 (1987)

Court of Appeals devoted their respective opinions attempting to prove the negative proposition that the Arts Tax could not possibly be an unconstitutional head or poll, but is in fact an income tax.


So focused were these lower courts on proving this negative that each wrote poorly reasoned, almost foolish, opinions neither of which were accurately based legally or factually. Their theme was "exceptions partially based upon amount, character and level of income make the rule", meaning the method chosen by the City Attorney to determine the class of who is taxed exempts the Arts Tax from being an unconstitutional head or poll tax.

Appellant's foregoing arguments herein show that approach is not just incorrect, but that it leads to illogical and seemingly nonsensical conclusions such as those 3 criteria of amount, level and character of income, together with the other 2 exceptions of age and residency "will yield diverse income predicated applications." Those 5 exceptions, especially the three relating to amount, level, and character of income, do not yield any "...diverse income predicated applications". Appellant has shown that once those Portland citizens of lower income and those who receive certain types of income are excluded, the Arts Tax is applied *per capita* across the population without any exceptions. Both lower courts misinterpreted the language "without regard to income, property or resources." That phrase means the Arts Tax (\$35 per year) itself does not

distinguish between what one group of the class pays verses what another group of the class pays based upon their income or other financial resources. The \$35 Arts Tax is not a function of the income of members of the class. The \$35 annual Arts Tax is imposed without consideration of income. The Arts tax remains \$35 a year for everyone in the qualifying class no matter what amount they make as income. Income as a partial basis for deterring who is initially in the class or group taxed per head, has no effect to disqualify the Arts Tax as a poll or head tax. The basis, regardless of what the criteria may be - amount or type of income, age, sex, dog ownership or cat ownership, working or unemployed, is NOT a part of the analysis as to whether the Art Tax itself is a head tax.

Dated this 26th day of October, 2016.

Respectfully submitted,


 George Wittemyer - *Pro Se*

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Pursuant to ORCP 9.05 (3) and ORAP 5.05 and ORAP 5.35, I certify the word count of this Appellant's Brief is fewer than 14,000 words and the size of the type is not smaller than 14 point for both the text of the Brief and the footnotes.

Dated this 26th day of October, 2016.

George Wittemyer, *Pro Se*, Petitioner for Review

Certificate of True Copy

I hereby certify that the foregoing copy of Plaintiff-Appellant's Brief is a true and correct copy of the original.

Dated: October 26, 2016

George Wittemyer, *Pro Se*

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on ~~Oct 26~~ 2016 I filed the original Petition for Review, marked as such, and 1. copies together with proof of service with the Supreme Court at the following address:

Oregon Supreme Court
State Court Administrator
ATTN: Records Section
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

By United States Postal Service, first class mail at the U.S. Post Office in Portland, Oregon.

Certificate of Service

I hereby certify on ~~Oct 26~~ 24, 2016, I served two (2) true and correct copies of the foregoing plaintiff-appellant's Petition for Review with copy of the Court of Appeals written opinion upon the following parties at the addresses set forth below (except only one (1) to the Attorney General):

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