IN THE SUPREME COURT OF THE STATE OF OREGON

GEORGE WITTEMYER, Plaintiff-Petitioner on Review,	)	Trial Court Case No. 130304234
versus	)	Court of Appeals Case No. A154844
CITY OF PORTLAND, State of Oregon, Defendant-Respondent on Review.	)	Supreme Court Case No. S064205

BRIEF ON THE MERITS OF *AMICUS CURIAE* JOHN A. BOGDANSKI

Review of Decision of Oregon Court of Appeals Affirming
Judgment of the Circuit Court for Multnomah County,
Honorable Kelly Skye, Judge

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STATEMENT OF THE CASE

Plaintiff, George Wittemyer, brought this action against defendant, the City of Portland, in the Circuit Court for Multnomah County, asserting several unrelated claims. One claim was that the City of Portland "Arts Education and Access Income Tax," City Code ch 5.73 (commonly known, and referred to herein, as the "Portland arts tax"), violates several provisions of the United States and Oregon Constitutions, including Article IX, section 1a of the Oregon Constitution (referred to herein as "Article IX, section 1a"). Plaintiff is a resident of the City of Portland and subject to the Portland arts tax. The Circuit Court (Skye, J.) granted defendant summary judgment on all of plaintiff's constitutional claims regarding the Portland arts tax. The Circuit Court issued a limited judgment for defendant under Rule 67B, Oregon Rules of Civil Procedure, on those claims.

Plaintiff appealed the adverse decision on Article IX, section 1a to the Oregon Court of Appeals. That court, without the benefit of oral argument, affirmed the decision of the Circuit Court, in an opinion published at 278 Or App 746, 377 P3d 589 (2016) (Haselton, S.J.). Plaintiff petitioned this court for review. *Amicus curiae* John A. Bogdanski (referred to herein as "*amicus curiae*") filed a brief in support of plaintiff's petition to this court, and noted his intent to file a brief on the merits of the case. This court granted the motion to

appear *amicus curiae* by its order dated July 19, 2016. The Court allowed plaintiff's petition for review by order dated September 15, 2016.

Amicus curiae was the plaintiff in a parallel action against defendant before the Oregon Tax Court on the sole issue whether the Portland arts tax violates Article IX, section 1a. *Amicus curiae* is a resident of the City of Portland and subject to the Portland arts tax. The Tax Court ruled, over his objection, that it lacked subject matter jurisdiction. *Bogdanski v. City of Portland*, 21 OTR 341 (2014). In the present case, assuming (but not conceding) that the Circuit Court had jurisdiction over plaintiff's claim under Article IX, section 1a, *amicus curiae* hopes to aid this court in reaching the correct application of Article IX, section 1a. This brief is filed pursuant to ORAP 8.15(5)(d).

SUMMARY OF ARGUMENT

The Portland arts tax is a "poll or head tax" within the meaning of Article IX, section 1a of the Oregon Constitution because it is imposed only on individual residents of the city, the amount of the tax is identical for all individuals who are required to pay it, and the tax is imposed even on those who have engaged in no activity. Under the prevailing test for interpreting ballot measures amending the Oregon Constitution, the Portland arts tax is a "poll or head tax," as the voters who enacted Article IX, section 1a intended that phrase to be read.

The language of Article IX, section 1a indicates that the Portland arts tax is a "poll or head tax." Moreover, the substance of the Portland arts tax is that of a "poll or head tax," in that the tax possesses every characteristic of a "poll or head tax." The context in which Article IX, section 1a, was enacted also strongly indicates that the Portland arts tax is a "poll or head tax" proscribed by that section. Quite importantly, the voters' pamphlet argument concerning Article IX, section 1a compels the conclusion that the City of Portland arts tax is a proscribed "poll or head tax." The Court of Appeals' contrary ruling is based on erroneous assumptions, and it adopts a definition of "poll or head tax" that defies analysis. Finally, to the extent that it is relevant, the conclusion that the Portland arts tax is "not assessed per capita" is erroneous.

ASSIGNMENT OF ERROR

The trial court and the Court of Appeals erred as a matter of law in failing to hold the City of Portland "Arts Education and Access Income Tax," City Code Chapter 5.73, unconstitutional as a "poll or head tax" prohibited by Article IX, section 1a of the Oregon Constitution.

ARGUMENT

1. The City of Portland arts tax is a "poll or head tax" within the meaning of Article IX, section 1a of the Oregon Constitution because it is imposed only on individual residents of the city, the amount of the tax is identical for all individuals who are required to pay it, and the tax is imposed even on those who have engaged in no activity.

A. The issue is not whether the tax is an "income tax."

In the trial court proceedings in this case, there was substantial debate about whether the Portland arts tax is, as it purports to be, an "income tax." Any emphasis on this question was misplaced. The proper inquiry is whether the tax is a "poll or head tax" within the meaning of Article IX, section 1a. Except to the extent that it informs the court on that issue, consideration of whether the tax might be considered an "income tax," in some sense of that term, is not relevant and potentially distracting. The tax does not necessarily have to be one or the other. A tax could conceivably be considered both an income tax and a "poll or head tax," in which case it would nevertheless be unconstitutional in Oregon. The Article IX, section 1a prohibition of a "poll or head tax" contains no exception for taxes that might be susceptible of dual classification.

B. Under the prevailing test for interpreting ballot measures amending the Oregon Constitution, the Portland arts tax is a "poll or head tax," as the voters intended that phrase to be read.

Article IX, section 1a was enacted by popular vote upon an initiative petition. In interpreting constitutional amendments adopted by ballot measure, the goal is to determine the voters' intent. *See, e.g.*, *State v. Sagdal*, 356 Or. 639, 642, 343 P3d 226, 228 (2015); *State v. Algeo*, 354 Or 236, 246, 311 P3d 865, 870 (2013); *State v. Harrell*, 353 Or 247, 255, 297 P3d 461, 466 (2013); *Pendleton School District 16R v. State*, 345 Or 596, 606, 200 P3d 133, 139 (2009). The prevailing mode of analysis is set forth in *Roseburg School District v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595, 597 (1993):

> The best evidence of the voters' intent is the text of the provision itself. The context of the language of the ballot measure may also be considered; however, if the intent is clear based on the text and context of the constitutional provision, the court does not look further.

(Citations, footnotes omitted.) If further inquiry is required after consulting the text and context of the ballot measure, one then examines the history of the provision, including

> other sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure. Such information includes the ballot title and arguments for and against the measure included in the voters' pamphlet, and contemporaneous news reports and editorial comment on the measure.

Ecumenical Ministries of Oregon v. State Lottery Commission, 318 Or 551, 559 n.8, 871 P2d 106, 111 n.8 (1993); *see also State v. Wagner*, 305 Or 115, 131-134, 752 P2d 1136, 1148-1149 (1988).

As will be demonstrated in the discussion that follows, when one puts these interpretive tools to work in this case, the meaning of Article IX, section 1a clearly emerges: A "poll or head tax" is one imposed only on individual residents of the taxing jurisdiction, where the tax is a single, flat-rate charge on all individuals who are subject to it, and the tax is imposed even on those who have engaged in no activity. Since the Portland arts tax fits squarely within this description, it violates Article IX, section 1a.

2. The language of Article IX, section 1a, indicates that the Portland arts tax is a "poll or head tax."

Article IX, section 1a, reads in its entirety as follows:

> 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.

The first sentence of this provision is the one at issue in this case. This court is being asked to interpret and apply those dozen words in the context of the Portland arts tax.

The constitutional amendment is terse. It does not go on to define "poll or head tax"; if it did, this court might not be called upon, as it is presently, to determine the meaning of that phrase. The language of Article IX, section 1a, however, is highly instructive in fashioning such a definition. It requires that the substance of the tax, rather than its form, be examined.

Note that the voters outlawed a "poll *or* head tax" (emphasis added), thus indicating that the label placed on the tax is not to control in determining whether it violates the ban. If the voters had outlawed only a "poll tax," a taxing authority imposing the identical type of charge on individuals might have been free to argue that its tax was instead a "head tax." The disjunctive phrase precludes this evasive argument. It instructs this court to consider what the common attributes of a "poll tax" and a "head tax" are, and to strike down any tax that contains those attributes.

Moreover, the text of the section also declares that the prohibited tax shall be *neither* "levied" *nor* "collected." This additional disjunctive language signals the voters' intent that procedural details regarding the manner in which payment of the tax is compelled from individuals are not to control in applying the prohibition. For example, if Article IX, section 1a had merely prohibited the "levy" of a poll or head tax, a taxing authority might have been free to argue that its poll or head tax was not being "levied" before it was collected. By adding "or collected" to the sentence, voters expressed their intent to forbid end-runs around the prohibition through technical distinctions in the way the tax is administered. This makes any procedural niceties in the collection of the Portland arts tax irrelevant in testing its constitutionality under Article IX, section 1a. The question is not the procedure for assessment, but rather the nature of the tax.

3. The substance of the Portland arts tax is that of a "poll or head tax."

A. The form of the tax does not control.

In considering the nature of a tax, it is axiomatic that the substance of the tax, and not its form, must control. *St. Louis Southwestern Railway v. Arkansas*, 235 US 350, 362, 35 S Ct 99, 59 L Ed 265 (1914) (when question is whether state tax deprives party of rights secured by Constitution, "the decision is not dependent upon the form in which the taxing scheme is cast.... We must regard

the substance, rather than the form...") In determining the substance of a tax, this court should examine the predominant character of the tax, rather than the label that the taxing authority has placed on it. As this court declared in *Redfield v. Norblad*, 135 Or 180, 196, 292 P 813, 818 (1931), "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." (Citations omitted).

This is especially true in testing the constitutionality of a tax. *Id.*; *see also Lunding v. New York Tax Appeals Tribunal*, 522 US 287, 297, 118 S Ct 766, 139 L Ed 2d 717 (1998) ("where the question is whether a state taxing law contravenes rights secured by [the federal Constitution], the decision must depend not upon any mere question of form...") (citations omitted); *Hanover Fire Ins. Co. v. Carr*, 272 US 494, 509-510, 47 S Ct 179, 71 L Ed 372 (1926) (equal protection challenge to state tax on corporation). Labels placed on taxes by those who impose them should not be decisive for this purpose. Regardless of whether a poll or head tax were formally designated a "capitation tax," as it was in colonial times (see US Const, Art I, § 9, cl 4); a "personal community charge," as it was when it was in effect in the United Kingdom in the late 1980's and early 1990's (see Abolition of Domestic Rates Etc. (Scotland) Act 1987, ch 47, *repealed by* Local Government Finance Act 1992, ch 14; Local Government

Finance Act 1988, ch 41, *repealed by* Local Government Finance Act 1992, ch 14); or some other name, the label does not change the nature or substance of the tax for purposes of considering its constitutionality.

Any consideration of the Portland arts tax beyond a shallow one compels the conclusion that despite its form, it is a "poll or head tax." It is a "poll or head tax" with a few categories of exemptions, including some relating to income, but a "poll or head tax" nonetheless.

B. The Portland arts tax possesses every characteristic of a "poll or head tax."

The Portland arts tax is imposed only on individuals who reside in the city. The amount of the tax is the same for every individual who must pay it; the tax is a single, flat-rate charge. Its amount does not vary based on income, receipts, business, activity, property, wealth, wealth transfer, inheritance, consumption, occupation, age, death, or any other choice or attribute of the taxpayer. One either does not owe the tax, or owes a fixed dollar amount applicable to all taxpayers. This is a "poll or head tax" in its classic form: a tax imposed on each "poll" that is, on each head, see Webster's Third New International Dictionary of the English Language 1755 (1981) of an individual.

Defendant has attempted to disguise the tax, but the disguise is exceed-

ingly thin. The operative language of the ordinance is:

> 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.

Portland City Code § 5.73.020.

All one has to do is remove the words "the income of" from the first sentence, and what remains is an express "poll or head tax":

> A tax of $35 is imposed on 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.

Defendant essentially asserts that the insertion of the three words "the income of" somehow transforms its "poll or head tax" into something other than a "poll or head tax." But those three words do not change anyone's liability for the tax in any way. Surely the Oregon voters who passed Article IX, section 1a did not intend that circumvention of the constitutional prohibition would be so

easy. To interpret Article IX, section 1a this narrowly is to mock the provision, and effectively to read it out of the Constitution.

C. The fact that the Portland arts tax exempts certain individuals, including those with little or no income, does not change its character as a "poll or head tax."

Of course, the Portland arts tax differs in several respects from the Oregon poll taxes of the 19th and early 20th Centuries. The Court of Appeals opined (278 Or App at 754-755) that because the original head taxes did not contain low-income exemptions, and the Portland arts tax does, the Portland arts tax complies with Article IX, sec. 1a. However, not every difference is relevant for the purpose of determining whether a tax is a "poll or head tax." Portland taxes women, for example; further, the arts tax is payable by credit card. Neither was true of the original Oregon poll taxes. But these differences do not matter. The crucial question is whether the arts tax exemptions convert what would otherwise be a head tax into something other than a head tax.

The mere existence of exemptions is not dispositive. The Portland arts tax is no less a "poll or head tax" because it contains exemptions than a property tax ceases being a property tax because it contains exemptions. For example, there are dozens of exemptions to the ad valorem real property tax in Oregon among them exemptions for the active military, disabled veterans, and surviving

spouses of veterans. No one would seriously argue that the ad valorem tax has somehow lost its character as a property tax simply because it contains such exemptions. *See Irwin v. Department of Revenue*, 15 OTR 24, 31 (1999) ("the scope of the exemptions cannot be viewed as indicating the nature of the tax").

The same should be true of a "poll or head tax." The fact that it provides exemptions of several kinds, including some relating to levels of income, does not change its substance, character, or nature from that of a "poll or head tax" to some other kind of tax. Indeed, as will be seen shortly (*infra* Part 4), the Portland arts tax exempts a far smaller portion of the population than did the original poll taxes that were indisputably the target of the initiative that created Article IX, section 1a. And as will also be seen (*infra* Part 5), the history of that ballot measure firmly establishes that the lack of proportionality, and not the absence of exemptions, was the evil meant to be remedied.

D. The Portland arts tax is imposed even on those who engage in no activity, in Portland or elsewhere.

Like the original poll taxes in Oregon, the Portland arts tax reaches residents who are engaged in no business, investment, or other activity, either within or outside the city limits. The tax is imposed on resident individuals with income. Income means any accession to wealth, from whatever source derived, that the taxpayer has realized and over which he or she has complete dominion.

See Commissioner v. Glenshaw Glass Co., 348 US 426, 431, 75 S Ct 473, 99 L Ed 483 (1955), *cited in Smith v. Department of Revenue*, 5 OTR 249, 252-253 (1973), *aff'd in part, rev'd in part on other grounds*, 270 Or 456, 528 P2d 73 (1974). This includes economic benefits realized involuntarily.

For example, if a Portland resident individual, engaged in no business, investment, or other activity, is defamed anywhere in the world regarding a personal attribute, and he or she proffers a claim for damages, amounts received on the claim are income and subject the resident to the Portland arts tax. Similarly, if a Portland resident individual's appreciated property anywhere in the world is condemned, stolen, or destroyed, and the resident receives compensation from a condemning authority or an insurer, the gain recognized on the transaction is income and subjects the resident to the Portland arts tax. Other examples of involuntary realization of income can easily be imagined.

Thus, unlike a license fee or user fee, the Portland arts tax is not imposed only on those who choose to conduct some sort of activity within the city or state. It is imposed on residents of the city who realize income anywhere, voluntarily or involuntarily.

4. The context in which Article IX, section 1a, was enacted compels the conclusion that the City of Portland arts tax is a "poll or head tax" proscribed by that section.

The second step in interpreting the voters' intent is to examine the context in which the ballot measure was passed. *Roseburg School District v. City of Roseburg, supra*. In determining what Article IX, section 1a means by the phrase "poll or head tax," it is helpful to consider the poll taxes or head taxes that were in effect prior to passage of that constitutional amendment.

Article IX, section 1a was enacted by an initiative petition (Ballot Measure 326) filed June 23, 1910, and adopted by the people in a statewide vote taken on November 8, 1910. The key 12 words in this case "No poll or head tax shall be levied or collected in Oregon" were the first 12 in the ballot measure, and they remain unchanged to this day. (The language of the 1910 ballot measure that followed the first sentence was changed by a referendum two years later. SJR 10 (1911), adopted by the people Nov. 5, 1912.)

What head taxes or poll taxes were imposed in Oregon prior to, and on, November 8, 1910? At the time of the election, Oregon had a statewide "road poll tax," levying a charge of $3 upon each male inhabitant of the state between the ages of 21 and 50. The tax was turned over to each county, or in some cases to cities, for the building and maintenance of roads. Act of Feb. 24, 1903, HB

280, §§ 39, 41, Or Laws 1903 at 262, 275-276; *see also* Or General Laws 1907, ch 54, § 2 (empowering City of Cornelius to collect "road poll tax," theretofore collected by Washington County, within city limits).

Poll taxes had been common and recurring in Oregon from the territorial era until the time Article IX, section 1a was enacted. A poll tax of 50 cents per person was first imposed in Oregon even before U.S. sovereignty arrived in 1845, during the period of the provisional government. It was imposed only on qualified voters (that is, free male descendants of white men over the age of 21) under the age of 60. Act for Assessing and Collecting Revenue, § 3 (Aug. 20, 1845), Or Laws 1845 at 39; *see also* Act of July 5, 1843, § 2, Art 4, Grover Or Archives at 28, 29 (setting qualifications for voting). See generally H. Corning, Dictionary of Oregon History 238-239 (1956). In 1847, a poll tax of 50 cents per person was imposed on each male emigrant over age 21 arriving in the Willamette Valley via southern Oregon. Act of Dec. 23, 1847, § 8, Or Laws 1843-1849 at 15, 16. At the first territorial legislative assembly in 1849, the probate courts were authorized to levy an annual poll tax of $1 on each male citizen over the age of 21 and under the age of 50, to raise revenue for county and territorial purposes. Act of 1849 Assessing and Collecting Revenue, § 2, Or Laws 1849-1850 at 13. This $1 poll tax remained in effect until its repeal in 1907. Or Laws 1907, ch 227 (Feb. 25, 1907).

Towns and cities were also routinely authorized by their charters to impose their own poll taxes, but only on able-bodied males between the ages of 21 and 50. See, e.g., Act of Feb. 5, 1903, SB 76, §§ 16(b)-16(c), Or Special Laws 1903 at 233, 252 (only poll tax allowed in City of Adams was street tax of $3 per year); Act of Feb. 2, 1903, SB 28, § 7(27), Or Special Laws 1903 at 197, 208 (Town of Stayton authorized to levy poll tax of $3, over and above road tax, for street improvements).

Exemptions to poll taxes began as early as 1870, when firemen of any regular organized fire company were expressly exempted from payment of all poll taxes assessed under state law. Act of Oct. 22, 1870, Or Laws 1870, at 20; Act of Oct. 26, 1870, § 1, Or Laws 1870, at 63. Beginning in 1887, active members of the state militia were also relieved of any and all poll tax liability. Act of Feb. 25, 1887 § 49, Or Laws 1887, at 107, 117-118. *See generally* Young, *The Financial History of the State of Oregon*, 10 Quarterly Or Hist Soc 239, 282 (1909).

Some taxes that were imposed in Oregon's earliest days were a type of compulsory labor, with payment of a monetary head tax allowed as a means of avoiding performance of required personal services. For example, beginning in 1847, each male inhabitant of the territory over the age of 21 was required either to work two days each year on the public highways of his district, or pay $1 per

day for either of the two days missed. Act of Dec. 28, 1847, Arts II-III, Laws of Or Territory Leg Assembly 1843-1849 at 17, 20-22. In some cases, the required work was described as a "road tax." *See, e.g.*, Act of Feb. 13, 1903, HB 236, § 81, Or Special Laws 1903 at 389, 414 (imposing $3 per year "road poll tax" on all male residents of City of Ontario except firemen and disabled; tax liability could be discharged by two days' work); Act of Feb. 2, 1903, *supra* (Stayton street poll tax could be discharged by two days' work in lieu of $3); Act of Jan. 31, 1855, § 1, Or Special Laws 1854 at 47 (authorizing Tillamook County commissioners to impose "road tax," not to exceed 15 days' work per year, on all able-bodied men between ages of 18 and 50). Similar rules governed service in the militia: A state tax of $2 per year was imposed on every resident required to perform military service, but those who actively served were exempt from payment. Act of Oct. 16, 1862, §§ 3, 61, Or General Laws 1862 at 15, 16, 31-32.

Under these rules, individuals without the means to pay the poll tax were exempt from paying money if they performed services. Since only persons who were not disabled were liable for the tax, every poor person subject to the tax was exempt, on condition that specified types of services be performed.

Despite the many exemptions, the public's disdain for the various poll taxes was so severe that opponents of other elements of the 1910 ballot measure

accused the measure's proponents of including the poll tax repeal as a ploy to distract the electorate and thereby garner votes for the other tax-related matters on the ballot. See *Complete Change in Taxes Aimed*, The Oregonian, Jan. 29, 1911, at 6 (poll or head tax abolition clause was said to have been a "joker" provision, inserted to gain passage of other features of ballot measures, by which counties would be authorized to establish their own systems of taxation); *Not One and the Same*, The Oregonian, Dec. 5, 1910, at 6 (editorial declaring, "The whole business was a fraud."). When the rest of the successful 1910 ballot measure was amended by referendum in 1912, no one dared attempt to reverse the abolition of poll and head taxes from two years earlier. Nor has anyone ever since.

The point of this historical survey is that in 1910, Oregon had in effect at least one poll tax, and had ample, recent experience over many decades with others. All of those taxes were imposed only on individual residents, each tax was a flat-rate charge on each person subject to it, and persons not engaged in any activity were subject to the taxes. They were imposed only on a minority of the population of the state white males between certain ages, with firemen, members of the national guard, and disabled men often being exempt. Some of the poll taxes exempted anyone willing to work, and anyone unable to work, thus ensuring that persons without income or accumulated wealth could avoid

payment of money. *The taxes were imposed on a far smaller percentage of the population than the Portland arts tax is imposed currently*. All of the taxes were nonetheless outlawed by the successful 1910 initiative.

In sum, the poll taxes of early 20th Century Oregon were like the Portland arts tax in every relevant detail. Just as Article IX, section 1a abolished the poll taxes of its day, it prohibits the arts tax imposed by defendant.

5. The 1910 voters' pamphlet argument concerning Article IX, section 1a compels the conclusion that the City of Portland arts tax is a "poll or head tax" proscribed by Article IX, section 1a.

A. The voters objected to the lack of proportionality in the amount of the tax, with no mention of taxpayer classification or exemptions.

Assuming that examination of the text and context of a constitutional ballot measure does not reveal the voters' intent, the final step in divining that intent is to examine other sources of information, available to the voters, that disclose the public's understanding of the measure. *Ecumenical Ministries of Oregon v. State Lottery Commission, supra*. These include the ballot title, arguments included in the voters' pamphlet, and contemporaneous news reports and editorials. *Id.*

Examination of the voters' pamphlet argument on the original version of Article IX, section 1a, is quite revealing in this regard. It shows that the voters' central objection to the poll tax was the fact that the amount of the tax was the same for all individuals who were required to pay it:

> The adoption of these amendments will very greatly increase the people's power. They will repeal the poll tax, which is the most odious and unjust of all taxes.... 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 a 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 saves 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?

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

Defendant contends, and the Court of Appeals has agreed, that if the tax discussed in this passage had provided any exemption for low-income individuals, the proponents of the measure would have conceded that it was not a poll tax to be prohibited by the constitutional amendment. This proposition defies logic. Assume that the tax exempted all laborers who earned $1.50 a day or less. According to defendant and the court below, the author of the voters' pamphlet would not have objected to the tax. How can that be, when the very complaint in the pamphlet would not have been addressed? "The laborer supporting a family on $2 a day" would still pay "exactly the same poll tax as the corporation manager with a salary of ten thousand dollars a year."

The voters' complaint was not a vague objection to a lack of "vertical equity" generally (the notion that those who are more able to pay taxes should contribute more than those who are not). The voters specifically called out the fact that every individual subject to the tax paid the same amount just as with the Portland arts tax. The complaint expressed in the voters' pamphlet was not about *who* had to pay the head tax, but rather that the *dollar amount* of such a tax was the *same* on all residents required to pay it. Without any graduation of amounts of tax, therefore, the Portland arts tax must fail.

B. The Portland arts tax is not graduated or proportional.

In at least one important phase of this litigation, defendant made the extraordinary assertion that the Portland arts tax is "graduated," because "it can either be zero or $35 depending on income, and it can never exceed 3.5% of a person's taxable income." (Defendant's Answering Brief in the Court of Appeals, page 17.) This argument stretches the term "graduated" beyond its breaking point.

A tax whose amount is $35 for every taxpayer is not "graduated" in any sense of the word. It is a flat rate charge the flattest tax imaginable. Discussion of a fanciful "tax" of "zero" was an attempt to conjure up proportionality where none exists. Those whose "tax" is "zero" are not subject to a tax at all. In order to be graduated, a quantity must increase gradually, which necessarily implies at least two amounts greater than zero.

The statement that the tax "can never exceed 3.5% of a person's taxable income" may be true, but it does not show that the tax is "graduated." A graduated or proportional tax is one under which at least some taxpayers pay either different dollar amounts or different fractions of a tax base. Neither is true of the Portland arts tax. Defendant managed to compose a sentence about the arts tax that had a percent symbol in it, but it falls far short of justifying the strained, if not absurd, characterization of the tax as "graduated."

6. The Court of Appeals made several critical errors on the way to its mistaken conclusion.

The Court of Appeals' erroneous conclusion rests on an unsound foundation. The court found a "contemporaneous common usage and historical legal context" (278 Or App at 754) for the term "poll or head tax" that are fundamentally at odds with the actual history of the constitutional provision at issue.

The court relied heavily on the 1910 version of *Black's Law Dictionary*, which defined a "poll tax" as "a tax of a specific sum levied against each person within 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." The court reads the phrase "without reference to his property" as modifying the verb "levied," but it could just as easily modify the phrase "specific sum." In short, the dictionary definition is ambiguous as to the proper resolution of the present dispute. And as seen earlier, Oregon voters in 1910 objected to the lack of proportionality in head taxes, not the lack of exemptions.

The Court of Appeals also cited as support for its decision *People of State of New York ex rel. Hatch v. Reardon*, 204 US 152, 159, 27 S Ct 188, 51 L Ed 415 (1907), which described a "poll tax" as a "tax of a fixed sum, irrespective of income or earning capacity." There, the term "irrespective" modifies the two words that immediately precede it: "fixed sum." This confirms that the essence

of a head tax is lack of proportionality, not exemptions or unfairness to the poor generally. (The court further quoted from a 2012 tax dictionary, which even if correct, sheds no light on the understanding of a term as used more than a century earlier. 278 Or App at 752 n.8.)

The Court of Appeals additionally found that the historical poll taxes in Oregon were "of universal, or near-universal, application." (278 Or App at 754.) This is plainly incorrect. The poll taxes that led up to the 1910 ballot measure applied only to white males between specified ages. Women, children, the elderly, and nonwhites were exempt. Moreover, some head taxes also exempted firefighters, militiamen, and the disabled. The taxes simply were not "near-universal" far from it.

Additionally, the Court of Appeals erroneously found that the Portland arts tax "yield[s] diverse, income-predicated applications." (*Id.*) It is difficult to understand how any diversity of "applications" exists. There are only two possible outcomes a tax of $35, or no tax at all. The fact that exemptions treat different residents differently is not a meaningful distinction from the original Oregon head taxes.

Finally, the Court of Appeals interpreted its own earlier decision in *City of Portland v. Cook*, 170 Or App 245, 12 P3d 70 (2000), rev den, 332 Or 56 (2001), as adopting a two-part definition of a "poll or head tax" that requires not

only that the tax lack proportionality, but also that it not be "assessed per capita." The court then announced that the phrase "assessed per capita" means without any exemption for those unable to pay. In so doing, the court engaged in the following discussion:

> [W]hile all "poll or head" taxes assess a uniform, fixed amount, not all taxes with a fixed sum, non-"proportional" feature are "poll or head" taxes. Rather, to so qualify, they must also be 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.
>
> That understanding of "*eligible*" taxpayer, as used in *Cook*, 170 Or. App. at 250, 12 P.3d 70, comports exactly with the historical construct of "poll or head tax," including contemporaneous usage in 1910. As noted, the only exemptions from the uniform, per capita imposition of such taxes were based on substantial public service. There were no financial exemptions. Rather, those in exigent circumstances were subject to the tax, albeit sometimes fulfilling their tax obligation through provision of "in kind" labor. See 278 Or. App. at 752-53, 753 nn 9 & 10.
>
> Here, as the trial court concluded, the Arts Tax is not im-

> posed per capita. The referent class of putative, "eligible" taxpayers that is, defined without reference to ability to pay is all income-earning residents of Portland who are 18 or older. However, because of the exemptions predicated on level and source of individual and household income, the tax is not "assessed on each eligible person," *Cook*, 170 Or. App. at 250, 12 P.3d 70, within that per capita class. * * *

278 Or App at 756-757.

The court erred in noting that "the only exemptions from the uniform, per capita imposition of such taxes were based on substantial public service." There were also exemptions based on age, gender, race, and disability. Moreover, able-bodied persons unable to pay some of the head taxes were allowed (as were those able but unwilling to pay) to perform services instead of paying money. The court saw this practice as "payment" of the tax rather than an elective exemption, but the question is one of semantics, which should not control the constitutional analysis. The fact is that under some of the original Oregon head taxes, only able-bodied men were covered, and such individuals were not required to pay money. Thus, persons without means were not required to pay.

More significantly, however, the Court of Appeals adopted a reading of the phrase "assessed per capita" that defies analysis. The court concluded that

"[t]he referent class of putative, 'eligible' taxpayers... is all income-earning residents of Portland who are 18 or older." How was this "class" line drawn? The opinion ended without offering so much as a clue. Given the potential importance of the question to taxpayers and taxing authorities throughout the state, more detailed and transparent reasoning should have been employed.

Alternatively, the phrase "assessed per capita" might be left out of the analysis of Article IX, section 1a entirely, in that it has engendered confusion without advancing the inquiry. To this point the discussion now turns.

7. Assuming that it is relevant, defendant's argument (and the lower courts' conclusion) that the arts tax is "not assessed per capita" is erroneous.

Defendant argued below, and the courts agreed, that the Portland arts tax is not a "poll or head tax" because it "is not assessed per capita." 278 Or App at 756-757; Order Granting Defendant's Motion for Partial Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment, at 2 (June 21, 2013) (hereinafter, "Order"). Assuming that the manner of assessment is relevant, the statement that it is "not... per capita" is open to multiple interpretations.

One possibility is that the declaration "not assessed per capita" merely restates the ultimate conclusion that the tax does not constitute a "poll or head tax." After all, "capita" is the Latin word for heads. As a mere reformulation of the court's ultimate finding, the statement is not helpful in resolving the issue presented.

Another possible reading of "not assessed per capita" is that the tax does not violate Article IX, section 1a because of the exemptions it provides for example, for certain persons of low income. This is the sense in which the lower courts in the present case appear to have used the phrase. 278 Or App at 756-757; Order, at 2. If that is the statement's meaning, then the statement is inaccurate. As has been seen (*supra* Part 4), the historical poll taxes that Article IX, section 1a was clearly intended to repeal and abolish were imposed on only a small segment of the population men between the ages of 21 and 50 (or 18 and 50), with militiamen, firefighters, and sometimes disabled men, exempt. *The Portland arts tax exempts far fewer individuals, as a percentage of the population, than the original poll taxes did.* Thus, its exemptions do not remove the Portland arts tax from the scope of the term "poll or head tax."

A third possible reading of "not assessed per capita" is as a reference to the methods by which defendant intends to collect the tax from those who have failed to pay it. If this is what the phrase means, then as has also been seen

(*supra* Part 2), it is irrelevant. The language of Article IX, section 1a "levied or collected" clearly reflects the voters' intent that the procedures for obtaining payment of the tax from taxpayers, and the taxing authority's remedies in the case of nonpayment, should have no bearing on whether the tax is prohibited by the constitutional amendment.

A fourth possible reading of "not assessed per capita" and likely the correct one can be gleaned from *Cook*, discussed *supra*. In that case, the Court of Appeals declared that a much different City of Portland tax, the business license tax, was "not assessed per capita." Then the court added a sentence explaining its meaning:

> It is not assessed per capita. Rather, it is assessed only on those persons or corporations who *choose to do business within the city*.

Cook, 170 Or App at 251, 12 P3d at 74 (emphasis added). If one uses the phrase "not assessed per capita" in this important sense namely, that the tax is assessed only on persons who engage voluntarily in some activity then as has been seen (*supra* Part 3D), the lower courts' conclusion of law in the present case, that the arts tax is "not assessed per capita," was in error.

CONCLUSION

Amicus curiae urges this court, for all of the foregoing authority, argument, and reason, to hold the City of Portland arts tax to be unconstitutional, in violation of Article IX, section 1a of the Oregon Constitution.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing copy of Brief on the Merits of *Amicus Curiae* John A. Bogdanski is a correct copy of the original.

Dated this 26th day of October, 2016.

John A. Bogdanski, *pro se, amicus curiae*

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I hereby 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 7,152 words.

Type size

I hereby 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(2)(d)(ii).

John A. Bogdanski, *pro se, amicus curiae*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 26th day of October, 2016, I filed the foregoing **BRIEF ON THE MERITS OF *AMICUS CURIAE* JOHN A. BOGDANSKI** by electronic filing with the State Court Administrator at the following address: https://appellate-efile.ojd.state.or.us/filing

I also hereby certify that I served the foregoing **BRIEF ON THE MERITS OF *AMICUS CURIAE* JOHN A. BOGDANSKI** on the 26th day of October, 2016, through the Court's electronic filing system:

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