No. _____

In The
Supreme Court of the United States

CITY OF DES MOINES,

Petitioner,

vs.

LISA KRAGNES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR A WRIT OF CERTIORARI

MARK MCCORMICK
Counsel of Record
MARGARET C. CALLAHAN
BELIN MCCORMICK, P.C.
666 Walnut Street Suite 2000
Des Moines, IA 50309-3989
Telephone: (515) 283-4615
Facsimile: (515) 558-0615
E-Mail: mmccormick@belinmccormick.com; mccallahan@belinmccormick.com

JEFFREY D. LESTER,
City Attorney
MARK GODWIN,
Deputy City Attorney
City Hall
400 Robert D. Ray Drive
Des Moines, IA 50309-1891
Telephone: (515) 283-4564
Facsimile: (515) 237-1748
E-Mail: jdlester@dmgov.org; magodwin@dmgov.org

Attorneys for Petitioner City of Des Moines, Iowa

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

May a court in a class action, consistent with the Due Process Clause, certify a plaintiff class consisting of all payers of a municipal franchise fee, and refuse to allow class members to opt-out, when the lawsuit seeks a class-wide refund that will necessarily have a disparate and negative impact on those class members who pay municipal property taxes?

PARTIES TO THE PROCEEDING

Petitioner is the City of Des Moines, an Iowa municipal corporation. No corporate disclosure statement is required of Petitioner.

Respondent is Lisa Kragnes, named representative of a plaintiff class certified as consisting of all City of Des Moines utilities customers who paid a City of Des Moines electricity or gas franchise fee from and after July 27, 1999.

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The Iowa District Court for Polk County entered its Ruling on Motion for Approval of Class Notice on August 27, 2008, in Case No. CE49273.

The Iowa District Court for Polk County entered its Ruling on Defendant's Third Motion to Decertify Class on October 9, 2008, in Case No. CE49273.

The Iowa District Court for Polk County entered its Findings of Fact, Conclusions of Law and Ruling on June 3, 2009, in Case No. CE49273.

The Iowa District Court for Polk County entered its Ruling on Defendant's Motion to Enlarge and Amend Findings of Fact and Conclusions and to Modify Ruling on September 2, 2009, in Case No. CE49273.

The Iowa Supreme Court issued the opinion for which review is sought on March 2, 2012, in Case No. 09-1473. The opinion is published at *Kragnes v. City of Des Moines*, 810 N.W.2d 492 (Iowa 2012).

The Iowa Supreme Court entered an order overruling the Petition for Rehearing of the City of Des Moines on April 6, 2012, in Case No. 09-1473.

JURISDICTION OF THE COURT

Petitioner seeks review of the Iowa Supreme Court decision filed March 2, 2012. Because Petitioner filed a timely petition for rehearing, the time for filing the petition for writ of certiorari runs from April 6, 2012, the date of denial of the rehearing, in accordance with Supreme Court Rule 13.3.

Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(a). The petition for certiorari raises questions regarding due process of law under the Fourteenth Amendment of the United States Constitution and the propriety of certification of a class under the State of Iowa's class action rule.

The decision of the Iowa Supreme Court is final on the federal constitutional question. The issues remaining for the Iowa trial court concern the mechanics of the class-wide remedy ordered, and the due process issue will remain regardless of the remedial details. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 480-81 (1975).

CONSTITUTIONAL PROVISION AND STATE RULES

I. UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN, SECTION 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. RULE 1.261, IOWA RULES OF CIVIL PROCEDURE.

One or more members of a class may sue or be sued as representative parties on behalf of all in a class action if both of the following occur:

(1) The class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable.

(2) There is a question of law or fact common to the class.

III. RULE 1.262, IOWA RULES OF CIVIL PROCEDURE.

(1) Unless deferred by the court, as soon as practicable after the commencement of a class action the court shall hold a hearing and determine whether or not the action is to be maintained as a class action and by order certify or refuse to certify it as a class action.

(2) The court may certify an action as a class action if it finds all of the following:

a. The requirements of rule 1.261 have been satisfied.

b. A class action should be permitted for the fair and efficient adjudication of the controversy.

c. The representative parties fairly and adequately will protect the interests of the class.

* * *

STATEMENT OF THE CASE

Approximately fifty percent of the monies used by the City of Des Moines in providing basic city services come from property taxes. (Tr. 516, 2015; Hr. 8/20/08 at 57). The balance comes from various fees and license and similar charges, including a franchise fee collected by electricity and gas utilities from customers within the City of Des Moines. (*Id.*). In July 2004, to offset recent and anticipated future reductions in state funding, the City of Des Moines adopted a phased-in increase to the electricity and gas franchise fees. (Exs. 3 & 4; video dep. at 24-25, 120-21 & Exs. 4 & CC). The City took note that a franchise fee increase spread the burden of municipal finance more evenly than a property tax increase because at least one-third of otherwise taxable property in the City of

Des Moines was and is held by nonprofit organizations exempt from property tax. (Exs. 41, 42 & 45; video dep. at 72; Tr. 8/20/08 at 58).

City resident Lisa Kragnes almost immediately filed a lawsuit, in the Iowa District Court for Polk County, seeking the refund by the City of "illegally collected" franchise fees dating back to 1999. (Petition). The refund was to extend not only to Kragnes herself but to all members of a proposed plaintiff class. (*Id.*).

The Iowa Supreme Court, in a ruling on interlocutory appeal before the certification of a class, held that the City of Des Moines utilities franchise fees were permissible only to the extent they were reasonably related to the City's costs of inspecting, supervising or otherwise regulating the electricity and gas franchises. *See Kragnes v. City of Des Moines*, 714 N.W.2d 632, 643 (Iowa 2006).

Upon remand from the Iowa Supreme Court, the trial court certified a class consisting of all individuals or entities who had paid an electricity or gas franchise fee to the City at any time from July 27, 1999, forward. (App. 134). The court recognized the City's argument that a significant portion of the designated class might not wish to go forward because they might lose more in increased property taxes than they would gain from a refund. (App. 133). However, the court said that this concern should be left until after class members had been given an opportunity to

"opt out," with decertification a possibility after that. (App. 133).

Some months later, the issue of approval of class notice came before a different judge. The City argued that the notice should include the right of class members to opt out and expressly invoked "federal due process guarantees." (Br. Object. Notice at 1-2). The City quoted a passage from *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985), in which the United States Supreme Court cited *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940), for the proposition that "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." (Br. Opt-Out/ Due Process/Conflict at 2). The City pointed to the conflict of interest between Kragnes and some class members as making the class action procedure improper, at least in the absence of an opt-out provision. (*Id.* at 1-2). Kragnes, at an evidentiary hearing, affirmed that she wanted to force a class-wide refund of the potentially excessive portion of the franchise fees even if she and other members of the class would ultimately lose money due to an increase in property taxes. (Hr. 8/20/08 at 105-06).

The trial court approved a class notice that did not allow opt-out and also did not include language, proposed by the City, regarding the likely negative economic impact of the class-wide refund being pursued by Kragnes. (App. 138-41). The court held that the Iowa class action rule did not allow opt-out in the circumstances presented even if intra-class conflict

existed, but it declined to find a constitutional violation. (App. 137-40). The court addressed and distinguished *Phillips Petroleum Co.* as recognizing due process opt-out rights only with regard to out-of-state members of a plaintiff class. (App. 138).

The City then filed a motion to decertify the class due to intra-class conflict, focusing particularly on conflicts arising from the inverse relationship between the franchise fees and property taxes. (Third Mot. Decertify). The City in its supporting brief drew on cases discussing the "adequacy of representation" requirement for class certification. (Br. Third Decertify at 4-6, 7-8). The City, however, also noted the due process implications of intra-class conflict, pointing to *Hansberry*, 311 U.S. at 44, as discussing the issue in "ominous constitutional terms." (App. 151). In addition, the City asserted again that the unavailability of opt-out rights under the Iowa class action rule violated due process. (Br. Third Decertify at 16-18).

The trial court declined to decertify the class, dismissing the significance of the intra-class conflict on the basis that all class members had the same interest in the determination of whether, and to what degree, the City's electricity and gas franchise fees were excessive and in having illegal fee collection cease. (App. 119). The court characterized the conflict regarding the desirability of a refund as going only to remedy, as secondary, and as speculative. (App. 119-20). The court addressed the City's opt-out argument by referring summarily to its prior ruling. (App. 123-24).

The case was tried to the court, which issued its ruling on June 3, 2009. The court declared the maximum allowable franchise fee for each utility and rejected the City's various arguments that the refund was not an appropriate remedy. (App. 99-100, 102-09). The court then awarded "monetary damages" in an amount equal to all sums illegally collected through the utilities franchise fees. (App. 101, 113). The court retained jurisdiction to determine the exact amounts to be refunded, how those amounts would be distributed to class members, and other remedial issues. (App. 113-14).

The City in a timely-filed post-trial motion renewed its request for decertification of the class due to intra-class conflict and argued in the alternative for the grant to class members of opt-out rights. (Mot. Enlarge at 1-3). The trial court denied relief.

The Iowa Supreme Court accepted the case for interlocutory review and filed its opinion on March 2, 2012. The court made some modifications to the trial court's findings regarding the permissible amount of the franchise fees, but it rejected the City's arguments that refund was an inappropriate remedy. (App. 24-44, 49-50). As a result of the rulings, the City of Des Moines must refund to the class upwards of $40 million already spent on basic city services.

The court rejected the City's argument that intra-class conflict made the class action inappropriate. The City in its appeal brief had again pointed out the

constitutional implications of intra-class conflict, citing *Hansberry*:

> A constitutionally significant difference exists between allowing an individual to represent a class in which all members have a "sole and common interest" in the litigation and allowing an individual to represent a class in which some members have an interest in resisting the class position. *Hansberry v. Lee*, 311 U.S. 32, 44-45, 61 S. Ct. 115, 119 (1940). "[A] selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Id*. at 45, 61 S. Ct. at 119-20. When "dual and potentially conflicting interests" exist, the parties to be represented cannot be said to be of the same class. *Id*. at 44, 61 S. Ct. at 119.

(Appellant's Br. at 33).

The Iowa Supreme Court, however, analyzed the issue solely under the Iowa class action rule. (App. 7-19). The court concluded that no "fundamental" conflict existed among class members because the "heart" of the case was the alleged illegality of the franchise fee imposed by the City and each class member would have paid the "illegal" fees. (App. 12). The court noted that the named plaintiff herself was a property taxpayer; attempted to portray the inverse relationship between the franchise fees and property tax rates as "speculative"; minimized the economic

interest of the taxpayer class members by labeling it an interest in "leav[ing] their right to a refund unremedied"; and expounded on the purported benefits of allowing Kragnes' lawsuit to proceed as a class action. (App. 13-19).

The Iowa Supreme Court also affirmed the trial court's refusal to allow class members to opt out. The court acknowledged the due process implications of the opt-out question; but it then merely noted that *Phillips Petroleum Co.*, 472 U.S. 797, and other existing precedents did not reach the present situation and declared that the Iowa class action rule was intended to take into account due process concerns. (App. 19-24).

One Justice of the Iowa Supreme Court dissented, finding a "basic and fundamental conflict" that was "inimical to the fundamental purpose of class actions." (App. 50). The dissent pointed out that the impact of the refund on City finances was not speculative but was "logic" and "economic reality." (App. 52). It would be "unfair," the dissent contended, to allow use of class action rule "as a vehicle to grow a judgment into an amount that will force the City to take action adverse to the class. A plaintiff who pursues such a goal cannot possibly represent the interest of the remaining class members." (App. 53). Moreover, while the dissent did not directly address intra-class conflict as an issue of due process, it did cite to *Hansberry v. Lee*, 311 U.S. 32. (App. 55).

The City, on March 16, 2012, timely filed a petition for rehearing, in which it focused on two issues.

First, the City again cited *Hansberry*, 311 U.S. at 40-44, and asserted that "the Iowa class action rule cannot be applied in a manner that violates the constitutional rights of absent class members. The constitutional rights of members resisting the class position are violated when a class is certified despite conflicting interests among class members." (Pet. Rehear. at 2). Second, the City called the Iowa Supreme Court's attention to *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2559 (2011), as an intervening decision in which the United States Supreme Court, through its characterization of *Phillips Petroleum* and otherwise, suggests the existence of a broad due process opt-out right. (Pet. Rehear. at 8).

The Iowa Supreme Court on April 6, 2012, denied rehearing without comment.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

COURTS NEED GUIDANCE ON THE REQUIREMENT OF DUE PROCESS IN CLASS ACTION LITIGATION WHEN THE REMEDY BEING PURSUED BY THE CLASS REPRESENTATIVE WILL NECESSARILY HAVE A NEGATIVE COLLATERAL IMPACT ON A SEGMENT OF THE REQUESTED CLASS.

"[A] selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they

are deemed to represent, does not afford that protection to absent parties which due process requires." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). The Iowa Supreme Court in affirming the trial court's class certification orders in the present case failed to honor the requirements of due process.

Numerous lower courts have found the United States Supreme Court's long-standing declaration regarding due process and class representation difficult to apply – or perhaps have simply been reluctant to apply it in certain types of cases. The cases that create problems generally are cases, like the present case, in which all members of the desired class may, in the abstract, be the victims of the same legal wrong but nevertheless may, due to their differing circumstances, have different and inconsistent interests regarding the appropriate remedy, or even whether to pursue any remedy at all.

For example in the present case, the refund sought by the class representative, and ordered by the Iowa trial court, ultimately will merely re-allocate the burden of City finance among class members: Those class members who do not pay municipal property taxes will realize a clear benefit from a refund, while those class members who do pay municipal property taxes will experience an offsetting increase in those taxes to finance the refund (or at least will see their tax dollars diverted to the refund, with a resulting decline in City services). The Iowa Supreme Court treated the interest of the property taxpayer class members dismissively, labeling it merely an interest

in "leav[ing] their right to a refund unremedied." (App. 16). The court affirmed not only the certification of the class but the denial to class members of the right to opt out. (App. 49). The court thus approved the pursuit by Kragnes of refunds owed to persons likely to be hurt by the refund remedy.

The Iowa Supreme Court's failure to reach a result consistent with due process may be attributable to the lack of clear guidance regarding due process and intra-class conflict. The Iowa Supreme Court in its decision (App. 16-17) cited several cases in which other courts have certified classes despite generally similar intra-class conflict. *See Prone v. State Teachers' Retirement Sys*., 780 F.2d 776, 781 (9th Cir. 1986) (approving class consisting of both retired and not-yet-retired members of a pension plan even though the relief sought would result in increased contributions by not-yet-retired plan members and might result also in elimination of favorable plan options); *Lockwood Motors v. General Motors Corp*., 162 F.R.D. 569, 578 (D. Minn. 1995) (approving class consisting of all dealers even though some dealers benefited from the marketing plan that class representatives sought to defeat); *Martino v. McDonald's Sys*., 81 F.R.D. 81, 85-86 (N.D. Ill. 1979) (approving class consisting of all franchisees even though relief to various class members would take possibly conflicting forms).

At the same time, the Iowa Supreme Court acknowledged several decisions (App. 17-18) in which courts have denied class certification due to similar intra-class conflicts. *See Gilpin v. American Fed. of*

State, County & Mun. Employees, 875 F.2d 1310, 1313 (7th Cir. 1989) (court refused to certify class of all non-union-member employees in suit challenging agency fees because non-union-member employees had different reasons for not joining the union and would not share the same goals for the litigation); *Alston v. Virginia High Sch. League*, 184 F.R.D. 574, 579 (W.D. Va. 1999) (court refused to certify class of all female high school athletes where the relief sought would have a negative impact on athletes at some schools).

The Iowa Supreme Court chose between these competing results by invoking its established position that the Iowa class action rule is to be "liberally construed" in favor of the maintenance of class actions. (App. 18). In other words, the Iowa Supreme Court subordinated the problem of intra-class conflict to the supposed benefits of class action treatment.

The United States Supreme Court has made clear that the class action device, however useful, is subject to the limits of due process. *See Hansberry*, 311 U.S. at 40-41. The Court in particular has held that "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum*, 472 U.S. at 812 (citing *Hansberry*). The Iowa Supreme Court erred in adopting a concept of "adequate representation" that, in light of the intra-class conflict, is inconsistent with due process.

The cases to date addressing intra-class conflict reveal a number of factors that could be relevant,

as a matter of due process, in determining whether a particular conflict prevents a finding of adequate representation. One factor is the opportunity for class members to opt out: In two of the three examples cited by the Iowa Supreme Court as allowing class certification despite some degree of intra-class conflict, the courts relied at least in part on the availability to class members of an opportunity to opt out. *See*, *e.g.*, *Lockwood*, 162 F.R.D. at 578; *Martino*, 81 F.R.D. at 86; *cf. Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993) (problem of actual and potential conflicts is "a matter of particular concern" when class members cannot opt out).

Another potential factor is the nature of the relief sought. There seemingly is a difference between a plaintiff class seeking injunctive or declaratory relief that might be of the same practical effect even absent class certification, and a plaintiff class seeking to recover monies owed to a person who does not wish to pursue those monies. *See Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 339 (4th Cir. 1998) (putative class members had "right to insist that money damages . . . not be pursued in their names"). Moreover, the element of monetary relief may increase the due process significance of whether class members can opt out. *See Dukes*, 131 S. Ct. at 2259.

Yet another potential factor is the nature of the intra-class conflict. While sometimes a class member may simply, for political or intangible reasons, prefer not to pursue a right, the intra-class conflict may instead involve actual inconsistent economic interests –

i.e., the remedy sought may in effect transfer money from the pockets of some class members to the pockets of other class members. As the dissent recognized (App. 51-53), the present case clearly involves the latter type of intra-class conflict. *See also*, *e.g.*, *Pipes v. Life Inv. Ins. Co*., 254 F.R.D. 544, 550 (E.D. Ark. 2008) (former policyholder was not an adequate representative for class that also included current policyholders when interpretation of policy to be urged on behalf of the class likely would result in greater-than-market premium increases for current policyholders); *Evans v. Metropolitan Util. Dist*., 176 N.W.2d 679 (Neb. 1970) (court refused to certify class consisting of both taxpayer and non-taxpayer utilities customers where the judgment sought against city necessarily would be financed at the expense of the taxpayer members of the class).

A related factor is the burden on the class representative to negate the existence of intra-class conflict. For example here, the Iowa Supreme Court dismissed the economic conflict between taxpayer and non-taxpayer members of the class as "speculative," even though, as the dissent pointed out, the conflict was, if not fully established, then at least highly likely. (App. 13-16, 51-52). The United States Supreme Court has required a "rigorous analysis" of whether federal class action requirements are met. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Lower federal courts have pointed to due process as requiring a stringent application of class certification requirements – including particularly the requirement of "adequate

representation." *See*, *e.g.*, *Rattray v. Woodbury County*, 614 F.3d 831, 835 (8th Cir. 2010).

The City contends that, upon a proper consideration of the relevant factors, this Court would determine that the Iowa Supreme Court failed to honor the requirements of due process in upholding class certification in this case.

The Iowa trial court's decision, through its order for a class-wide refund, imposes an obligation on the City to pay out some $40 million. The record identifies no possible source of such funds independent of property taxes. Thus, regardless of whether property taxes are now increased or whether tax monies are merely diverted to the payment of the refund (and City services reduced), the taxpayer class members will be financing not only their own refunds but the refunds due to the non-taxpayer class members.

The certification of the class in the present case worked a significant change in the impact of this litigation on the City of Des Moines, its residents, and particularly its taxpayers. The class action device for litigation, while frequently salutary, is subject to improper use and abuse. "The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question." *Phillip Morris USA, Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, Circuit Justice).

This Court should provide guidance to the Iowa Supreme Court, and other courts, on when intra-class conflict is constitutionally acceptable, when

intra-class conflict can be resolved through opt-out or similar class techniques, and when intra-class conflict precludes certification of the class desired by the putative class representative.

CONCLUSION

The City respectfully requests that the United States Supreme Court grant the petition for writ of certiorari, reverse the ruling of the Iowa Supreme Court, and remand for proceedings consistent with the Court's opinion.

Respectfully submitted,

BELIN MCCORMICK, P.C.

MARK MCCORMICK
Counsel of Record

MARGARET C. CALLAHAN
666 Walnut Street Suite 2000
Des Moines, IA 50309-3989
Telephone: (515) 283-4615
Facsimile: (515) 558-0615
E-Mail: mmccormick@
belinmccormick.com;
mccallahan@belinmccormick.com

JEFFREY D. LESTER, City Attorney
MARK GODWIN, Deputy City Attorney
City Hall
400 Robert D. Ray Drive
Des Moines, IA 50309-1891
Telephone: (515) 283-4564
Facsimile: (515) 237-1748
E-Mail: jdlester@dmgov.org;
magodwin@dmgov.org

Attorneys for Petitioner
City of Des Moines, Iowa