
In The
Supreme Court of the United States

—◆—
CITY OF DES MOINES,

Petitioner,

v.

LISA KRAGNES, et al.,

Respondents.

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

—◆—
**BRIEF OF CITY OF DUBUQUE AS AMICUS
CURIAE IN SUPPORT OF CITY OF DES MOINES'
PETITION FOR A WRIT OF CERTIORARI**

—◆—
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**BRIEF OF AMICUS CURIAE,
CITY OF DUBUQUE IN SUPPORT OF
CITY OF DES MOINES' PETITION
FOR WRIT OF CERTIORARI**

Amicus Curiae

The City of Dubuque respectfully requests that this Court grant the City of Des Moines' petition for writ of certiorari.

Interest of Amicus Curiae

The City of Dubuque is a political subdivision of the State of Iowa. Like the City of Des Moines, the City of Dubuque is engaged in class action litigation in which conflicts within the certified class raise due process issues. The City of Dubuque, like Des Moines, is a defendant in a pending class action litigation challenging the validity of its gas and electric franchise fees.¹ The cities of Sioux City, Iowa, and Manchester, Iowa, are also defendants in class action challenges to their electric and gas franchise fees.² As in Des Moines, the certified class in all these actions includes all persons who paid gas or electric franchise fees. By law this class includes all customers receiving

¹ *J. Thomas Zaber v. City of Dubuque*, Iowa District Court for Dubuque County, Case No. 01311 CVCV054663.

² *Patricia Briggs, et al. v. City of Manchester*, Iowa District Court for Delaware County, Case No. CVCV005960; *Kathleen Sweisberger v. City of Sioux City*, Iowa District Court for Woodbury County, Case No. CVCV134376.

gas or electricity services within the cities except the city itself. Iowa Code §364.2(4)(f). Like Des Moines, Sioux City, Manchester and Dubuque have used some funds from franchise fees for general municipal services purposes. The Iowa Supreme Court has held that franchise fees collected in excess of the cost of regulation of the utility are taxes under state law and must be refunded. *Kragnes v. City of Des Moines*, 714 N.W. 2d 632 (Iowa 2006). These common issues compel the City of Dubuque to assert its position in regard to the City of Des Moines' petition for writ of certiorari.

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ARGUMENT

AMICUS CURIAE ARGUMENT OF THE CITY OF DUBUQUE IN SUPPORT OF THE PETI- TION FOR A WRIT OF CERTIORARI

The City of Dubuque, Iowa, files this brief to raise additional matter that the City of Des Moines did not raise in its Petition for Writ of Certiorari.

The City of Dubuque is concerned that the scope and impact of the particular problem of the class conflict on other cities in Iowa is not raised in the Petition for Writ of Certiorari and the extent of the inherent and unresolved conflicts within the class should be clarified. The Iowa Supreme Court majority (as pointed out by the City of Des Moines in its Petition for Writ of Certiorari) characterized the conflicts within the class as "speculative." The dissent in the

Iowa Court noted the conflict was either established or likely. It is the view of the City of Dubuque that the conflict is inherent in the manner in which cities in Iowa raise money to pay for services. Hospitals, churches, educational institutions, charitable organizations and numerous other classes of property are exempt from paying local property taxes. Iowa Code §427.1. All users of gas or electricity including owners of property exempt from property taxation (except the City itself) pay franchise fees. Iowa Code §364.2(4)(f). The Iowa Supreme Court indicated that one option a city might have would be to use franchise fees to pay franchise fee refunds. This speculation demonstrates a woefully inadequate comprehension of municipal finance in Iowa. Refunds paid from franchise fees will need to be subsidized by general taxpayers. If money from franchise fees is not used for general services, general municipal services still must be provided. Thus, if cities are to be able to open graves in cemeteries, mow parks, provide police and fire protection, prosecute traffic violators, enforce zoning laws and otherwise provide services modern cities are expected to provide, they will need to do so by making up for lost franchise fee money used for refunds by raising general property taxes. Directly or indirectly municipal taxpayers will pay more in taxes to fund a refund than they receive back in refund. This is in contrast to tax exempt entities which paid gas and electric franchise fees. Tax exempt entities will simply receive a refund. Under the Iowa Supreme Court's ruling taxpayers in the certified class are prohibited from making the economically rational decision to lower

their costs by waiving a refund and opting out of the class. It is difficult to conceive how any “scheme of ordered liberty” as part of “a fair and enlightened system of justice” *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3032 (2010) citing *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149 (1937), or due process, is advanced by placing people involuntarily in a class and then prohibiting them from making the rational decision to leave the class. Due process should allow people in litigation to make choices in their own interest. The ruling of the Iowa Supreme Court deprives class members of the fundamental right to decide for themselves whether to participate in litigation.

◆

CONCLUSION

This Court should grant certiorari in this matter and resolve the due process issues raised by the City of Des Moines in its petition.

Respectfully submitted,

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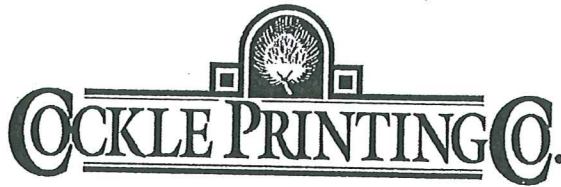
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Respondents.

AFFIDAVIT OF SERVICE

I, Patricia Billotte, of lawful age, being duly sworn, upon my oath state that I did, on the 26th day of July, 2012, send out from Omaha, NE 4 package(s) containing * copies of the BRIEF OF CITY OF DUBUQUE AS AMICUS CURIAE IN SUPPORT OF CITY OF DES MOINES' PETITION FOR A WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served either by Priority Mail or by third-party commercial carrier for delivery within 3 calendar days. Packages were plainly addressed to the following:

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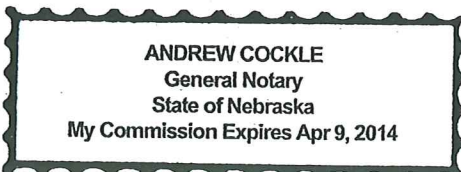
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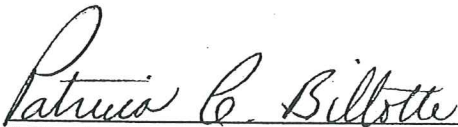
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Subscribed and sworn to before me this 26th day of July, 2012.
I am duly authorized under the laws of the State of Nebraska to administer oaths.





Notary Public



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No. 12-37

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CERTIFICATE OF COMPLIANCE

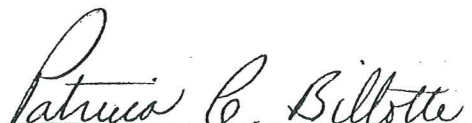
As required by Supreme Court Rule 33.1(h), I certify that the BRIEF OF CITY OF DUBUQUE AS AMICUS CURIAE IN SUPPORT OF CITY OF DES MOINES' PETITION FOR A WRIT OF CERTIORARI in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 916 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 26th day of July, 2012.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

ANDREW COCKLE
General Notary
State of Nebraska
My Commission Expires Apr 9, 2014



Notary Public



Affiant