No. 12-37

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons for review where the state court of last resort has affirmed a state rule based class action involving a declaratory, injunctive and refund order finding illegal fee and illegal taxation by a municipality and where the class action determinations do not decide an important question of due process that has not been settled by this Court, do not conflict with relevant due process decisions of any Court, and the claim of Petitioner is at most only an alleged error of factual findings or the alleged misapplication of a properly stated rule?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other

SUPPLEMENT TO LOWER COURT DECISIONS

The following is listed as a supplement to the Lower Court Decisions set out by the Petitioner:

The Iowa Supreme Court issued its prior opinion on interlocutory appeal on May 26, 2006, in Case No. CE49273. The opinion is published at *Kragnes v City of Des Moines*, 714 NW2d 632, 639 (Iowa 2006)("*Kragnes I*)".

The Iowa District Court for Polk County denied certification of the plaintiff class in a Ruling on Motion for Class Certification, filed January 12, 2006, in Case No. CE49273. While this Order denied certification at that time, it discussed and set out the basis involved in this case for the eventual certification granted in the Ruling on Motion Pursuant to Iowa R. Civ. P. 1.276 and to Expand Findings and Reconsider Ruling on Motion for Class Certification, which reconsideration order was filed on June 23, 2006.

STATE AND FEDERAL RULES

I. Iowa Rule of Civil Procedure 1.263. Criteria considered

1.263(1) In determining whether the class action should be permitted or the fair and efficient adjudication of the controversy, as appropriately limited under rule 1.262(3); the court shall consider and give appropriate weight to the following and other relevant factors:

a. Whether a joint or common interest exists among members of the class.

b. Whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for a party opposing the class.

c. Whether adjudications with respect to individual members of the class as a practical matter would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

d. Whether a party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or

corresponding declaratory relief appropriate with respect to the class as a whole.

e. Whether common questions of law or fact predominate over any questions affecting only individual member.

f. Whether other means of adjudicating the claims and defenses are impracticable or inefficient.

g. Whether a class action offers the most appropriate means of adjudicating the claims and defenses.

h. Whether members who are not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions.

i. Whether the class action involves a claim that is or has been the subject of a class action, a government action, or other proceeding.

j. Whether it is desirable to bring the class action in other forum.

k. Whether management of the class action poses unusual difficulties.

l. Whether any conflict of laws issues involved pose unusual difficulties.

m. Whether the claims of individual class members are insufficient n the amounts or interests involved, in view of the

complexities of the issues and the expenses of the litigation to afford significant relief to the members of the class.

1.263(2) In determining under rule 1.262(2) that the representative parties fairly and adequately will protect the interests of the class, the court must find all of the following:

a. The attorney for the representative parties will adequately represent the interests of the class.

b. The representative parties do not have a conflict of interest in the maintenance of the class action.

c. The representative parties have or can acquire adequate financial resources, considering rule 1.276, to ensure that the interests of the class will not be harmed.

II. Iowa Rule of Civil Procedure Rule 1.264. Order of certification

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1.264(2) The order certifying or refusing to certify a class action shall state the reasons for the court's ruling and its findings on the facts listed in rule 1.263(1).

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III. Iowa Rule of Civil Procedure Rule 1.266. Notice of Action

1.266(1) Following certification the court, by order after hearing, shall direct the giving of notice to the class.

1.266(2) The notice, based on the certification order and any amendment of the order, shall include all of the following:

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f. A statement that any member of the class may enter an appearance either personally or through counsel.

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IV. Iowa Rule of Civil Procedure Rule 1.267. Exclusion

1.267(1) A member of a plaintiff class may elect to be excluded from the action unless any of the following occur:

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b. The certification order contains an affirmation finding under rule 1.263(1)(a), (b), or (c).

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V. Iowa Rule of Civil Procedure Rule 1.268. Conduct of action

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1.268(2) A class member who is not a representative party may appear and be represented by separate counsel.

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VI. Federal Rule of Civil Procedure 23 Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule **23**(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a

class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

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(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule **23**(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule **23**(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who

requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule **23**(c)(3).

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SUMMARY OF ARGUMENT

The Petitioner's statement of issue fails to present any "compelling reason" for its Petition for a Writ of Certiorari to be granted ("Petition"). *See* Sup. Ct. R. 10. Contrary to the assertions of the Petitioner, the Iowa Supreme Court's March 2, 2012 Opinion ("Opinion"), which affirmed a trial court's class action and trial declaratory determination that the Petitioner had illegally taxed all of its gas and electric utility ratepayers, and the class action determinations (a) did not decide an important question of federal law that has not been settled by this Court, (b) did not decide an important question of federal law in a way that conflicts with relevant decisions of this Court, (c) did not decide an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals, and (d) any error claimed by the Petitioner is only an alleged error as to factual findings or the alleged misapplication of a properly stated rule. *See* Sup. Ct. R. 10 and 10 (b)-(c). Therefore, the Petition should be denied.

This is a case where class action declaratory relief was sought and granted by determining (a) the amount of franchise fee that could legally be assessed against electric and gas utility users; (b) that the franchise fees assessed in excess thereof were illegal taxes; (c) by the enjoining of any further illegal taxation through the use of excessive extraction of franchise fees; (d) by a determination of the amount of taxes illegally extracted from the

class; and (e) by reserving for future resolution in the processing of the case the manner in which the illegal taxes would be refunded to the class of utility rate payers. (District Court Ruling, Pet. App. 99, 112-114); (Opinion, Pet. App. 3, 49-50). The Iowa Supreme Court, a state court of last resort, interpreted and applied the state class action rules of the State of Iowa as to this state certified class action wherein the Petitioner was determined, after trial, to have engaged in illegal assessment of taxes when it was excessively assessing a utility franchise fee to all electric and gas utility consumers using those services in the jurisdiction of the municipality.

One overriding error of the Petitioner in its Petition stems from its refusal to accept, or its confusion in understanding, that this case involves the application of state class action rules that are analogous to federal class action Rule 23(b)(1)(A) and is not analogous to class actions under federal Rule 23(b)(2) or (b)(3). Compare Iowa Rule of Civil Procedure 1.263(1)(a) and (b) with Fed R. Civ. P 23(b(1)(A), (b)(2) and (b)(3). Rather than cite to and rely upon case analysis of the due process applications and basis for Rule 23(b)(1) type cases, Petitioner incorrectly cites and attempts to rely only on case analysis as to classes certified, or attempted to be certified under class action rules similar to, or those involving, federal Rules 23(b)(2) and 23(b)(3). By doing so, the Petitioner has ignored this Court's rule and case analysis wherein it is stated that Rule 23(b)(1) class actions have been held to properly allow for different considerations as to due process as well as to the provision for and indeed the need for no opt out provisions due to the necessary

requirements of such a class action and the corresponding compliance with due process by allowing a class action processing with no opt outs in a Rule 23(b)(1) type class action.

In the present case the Iowa Supreme Court and the Iowa District Court, properly applied settled law as to the rules for class action certification under a 23(b)(1) type case along with the law of alleged class action due process in considering conflicts and the provision for no opt outs. This was done as different due process considerations are involved due to the nature of the type of class action herein involved.

One further error of the Petitioner in its assertions is its refusal to accept or acknowledge that the Iowa District Court and the Iowa Supreme Court made factual findings that the Petitioner's assertion of a necessary conflict was "speculative". Its assertions to this court that "necessary" conflicts exist are, therefore, merely asserting disagreement on a factual issue that has been determined, after hearing, adverse to the Petitioner. That does not give rise to a conflict of law sufficient to cause a determination of a "compelling" reason to grant the Petition.

The Iowa class action rules, including Rule 1.263(1), which is based upon the model rules of class actions and is similar to federal rule of civil procedure 23(b), take into consideration different and case specific underlying facts when determining whether to certify a case as a class action. Under

Iowa Rule of Civil Procedure 1.263(1), when a case is such that all class members have a joint or common interest (subparagraph a), or when a defendant is required to treat all members of the class alike such that separate adjudications would create a risk of inconsistent adjudications and create a risk of inconsistent or incompatible standards of conduct (subparagraph b) or when a determination of one member's rights would likely be conclusive of all of the class members rights and/or obligations (subparagraph c), then the case can be certified to be processed as a class action. Two of these were factually determined to exist in this case. Under the Iowa Rules, when one of these three determinations are present then no member of the class is allowed to opt out. *See* Iowa Rule 1.267(1)(b) and District Court Order of 8/27/2008 at Pet. App 140.

This is the same for federal Rule 23(b)(1). This is a different rule from that for a class that is certified under the other sections of Iowa Rule 1.263, where an opt out is allowed. *See* Iowa Rule 1.267(1) which, similar to federal Rule 23(b)(3), states that in all cases other than the specific situations there set forth all class actions shall allow opt outs.

Rule 23(b)(3) type cases, because of the nature of the cases, have different considerations as to due process, class conflict or the need for or allowance of opt outs. When the present case is viewed, as it properly should be viewed, as a rule 23(b)(1) type of case where due process considerations are viewed differently due to the nature of this specific kind of class action, e.g. all class members are in a position that equal conduct from the defendant is required

(such as with utilities or taxes as are involved in this case), and when separate adjudications could result in conflicting duties of conduct by a defendant, no opt outs are allowed. Here the Iowa Supreme Court has properly applied this settled law to its determination of the factual findings. The Petitioner has not born its burden of showing a compelling reason for the granting of the Petition. The Petition should be denied.

STATEMENT OF THE CASE

Under the Iowa Constitution, as well as Iowa Code §364.3(4), a municipality in Iowa cannot levy a tax unless expressly authorized by the general assembly." *Kragnes v City of Des Moines*, 714 NW2d 632, 639 (Iowa 2006)("*Kragnes I*"). A franchise fee imposed by a city must be limited to the reasonable cost of inspecting, licensing, supervising, or otherwise regulating the activity. *Id.* at 641. If a fee is charged by a city in an excessive amount it is an illegal tax levy. *Id.* at 641.

Prior to the beginning of 2004, the Petitioner had assessed a 1% franchise fee on gas and electric utility customers in its jurisdiction. *Id.* at 633. On July 1, 2004, Petitioner passed an ordinance to increase its franchise fees imposed from 1% to 3% of gross sales effective September 1, 2004. *Id.* at 636. Prior to the institution of that increase, Respondent filed this suit on July 27, 2004 (Pet. App. 59). As the District court later noted in its order for class certification, this class action "was to determine what declaratory, injunctive or monetary relief may be

awarded to the class relative to the validity or legality of the franchise fees assessed by the defendant to the class for the time period in question". (Pet. App. 134). Despite the existence of this lawsuit, the Petitioner went forward with the increase in the franchise fee from 1% to 3% and then again increased the gas and electric franchise fees from 3% to 5% effective June 1, 2005. *Id.* at 636. (*Id.* at 59).[1]

a) The Iowa District Court's Decisions on Conflicts of Interest, Adequacy of Class Representative and Opt-Out.

Respondent's initial Motion for Class Certification was denied on January 12, 2006. (Resp. App. at 13). In the initial ruling as to class certification, the District Court correctly noted that to certify the action under Iowa law there must be numerosity, commonality, adequacy, and it must be shown that it should be permitted for fair and equitable adjudication of the action. (Resp. App. at 5). It was found that the criteria of numerosity and commonality did not appear to be reasonably in dispute. (Resp. App. at 5). It was noted the only

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[1] Had the Petitioner not instituted the increases in the fees in the face of, and during the time of, the existence of this lawsuit, no monetary refund would have likely accrued. *See* Opinion at 49-50 for the allowed amounts. (Pet. App. 49-50). The Iowa Supreme Court found Petitioner's conduct in continuing and increasing its collections of the illegal tax against all class members after notice of the claims in this case compelling on the issue of class member refunds of their illegal tax exactions, particularly in light of prior Iowa Supreme Court decisions (Pet. App at 42).

difference in the claims of the class members was the specific amount of franchise fees paid, should a refund be ordered. (Resp. App. at 6).

Under Iowa Rule 1.263(1) the court was required to consider at least the thirteen factors there set out. (Resp. App. at 7). The District Court found that items (a), (b), (e), (f), and (g) had the most relevance in the case with the remaining factors having little or no pertinence to this dispute. (Resp. App. at 7). These found factors include, (a) "Whether a joint or common interest exists among the class members" (b) "Whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of that class that would establish incompatible standards of conduct for a party opposing the class" (e) "Whether common questions of law or fact predominate over any questions affecting only individual members." (f) "Whether other means of adjudication of the claims and defenses are impracticable or inefficient" and (g) "Whether a class action offers the most appropriate means of adjudicating the claims and defenses." *See* Iowa Rule 1.263(1). Iowa Rule 1.263(1)(b) contains a near identical statement to that found in a federal Rule 23(b)(1)(A) class under the federal rules. [2]

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[2] Unsurprisingly, the federal Rule 23(b)(1)(A) class has been described by this Court as one of the fundamental classes envisioned in the creation of the class action rules, and also as specifically intended to deal with cases such as this one, involving utilities and taxation. See *Amchem Products, Inc. v. Windsor,* 521 U.S. 591,613 (1997). *See also, Wal-Mart Stores, Inc. v. Dukes, et. al.* 131 S. Ct. 2541, 2458 (2011).

Compare Iowa Rule 1.263(1)(b) with federal Rule 23(b)(1)(A).[3]

In explaining the findings in the present case, the District Court stated:

> "There is considerable commonality in the proposed class. The interests of each purported class member are identical; they only vary as to the amount of fees collected by the city during the applicable period. If each individual member of the purported class were required to fend for themselves in pursing relief against the defendant, there would be a significant risk of inconsistent adjudications as these individual claims made their way through the trial court system."

(Resp. App. at 7). For these reasons, the District Court found that the factors upon which Iowa Rule 1.263(1) centered on two broad considerations 1) judicial economy; and 2) protection of litigants' rights, (both those in court and those absent) had been satisfied and class action should be permitted. (Resp. App. at 8).

The District Court specifically addressed the adequacy of Lisa Kragnes as the class representative. (Resp. App. at 9-10). The Court

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[3] Conversely, Iowa Rule 1.263(1)(d), similar in form to the federal Rule 23(b)(2) class at issue in *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2557-8 (2011), was found to have little to no pertinence to the present dispute. (Resp. App. at 6).

noted that the Petitioner had brought nothing to the court's attention that would indicate that the plaintiff has a conflict of interest. (Resp. App. at 10).

The Court specifically found that Kragnes' interests did not appear to diverge from those of the class members and no one from the prospective class had come forward with any concerns or objections in this regard. [4] (Resp. App. at 10). It further found therefore that the elements for class certification were satisfied. (Resp. App. at 9). However, the Court was concerned about the class representative's ability to financially afford the action, as her fee agreement with her attorneys had required her to advance the costs of litigation. (Resp. App. at 10-11). Finding evidence was lacking regarding adequate financial resources, class certification was denied. (Resp. App. at 13).

Upon motion by Respondent, the District Court later reconsidered its ruling regarding class certification and expanded its findings of fact after a contested hearing. (Pet. App. at 128).[5] The District

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[4] This demonstrates that even the Petitioner, contrary to its current position, did not believe, at that time of initial certification, that a conflict of interest existed for Kragnes in the class representative status.

[5] In the interim the Petitioner had filed for interlocutory appeal to the Iowa Supreme Court. The Iowa Supreme Court granted the application for interlocutory appeal for the purpose of ruling upon issues as to the legality of the franchise fee challenged by the Respondent. This resulted in the issuance of the case referred to as "*Kragnes I*", i.e. *Kragnes v City of Des Moines*, 714 NW2d 632, (Iowa 2006). *Kragnes I* ordered the case returned to the District Court for further determination of the

Court, upon this reconsideration, found that the class representative had or could acquire adequate financial resources pursuant to an amended fee agreement with counsel. (Pet. App. at 130). The Court adopted its other findings from its January 12, 2006 order, as discussed above, and ordered the class proceed as a class action. (Pet. App. at 130). This ruling certified the class as "all persons, firms, or corporations who have paid a franchise fee, from July 27, 1999 to the present, pursuant to the Gas and Electric Franchise ordinance passed by the City of Des Moines in effect for the applicable period." (Pet App. at 134).

The District Court addressed further issues as to class action status when considering the notice to be sent to class members under Iowa Rule 1.266. (Pet. App. at 136). The Court there addressed, among other objections, the Petitioner's objection that an opt-out was not included in the proposed notice to the class members of this mandatory class action. (Pet. App. at 137). In finding that the Iowa Rules did not permit class members to be excluded, the Court properly noted:

> "The ultimate issue before the Court is whether the proposed notice at issue will satisfy the requirements of constitutional due process. The Supreme Court of Iowa has set forth specific requirements for notices in class action suits that are to be followed by

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propriety of class action processing and the factual and legal development and trial of the case.

> all litigants, *see* Iowa R. Civ. P. 1.266, and has further determined that the exclusion of class members must be precluded under the appropriate circumstances to ensure fair and efficient adjudication of controversies. Iowa R. Civ. P. 1.267. Certainly the Supreme Court would have considered notions of due process in drafting these rules, and by its adoption of said rules would have reached the determination that they infringe upon no constitutional rights. In the absence of authority compelling a contrary result, the Court will not find that Rule 1.267 is unconstitutional. The Court finds that Iowa Rule of Civil Procedure governs and consequently requires an absence of an "opt-out" provision in the notice at issue."

(Pet. App. at 138)(citations original).[6] The District Court additionally addressed the Petitioner's new and factually unsupported contention that conflicts of interest mandate inclusion of an opt-out provision and declined to ignore the clear instructions of Iowa Rule 1.267. (Pet. App. at 139).

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[6] Of note, the Notice approved by the Court notified every class member, pursuant to Iowa Rule 1.266(2)(e-f) and Iowa Rule 1.268(2), of the right of each class member to enter a personal appearance or an appearance through counsel and be represented separately. (Resp. App. at 14-16).

The District Court had additional opportunity, following evidentiary hearing, to address the conflicts of interest objection of the Petitioner in its Ruling on Defendant's Third Motion to Decertify. (Pet. App. at 115). The Court correctly noted "not every disagreement between a representative and other class members will stand in the way of a class action suit." (Pet. App. at 117) citing to *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d at 746 *accord City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 792 (Iowa 1994). In analyzing whether the conflicts the Petitioner raised were "fundamental", the Court noted that conflicts relative to issues of liability predominate over issues concerning an appropriate remedy once liability is established. (Pet. App. at 118-119).

The District Court ultimately explained in its findings that the "crux" of the suit was the illegality of the franchise fee. (Pet. App. at 119). He found that all class members have a beneficial interest in having the appropriate amount of franchise fees charged judicially determined and ceasing the collection of any illegal taxes/fees. (Pet. App. at 119). He determined that this is not a situation where a class representative claims to be harmed by conduct that has benefited other class members, but rather, "All members of the class have an interest in ensuring proper taxation by their municipal government." (Pet. App. at 119). As such, the Court found that a fundamental conflict between class members as to the central issue of liability had not been presented. (Pet. App. at 119).

In finding that the issue of remedy was secondary to that of liability, the District Court addressed the speculation inherent in the alleged conflict as to remedy. (Pet. App. at 119-120). He noted that the Petitioner's prediction of a loss was contingent on a number of variables including, but not limited to, the amount of recovery, the actions of the City Council to generate funds to pay the judgment, and the time frame within which the Petitioner may choose to pay the judgment to claimants who elect to receive a refund." (Pet. App. at 119-120). As such, the Court made the factual finding that the conclusion that some class members may suffer a loss as a result of the remedy was speculative and unsupportive of decertification. (Pet. App. at 119-120).

b. The Iowa Supreme Court Decision on Class Action Status.

The case proceeded to trial and resulted in a declaratory judgment which, among other things: (a) factually determined that the franchise fees imposed by the Petitioner were in excess of the legal amount and constituted illegal taxation in that amount; (b) ordered that the Petitioner cease and desist any future illegal collection of such excessive franchise fees; (c) ordered a class judgment in the amount of the illegally collected taxes; and (d) reserved jurisdiction to supervise the method and manner of distribution to the class.[7] (Pet. App. 112-114).

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[7] Between the time of the trial and the entering of the Trial Court's Decision, the Iowa legislature considered the issue. It passed legislation that authorized the future collection of tax

On interlocutory appeal following the trial court decision, the Iowa Supreme Court addressed the Petitioner's contentions as to both the class action objections as well as the underlying concerns on the judgment entered against the Petitioner. (Pet App at 2). ("*Kragnes II*"). The Iowa Supreme Court affirmed the class declaratory and injunctive judgment, with modifications as to the amount of judgment refund which had been awarded to the class, and remanded for further appropriate proceedings. (Pet. App. at 2).

Petitioner based its appeal of class certification on two grounds: 1) a purported fundamental conflict between the members of the class; and 2) the lack of an opt-out clause for class members. (Pet. App. at 4). It additionally argued, in the alternative, that if the action were to continue as a class, subclasses should be ordered. (Pet. App. at 4).[8]

In its discussion of the Petitioner's contention that the district court abused its discretion in not

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through the imposition of gas and electric franchise fees, specifying the process which the municipality must follow to be allowed to do so. *See* Opinion FN 14, Pet. App. 42-43. The Iowa legislature specifically declined to allow this taxing authority to be retroactive. *See* Opinion, FN 14, Pet. App. 42-43.

[8] While denying subclasses needed to be created up to this point, the Iowa Supreme Court expressed no opinion as to whether subsequent proceedings in accord with their decision will justify the division of the class into subclasses. (Opinion, Pet. App at 15, in FN 9).

finding intra-class conflict precluding certification, the Iowa Supreme Court reviewed the applicable law presented by the parties. (Opinion, Pet. App. 8-19). The Court found no abuse of the district court's broad discretion. (Opinion, Pet App. at 11-12). It held:

> "The heart of this case is the illegality of the franchise fee imposed by the City, and we agree with Kragnes that there is no fundamental conflict among the class members as to that issue. Each of the class members paid fees that the City should not have collected and in this fundamental respect their claims are identical, consistent, and compatible"

(Pet. App. at 12)(internal citations omitted).

In response to the City's contention that this will have adverse consequences to the economic interests of property owners in the City, the Iowa Supreme Court noted that Kragnes is herself a property owner within the City and shares the exact same status as the other property owners in the City. (Pet. App. at 12). The Court specifically considered and rejected the Petitioner's attempt to minimalize or neutralize the significance of this identical status. (Pet. App. at 12). As to the Petitioner's "retrospective and prospective" argument of class conflict, it made the factual finding that both assertions by the Petitioner contained "an abundance of speculation":

> "In the last analysis, the City's characterization of the conflict between the interests of Kragnes and other class

> members is rife with speculation – beginning with speculation about what City leaders would have done in the past and ending with predictions about what leaders will do in the future. And in between is speculation about the effect of hypothetical decisions on property owners. Did they pay less in franchise fees than they would have in property taxes had the franchise fee not been increased? Did some nonproperty-owning class members pay more in franchise fees than they would have paid through rent increases occasioned by property tax increases had the franchise fees not been increased? How, if at all, will property tax rates be affected in this case?" (Decision at 12-13)(citing *See Hispanics United of DuPage Cnty. v. Vill. Of Addison*, 160 F.R.D. 681, 690 (N.D. Ill. 1995)(claimed conflict of interest between class members whose property would be destroyed by village's redevelopment plan and class members whose property would not be destroyed and might increase in value was "dependent on myriad factors that cannot be forecast with any degree of certainty" and did not defeat request for certification of class).

(Opinion, Pet. App. at 15-16). The Iowa Supreme Court noted in footnote:

> "Just as it is possible the City's elected leaders who made the decision to collect the fees in question might have chosen not to provide certain services instead of collecting the fees had they understood their collection was illegal, we cannot know how the current and future City leaders will choose to finance any refund that might be required. We will not speculate whether the refund will be financed through spending reductions, tax increases, fee enhancements, or some combination of these and other alternatives, nor do we express an opinion as to how the refund should be structured in view of the alternatives shown by the evidence on remand to be available under the circumstances."

(Opinion, Pet. App. at 16). The Iowa Supreme Court went on to state:

> The class action rules are "remedial in nature and should be liberally construed to favor of the maintenance of class actions." *Comes v. Microsoft*, 696 N.W.2d at 320. The goal of the class action rule is:
>
> > "efficient resolution of the claims...of many individuals in a single action, the elimination of repetitious litigation and possibly inconsistent adjudications involving common questions, related events, or requests for

> similar relief, and the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits."

(Opinion, Pet. App. at 18) citing *Comes v. Microsoft*, 696 N.W.2d at 320.

The Iowa Supreme Court found no reversible error in the district court's determination and that no fundamental conflict of interest existed between Kragnes and the other class members precluding certification or mandating decertification. (Pet. App. at 19).

c. **The Iowa Supreme Court's Decision on Opt-Out.**

In its discussion on opt-out, the Iowa Supreme Court noted that Iowa Rule 1.267(1) provided that a member may not be excluded if the certification order contains affirmative findings as to Iowa Rule 1.263(1)(a), (b), or (c). (Pet. App at 19). Notwithstanding the affirmative findings precluding opt-outs, the Court addressed the Petitioner's argument that an opt-out should be required. [9] The Court

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[9] It was noted that *Phillips Petroleum Co. v. Shutts,* was erroneously relied upon by the Petitioner at this level, as it was limited to jurisdiction of out-of-state class members, a fact that does not exist in this case. *Adams v. Robertson*, 520 U.S. 83, 88-89 (1997). The Court should note additionally that, as previously discussed, *Shutts* dealt with a 23(b)(3) type action,

addressed that the Iowa class action rules are modeled after the Model Class Actions Act. (Pet. App. at 22). The court noted that the findings of fact found in this action are nearly identical to those needed in Federal Rule 23(b)(1) which similarly does not provide for opt-outs. (Pet. App. at 23). It held that "it is reasonably certain that the named representatives will protect the absent members and give them the functional equivalent of a day in court." 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1786, at 496 (3d ed. 2005). The Court held that the procedural safeguards of the Iowa Rules account for due process concerns and rejected the City's contention that Rule 1.267(1) violated due process. (Opinion, Pet. App. at 19).

REASONS FOR DENYING THE PETITION

As to the issue of compliance with federal due process, the Opinion of the Iowa Supreme Court does not conflict with any decision of this Court, of any Courts of Appeal or of any state courts of last resort. As previously noted, the Petitioner misstates the class certification due process issues as they actually developed and were applied and addressed by the Iowa Courts.

a. The Iowa Supreme Court Decision Complies with Federal Precedent and Due Process.

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not a 23(b)(1) type action as in the instant case. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 797 (1985).

i. Class Actions Generally and Federal Rule of Civil Procedure 23.

The class action is a longstanding invention of equity to enable a court to proceed to decree in suits where the number of interested parties are so great that joinder of the parties under the usual rules of procedure is impracticable. *Hansberry v. Lee*, 61 S. Ct. 115, 118 (1940). It is familiar doctrine from this that the members of a class not present may be bound by the judgment where they are adequately represented by parties who are present or where they actually participate in the litigation in which members of the class are present. *Id.* at 118. Additionally, they can be bound where the interests of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such legally to entitle the former to stand judgment in the latter. *Id.* at 119.

The Court in *Hansberry* dealt with the issue of class res judicata as applied to a restrictive agreement. *Id.* The Court noted that applying a class label to such a group allowed for opportunities for fraudulent and collusive sacrifice of the rights of the absent parties and did not satisfy due process any more so than allowing a judicial officer to hold trial in a situation wherein he may have a conflict with the outcome of litigation. *Id.*

At present, federal Rule 23 and its underlying provisions govern certification of class action

lawsuits in the federal courts. *Wal-Mart Stores, Inc. v. Dukes, et. al.* 131 S. Ct. 2541, 2547 (2011); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997). These provisions are subject to the Due Process Clause of the 14th Amendment to the United States Constitution and its guarantees. *See Wal-Mart Stores, Inc. v. Dukes, et. al.* 131 S. Ct. 2541, 2559 (2011).

The requirements for certification are two fold under Rule 23, as found in 23(a) and 23(b). *See* Fed. R. Civ. P. 23(a), 23(b). Rule 23(a) requires that the members of a class may sue or be sued as representative parties only if four conditions are met. These include numerosity, commonality of issues of law and fact, typicality of claims and defenses, and adequacy of representation.

Rule 23(b) breaks the types of class actions that may be certified into three types. These include the (b)(1) classes certified because prosecuting separate actions would create a risk of: (A) inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or substantially impair or impede their ability to protect their interests. The 23(b)(2) class is certified if the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. The 23(b)(1) and (b)(2) classes are

"mandatory" classes wherein notice is not required and opt-out does not exist. *Wal-Mart Stores Inc. v. Dukes,* 131 S.Ct. at 2558. Finally, the 23(b)(3) classes are certified as an "adventuresome construction" where the court finds that questions of law or fact common to class members predominate over questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

For 23(b)(1) and (b)(2) classes, the court *may* direct appropriate notice to the class. (emphasis added). For 23(b)(3) classes the court *must* direct notice to class members. (emphasis added). This required notice in a 23(b)(3) class action also must include an opt-out provision. The Rules also provide that a class member in a 23(b)(3) action must be noticed that they may enter an appearance through an attorney if the member so desires.

ii. Due Process as to Adequacy of Representation and Conflicts of Interest within Rule 23 (b)(1) Cases.

Class actions are an exception to the usual rule that litigation be conducted between individual parties. *General Telephone Co. of Southwest v. Falcon*, 102 S. Ct. 2364, 2369 (1980). It is "peculiarly appropriate" when the issues involved are common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class. *Id.* quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). In such cases,

the class action device saves resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion. *Id.*

In order to justify a departure from the ordinary assumption of individual parties, the class representative must be part of the class and possess the same interest and suffer the same injury as the class members. *Wal-Mart Stores Inc. v. Dukes,* 131 S.Ct. at 2550. The Court has repeatedly held that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members". *Id.* at 2370 citing *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403 (1977).

The commonality and typicality requirements of Rule 23(a) tend to merge as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether under the circumstances the representative's class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. *Id.* at 2371. The same requirements tend to merge with the adequacy requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest. *Id.*

As to a Rule 23(b)(1) case, this Court stated in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997) as follows:

> "... Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing "incompatible standards of conduct for the party opposing the class," Fed. Rule Civ. Proc. 23(b)(1)(A), or would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests," Rule 23(b)(1)(B). Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)." Kaplan, Continuing Work 388 (footnotes omitted). Rule 23(b)(1)(B) includes, for example, "limited fund" cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims. See Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., pp. 696–697 (hereinafter Adv. Comm. Notes)."

Id. at 614.

Even an assumption that some class members may prefer to leave their rights un-remedied does not mandate a determination that an abuse of discretion occurred in certification of a class. *Probe v. State Teachers' Ret. Sys.,* 780 F.2d 776, 781 (9th Cir. 1986)(no abuse of discretion in certifying class including retired teachers and teachers presently working in action challenging use of sex-segregated actuarial tables in calculating retirement benefits notwithstanding the prospect that if the suit were to result in higher benefits for some class members, larger contributions would be required of presently working teachers); *Martino v. McDonald's Sys., Inc.,* 81 F.R.D. 81, 85-86 (N.D. Ill. 1979)(concluding defendant-franchisor's assertion that most McDonalds' franchisees were content with the franchisor's systems, saw no merit in plaintiff's antitrust claims, or preferred to leave the violation of their rights un-remedied did not preclude certification of a class of franchisees).

iii. Due Process and Opt-Outs

This Court had recent opportunity to discuss opt outs as it relates to class certification in *Wal-Mart Stores, Inc. v. Dukes, et. al.* 131 S. Ct. 2541 (2011). While decided on issues of commonality under Rule 23(a), the Court in *Dukes* provided clear discussion as to the different types of class action that can be certified under Rule 23(b) as well as the different due process protections each require, including as to opt-outs, due to the fundamentally different nature of the different types of class

actions[10]. *Id.* at 2557. The Court stated, in pertinent part:

> "Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment – that the individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3) by contrast is an "adventuresome innovation" of the 1966 amendments, framed for situations in which 'class – action treatment is not as clearly called for'. *Id.* at 2558 (internal citations omitted).

The Court in *Dukes* further stated in footnote:

> "Rule 23(b)(1) applies where separate actions by or against individual class members would create a risk of establishing incompatible standards of

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[10] In *Dukes,* this Court determined that the class should not have been certified due to a failure of commonality of claims under 23(a) as well as that the class's back pay claim certified under 23(b)(2) should have been certified with the protections of 23(b)(3). *Id.* at 2557.

> conduct for the party opposing the class, such as where the party is obliged by law to treat the members of the class alike". *Id.*

Federal court precedent is clear that a 23(b)(1) class provides no opt-out as the purpose of the class action, in addition to the general purposes of judicial economy, are to avoid unworkable and incompatible standards of conduct, ***as in a class action challenging the legality of a utility fee or tax.*** See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (emphasis added). Applying that analysis to this case, which arises by virtue of the Petitioner's imposition of an illegal tax on all gas and electric utility ratepayers in the City of Des Moines expressed as a set percentage of each ratepayers bill the appropriateness of class certification could not be clearer. Trying the issues in multiple individual cases in this illegal tax case is not only impractical and inefficient for the parties and the Court system, but the risk of inconsistent adjudications is clear. Equally clear, is the mandate that the defendant assess the fee equally.

This class action case provided (1) a determination of the percent of allowable franchise fee determining the amount for all rate payers; (2) that the Petitioner cannot assess any utility customer more than the legal amount of franchise fee; (3) By establishing the amount of allowable franchise fee, the suit also establishes the amount of illegal taxation that had occurred; (4) if more than one suit had occurred and a varying adjudication occurred as to the allowed amount of

franchise fee, then the Petitioner would be subject to varying adjudications as to amount of fee allowed to be charged and the amount of illegal taxation that occurred; and (5) an injunction issued in one case as to one franchise fee determination could cause a conflict with an adjudication as to an injunction for an adjudication in another franchise fee and tax determination. In sum, if there were more than one suit on the issues, varying standards of conduct could apply to the Petitioner. Consequently, as is provided in the federal and state rules and the case statements of this Court, this is not an appropriate case for opt outs.

Further, the argument offered by the Petitioner in seeking to decertify the class would also serve to violate the requirement and mandate that Due process requires meaningful backward looking relief. See Opinion, Pet. App. 38 citing to *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36 (1990). The anomaly of the position advocated by the Petitioner is that acceptance of its position would be a denial of due process to the class members. That is likely why the rules, and this Court's previous references thereto, require a mandatory class, with no opt outs, in cases of utilities and taxation. *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 613 (1997). *See also* general discussion in *Wal-Mart Stores, Inc. v. Dukes, et. al.* 131 S. Ct. 2541, 2457-8 (2011)

The procedural requirements of a 23(b)(1) class, as opposed to 23(b)(3) classes are not the same and need not be as the concerns for mandatory classes are not the same. *See Id.* at 2558. In

discussing the procedural protections and differences between another mandatory class, the (b)(2) class, including the right to opt-out, this Court noted that those specific protections are missing from (b)(2) in the Federal Rules "not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*". *Id.* (emphasis original).

The Court noted that the Rule does not require that class members even be given notice. *Id* at 2559. The lack of notice and opt-out rights are because this is a mandatory class, and depriving people of their right to sue in this manner complies with the Due Process Clause.[11] *Id.* Respondent asserts this is a clear statement of due process application to the facts of the present case which is a mandatory class. The Petitioner has not cited any federal or state case that holds that a 23(b)(1) type of case violates due process due to class conflicts or lack of opt-outs. Further, Respondent asserts, as noted below, that the Iowa courts have appropriately, consistently and properly applied this due process of law in the certification and processing of the present case.

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[11] In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814 (1985).that case, the Court held that the Due Process Clause interests of absent plaintiffs are sufficiently protected by a forum State when those plaintiffs are provided with a request for exclusion. *Id.* The case does not apply to a mandatory state class action where all parties are subject to the personal jurisdiction of the Iowa courts.

b. Iowa Precedent and Due Process with Regard to Iowa Class Actions as Modeled after The Model Class Actions Act.

The Iowa class action rules are based upon the Uniform Class Action Rules promulgated by the National Conference of Commissioners on Uniform State Laws. *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741, 743(1985). The goal of the Iowa class action rules has been stated as:

> "efficient resolution of the claims ... of many individuals in a single action, the elimination of repetitious litigation and possibly inconsistent adjudications involving common questions, related events, or requests for similar relief, and the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate suits."

Comes v. Microsoft Corp., 696 N.W.2d 318, 320 (Iowa 2005).

The Iowa class action rules are "remedial in nature and should be liberally construed to favor the maintenance of class actions." *Id.* Similar to the federal standard the Iowa district court's decision to grant or deny class action status is reviewed for abuse of discretion *Vignaroli v. Blue Cross of Iowa, supra* at 743. "This discretion has been characterized as 'broad'." *Id. at 744* citing &A C.

Wright & A. Miller, Federal Practice and Procedure § 1784, at 134 (1972) and *see also Iowa Uniform Class Actions Rule: Intended Effects and Probable Results,* 66 Iowa L. Rev. 1241, 1256 (1981).

Iowa Rules of Civil Procedure 1.261, 1.262, and 1.263 deal with the findings of fact necessary to certify a class under the Iowa rules. Rule 1.261 requires numerosity and commonality. Rule 1.262 allows a court to certify a class action if it finds that 1.261 has been satisfied as well as that a class action should be permitted for the fair and efficient adjudication of the controversy and the representative parties fairly and adequately will protect the interests of the class.

In determining whether the class action should be permitted for the fair and efficient adjudication of the controversy, as appropriately limited under Rule 1.262(3), the court *shall* consider and give appropriate weight to factors listed under 1.263(1). These factors, which are given weight and upon which the court makes findings in the order certifying class, bear similarity to the types of classes found under federal Rule 23(b). Thus, the findings of the Iowa court in certifying the class action under the state rule provide basis upon which to apply the federal precedent under its own rules. *See Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d at 743.

Iowa Rule 1.264(2) requires that the order certifying the class action state the reasons for the court's ruling and lay out its findings of fact as required in rule 1.263(1). In contrast to federal Rule

23(c), Iowa Rule 1.266 requires notice be given to the class members in all actions certified under its rules. Additionally, it requires a statement that any member of the class may appear personally or through counsel. *See* Rule 1.266(2)(f). This is followed up by Rule 1.268(2) which permits that any class member that is not a representative party may be represented by separate counsel in the conduct of the action.

Iowa Rule 1.267 handles the "opt-out" portion of the rules, as required by due process in certain types of class actions. Rule 1.267(1) delineates that any member of a plaintiff class may be excluded from the action unless, in pertinent part, the certification order contains an affirmative finding as to 1.263(a),(b), or (c), i.e. the Iowa Rule equivalents to 23(b)(1)(A) and (B) and (b)(2), mandatory classes under federal law.

The Iowa Supreme Court has had opportunity to discuss these rules and application and provide clear guidance to its courts as to their application since their adoption. *See e.g. Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741 (1985). Important to the instant matter, the Court has given clear instruction as to analysis of an alleged conflict of interest between a class representative and class members as they relate to adequacy of representation. *See Id.* at 746-747.

In *Vignaroli*, the Court addressed a case certified as to shared issues of liability common to the class for the individualized damages resultant

from an alleged breach of an employee manual in the termination and rehiring of employees as part of a transfer, an action most similar to a federal Rule 23(b)(3) class. *See Id.* at 746. In responding to the objections to adequacy and conflicts of interest, the court said:

> "This argument misses the crux of the plaintiffs' case. The cause of action presented here focuses on the forced transition of BC/BS employees to employment with the subsequent employer. All of the class members were dismissed and simultaneously offered positions with EDSF. In this underlying event, lies the crux of plaintiffs' claims against defendants." *Id.*

The Iowa Supreme Court further explained that:

> "Not every disagreement between a representative and other class members will stand in the way of a class action suit. The conflict must be fundamental, going to the specific issues and controversies." *Id.* (internal citations omitted).

Indeed, the fact that some members of an alleged class do not favor the bringing of a lawsuit will not defeat the bringing of a class action. *Id.* at 747. The question ultimately lies at the "crux" of the suit and

whether there lies a fundamental conflict of interest as to the issues therein. *Id.* at 746.

c. The Petitioner has Failed to Show any Basis to Conclude that any Due Process Question is Either not Determined by this Court or that there are Any Inconsistent Lower Court Decisions on Due Process as it Relates to the Issue in this Case, a Rule 23(b)(1) Type of Class Action Case.

The Iowa Supreme Court and underlying district courts have had multiple opportunities to address the concerns raised herein by the Petitioner. (Opinion, Pet. App. at 4). In each decision the courts have applied the applicable law to the arguments of the Petitioner as well as reviewed and applied the applicable facts in this action. (Opinion, Pet. App. at 7-24). The Iowa Supreme Court additionally has had opportunity to review the factual findings and applications of law for abuse of discretion and to make them final as to the class certification to this point. (Opinion, Pet. App. at 7-24). In each instance the Iowa courts have appropriately reviewed the federal and state precedents cited to them, as well as authority from other jurisdictions, and made findings of fact and determinations of law consistent with the due process, the evidence presented and within their broad discretion under the class certification rules. (Opinion, Pet. App. at 7-24).

While the Petitioner attempts to characterize its Petition as a request for the Court to provide guidance, it is really not only a mischaracterization of the Iowa Supreme Court's rulings and the basis for

the class action certification but is also at most a complaint as to the Iowa Judiciary's alleged misapplication of law and/or incorrect findings of fact. The above review of the applicable law to these issues and decisions of the Iowa Judiciary have been provided to demonstrate to the Court that the appropriate law was applied and the Due Process protections of the United States Constitution have been afforded in this matter.

The Court should deny the Petition in this case. The decisions of the Iowa judiciary properly applied appropriate federal and state precedent with regard to the state class action rules. The findings of fact of the district courts were well within their broad discretion and consistent with those necessary for the maintenance of this mandatory class action, and the notice afforded and the additional rights of individual appearance representation were appropriate additional protections to afford a 23(b)(1)type of class. These findings of fact have been reviewed for abuse of discretion and upheld by the state court of last resort, Iowa Supreme Court.

CONCLUSION

In its decisions, the Iowa judiciary found that the heart of the case was the issue of illegal taxation that the City levied against its utility rate payers through its enacting of an excessive franchise fee on gas and electric utilities. This is a Rule 23(b)(1) type of class action case. The class of people being so illegally taxed had right to a class action to declare the amount of legal franchise fee, the amount of

illegal tax, to stop such illegal activity, and to obtain an order to cause the municipality to refund the illegally collected tax to the class. The application of such a court decision perforce must affect all of the members who were being assessed a franchise fee, illegally taxed, and the complicated calculation of the amount of proper costs to be included in the franchise fee that became necessary at trial increased the risk of inconsistent adjudications in the face of a lack of preclusion attaching in these proceedings. (See Opinion, Pet. App. 19). Moreover, the finding of this mandatory class made unnecessary and indeed counterproductive any opt-out in a class wherein members cannot be excluded. The City's position continues to fail to understand the type of litigation, the full extent of the damage wrought by their fiscal irresponsibility and their illegal and "creative" revenue generation, as well as the need for an efficient and final decision on this matter within the Iowa judiciary, the Iowa legislature, and the State of Iowa as a whole. As the Iowa Supreme Court stated:

> "The litigation of this case has resulted in two Supreme Court opinions, a forty-nine page district court decision after a fourteen-day bench trial involving the testimony of twenty-eight witnesses, including eight experts—three for the City and five for Kragnes. The record fills five bankers' boxes. However, Kragnes's claim standing alone would likely fall within the jurisdictional limit of the small claims court. We think this case demonstrates the very necessity

> and importance of class action litigation both for the plaintiffs and for the City. The likelihood of a plaintiff bringing such a complex suit requiring substantial resources to litigate in small claims is highly unlikely. And if she, and scores of thousands of others like her, did bring their claims individually, it could easily overwhelm the legal department of the City and the resources of the Polk County district court, and would likely result in inconsistent adjudications. We affirm on this issue."

(Opinion, Pet. App. at 19).

This case is a case where a sovereign state has properly used its laws and rules, within the confines of due process, to allow a class to stop the law breaking of one of its municipalities. The law breaking municipality has used its immense power to elongate and complicate the legal process. In its Petition it continues to attempt to avoid the consequences of its unlawful conduct. Its efforts to be allowed to retain illegally extracted taxes, all of which was obtained while on notice of the claim of illegality, have been rejected by the Iowa courts, the Iowa legislature and the Iowa executive.

Here, the Petitioner has shown no compelling reasons for this Court to grant the Petition. The Respondent Class respectfully requests the Supreme

Court of the United States deny the City of Des Moines' Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LISA KRAGNES, Plaintiff, vs. CITY OF DES MOINES, IOWA, Defendant.	CASE NO. CE 49273 **RULING ON MOTION FOR CLASS CERTIFICATION** (Filed January 12, 2006)

A contested hearing on the plaintiff's motion for class certification was held before the undersigned on November 22, 2005 as previously scheduled. Upon consideration of the arguments made at the hearing, and having reviewed the court file and being otherwise duly advised in the premises, the court rules as follows:

The plaintiff seeks to have certified a class of individuals identified as "all persons, firms, or corporations who have paid a franchise fee, from July 27, 1999 to the present, pursuant to the Gas and Electric Franchise ordinance passed by the City of Des Moines in effect for the applicable period." This is in connection with her claim that the aforementioned fee is illegal and should be refunded to those persons who have paid them during the

period in question. The defendant has asserted three objections to the proposed certification: 1) the request is untimely; 2) there has been no opportunity to gather evidence on the issues raised by the request for certification; and 3) certification is unnecessary, in that the defendant cannot afford the plaintiff and the contemplated class the monetary relief requested. The court will take up these objections first, and if necessary, consider the request for certification in light of the criteria set forth in Iowa R. Civ. P. 1.262 and 1.263.

Timeliness of request for certification. Iowa R. Civ. P. 1.262(1) provides that a hearing on the issue of class certification should take place "as soon as practicable after the commencement of a class action." It is undisputed that the formal request for such a hearing was not made until October 11, 2005, almost fifteen months after the plaintiff's petition was filed and less than two months before this matter was initially set for trial.

There are no Iowa appellate decisions construing the "as soon as practicable" language in rule 1.262(1). As this is the identical language which until recently was utilized in the federal class action rule, see Fed. R. Civ. P. 23(c)(1)(2003)[1], federal cases interpreting this rule are particularly helpful. Vos v. Farm Bureau Life Ins. Co.,667 N.W. 2d 36, 44 (Iowa 2003).

It is clear that the "as soon as practicable" language does not set a definite deadline for seeking

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[1] Rule 23(c)(1) was amended effective December 1, 2003, and now requires the determination regarding certification to take place "at an early practicable time."

class certification. Cases which have analyzed the federal language have allowed certification to be determined several years after the commencement of the litigation, see, e.g., Pyke v. Cuomo, 209 F.R.D. 33 (N.D.N.Y. 2002) (certification allowed more than ten years from start of litigation) or even after a decision on the merits of the claim, see, e.g., Wright v. Schock, 742 F.2d 541, 543-44 (9th Cir. 1984). The primary consideration in addressing the timeliness issue in the context of a request for class certification is whether the opposing party has been prejudiced by an otherwise impracticable delay. See Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106, 1111 (8th Cir. 1977), overruled on other grounds, Coopers v. Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) ("Furthermore, the general rule is that a delay prior to moving for class action certification is not a basis for refusing certification absent some showing of prejudice.").

The defendant has been unable to persuade the court that it has been unfairly prejudiced by the manner in which this case has been submitted to this point. The parties jointly elected to submit cross-motions for summary judgments on the legal validity of the plaintiff's claim (i.e., the illegality of the city's franchise fees). Because the parties were granted leave to file dispositive motions less than 60 days prior to trial, the original trial date was chosen to hear the cross-motions, with the understanding that any further proceedings after the court's ruling would be addressed accordingly. The action has been on file now for just less than 18 months. The timing of plaintiff's motion is insufficient to justify a denial of certification on that basis alone.

Need for certification discovery. The defendant ar-gues it is unfair to go forward with certification at this point, as no discovery has taken place on the various criteria on that issue. It neither specifies the nature of this omitted discovery, nor states how it was unable to proceed with such discovery on its own prior to plaintiff's motion for certification. If it felt that certification was problematic, it could have requested limited discovery if it had a particularized need for the information and the requests were not unduly burdensome. See M. Berenson Co. v. Faneuil Hall Marketplace, Inc., 103 F.R.D. 635, 637 (D. Mass. 1984). Absent more specific concerns regarding the need for such discovery, this basis is insufficient to deny certification.

Futility of requested relief. The defendant argues that the monetary relief requested on behalf of the class (refunds of any improperly assessed fees) cannot be had by anyone other than MidAmerican Energy, as the entity who charged the fees to the purported class as its customers. As the plaintiff correctly points out, however, while MidAmerican charged the fees, it in turn passed them on to the defendant. Assuming that a refund of any illegally assessed fees is in order, there is no reason why the defendant, as the entity which received the ultimate benefit of those fees, should not be the one making the refund. The defendant has appeared to have contemplated such a scenario when it passed the franchise fee ordinances in 2004 which state in part, "If a refund to customers is ordered by the Supreme Court in a final non-appealable decision, the city agrees to repay to the Company such fees as are ordered to be repaid." Plaintiff's Exhibits 3 and 4 to Motion for Summary Judgment.

This court has previously ruled that MidAmerican Energy is not an indispensable party to this litigation, in that any information in its possession may be obtained through standard discovery. MidAmerican's presence is neither required to facilitate the compilation of information necessary to see this case through, or to accomplish any monetary relief that may be forthcoming. The defendant remains free to seek the joinder of MidAmerican as a party to foster these goals. However, its absence as a party is insufficient as a basis for denying certification, if otherwise in order. Having addressed the stated objections of the defendant to certification, the court will now address that issue in the context of the requirements of rule 1.262 and 1.263.

To certify a class action, this court must find all of the following: 1) the class is so numerous that joinder of all parties is impracticable; 2) there is a question of law or fact common to the class; 3) a class action should be permitted for the fair and efficient adjudication of the controversy; and 4) the representative parties fairly and adequately will protect the interests of the class. Luttenegger v. Conseco Financial Servicing Corp., 671 N.W. 2d 425, 436-37 (Iowa 2003) (citing Iowa R .Civ. P. 1.261 and 1.262). The plaintiff has the burden of proving that the purported class meets all these criteria. Id. The plaintiff's burden in this regard has been described as "light." Comes v. Microsoft Corp., 696 N.W. 2d 318, 324 (Iowa 2005).

The first two criteria do not appear to be in reasonable dispute. The parameters of the purported class would appear to be vastly greater than the minimum threshold of forty individuals necessary to

satisfy the numerosity requirement of Iowa R. Civ. P. 1.261(1). Martin v. Amana Refrigeration, Inc., 435 N.W. 2d 364, 368 (Iowa 1989). The court takes judicial notice of the fact that the city of Des Moines had a population of 198,682, with 85,067 housing units, according to the 2000 census. See http://quickfacts.census.gov/qfd/states/19/1921000.html. (summary of information from U.S. Census Bureau); State v. Proulx, 252 N.W. 2d 426, 431 (Iowa 1977) (use of judicial notice of population evidenced by census reports). Based on the definition of the purported class (residents of Des Moines who have been customers of MidAmerican Energy or its predecessors), it is more than large enough to satisfy the numerosity requirement.

In addition, there are also common legal questions that run throughout each of the claims held by the members of the purported class. These include whether the franchise fees in question are appropriate or illegal as taxes, and whether the class members are entitled to declaratory, injunctive or monetary relief. [2] The only differentiating issue among the purported class members would be the amount of any monetary damages allowed, based on the amount of fees paid, should a refund be allowed. This is insufficient in and of itself to preclude certification. City of Dubuque v. Iowa Trust, 519 N.W.2d 786, 792 (Iowa 1994). This element has been satisfied as well.

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[2] This court has already ruled on Ms. Kragnes' entitlement to declaratory and injunctive relief after concluding the fees were in fact illegal. Whether Ms. Kragnes is entitled to monetary relief in the form of a refund, and the scope of any relief to the class should certification be granted, remain for the court's consideration.

In determining whether a class action should be permitted for the fair and efficient adjudication of the controversy, the court is required to consider and give appropriate weight to thirteen different criteria found at Iowa R. Civ. P. 1.263(1)(a)-(m). While the court is required to make factual findings on the factors so considered, it is not required to make such findings as to each factor. Comes, 696 N.W.2d at 321. Of the factors listed in rule 1.263(1), this courts considers those listed in subparagraphs (a), (b) (e), (f) and (g) to have the most relevance to this case. The remaining factors either have little pertinence to this dispute, or none at all.

There is considerable commonality in the proposed class. The interests of each purported class member are identical; they only vary as to the amount of fees collected by the city for the applicable period. If each individual member of the purported were required to fend for themselves in pursuing relief against the defendant, there would be a significant risk of inconsistent adjudications as these individual claims made their way through the trial court system. Because many of these individuals would presumably be eligible to pursue their in small claims court due to the size of their monetary claims,[3] there would also be significant issues of whether these varying adjudications would have preclusive effect in later claims. See Khan v. Heritage Property Management, 584 N.W.2d 725, 728 (Iowa Ct. App. 1998) (issue adjudicated in small

[3] It is believed that even the named plaintiff would find herself in this situation had she so chosen, as it is alleged that her individual claim or monetary relief would be approximately $600, well below the amount in controversy for small claims actions. See Iowa Code §631.1(1)(2005).

claims judgment has no preclusive effect in subsequent district court action).

These individual claims (which could total into the tens or hundreds of thousands, based on the aforementioned population figures) could quickly overwhelm the defendant and its legal department. Since the legal issues raised by plaintiff's petition are equally applicable to all the potential members of the requested class, it stands to reason that the most efficient way to address these claims in their totality would be to allow them to be adjudicated in a single proceeding which would bind all parties and the members of the class. The amounts, if any, of any monetary relief deemed appropriate could be dealt with through the notice and opt-out provisions of Iowa R. Civ. P. 1.266, as well as those rules otherwise pertaining to the conduct and resolution of such an action. See Iowa R. Civ. P. 1.268, 1.271, 1.274.

The factors in rule 1.263(1) center on two broad considerations: achieving judicial economy by encouraging class litigation while preserving, as much as possible, the rights of litigants, both those presently in court and those who are only potential litigants. Comes, 696 N.W.2d at 321 (citing Luttenegger, 671 N.W.2d at 425). For the reasons outlined above, the court concludes that these considerations have been satisfied and that a class action should be permitted for the fair and efficient adjudication of the controversy at hand.

The final consideration for this court is whether the named plaintiff as the proposed representative of the class will fairly and adequately protect the interests of the class. To come to this conclusion, the court must be able to conclude the

following: 1) the attorneys for the named plaintiff will adequately represent the interests of the class; 2) the named plaintiff does not have a conflict of interest in the maintenance of the class action; and 3) she has or can acquire adequate financial resources, considering Iowa R. Civ. P. 1.276, to ensure that the interests of the class will not be harmed. Iowa R. Civ. P. 1.263(2)(a)-(c). The determination of whether the class representative will be able to fairly and adequately represent the class has been deemed "perhaps the most significant of the prerequisites to a determination of class certification," in large part because of the need to protect the due process rights of the absent class members. Stone v. Pirelli Armstrong Corp., 497 N.W.2d 843, 846 (Iowa 1993) (quoting Folding Cartons, Inc. v. American Can Co., 79 F.R.D. 698, 701 (N.D. Ill. 1978).

The defendant has raised no issues regarding the ability of the attorneys for the plaintiff to prosecute this action, and the court likewise has no concerns in that regard. Present counsel has been able to successfully respond to two dispositive motions filed by the defendant, and ahs preliminarily convinced this court that the underlying premise for this litigation (i.e., the legality of the defendant's franchise fee) is valid. While present counsel of record is a small firm, they have entered into an agreement with a larger litigation firm to assist in these proceedings. On the whole, they appear to be sufficiently qualified, experienced and able to conduct the litigation as a class action. See In re Drexel Burnham Lambert Group, 960 F.2d 285, 291 (2d Cir. 1992). Based on the information before the

court at present, it finds that counsel for the plaintiff will adequately represent the interests of the class.

Second, nothing has been brought to the court's attention that would indicate that the plaintiff has a conflict of interest if this action were to be maintained as a class action. Her interests vis-à-vis the class members do not appear to diverge, and no one from the prospective class has come forward with any concerns or objections in this regard. There is no close affiliation between the plaintiff and her present counsel that might otherwise indicate the potential for conflict, especially as pertains to the potential for a settlement that might be less favorable to the class but beneficial to counsel in terms of attorney fees. See Susman v. Lincoln American Corp., 561 F. 2d 86, 90-91 (7th Cir. 1977). The plaintiff as the representative party of the purported class does not have a present conflict of interest in the maintenance of the class action.

The final hurdle to certification, the financial resources of the plaintiff, is frankly the most problematic for the court. Nothing regarding the plaintiff's financial condition has been provided to the court. While it is the court's understanding that the plaintiff is employed, it has no information regarding her income and other assets and liabilities such as would allow for a proper examination of this issue. See Stone, 497 N.W.2d at 848. The court is wary of coming to the conclusion regarding the plaintiff's financial wherewithal under these circumstances. This is an especially important consideration, as stated in Stone:

> Other than a bare promise, Stone has made no showing as to how she will reimburse her

> attorneys for litigation expense Advancements if she loses. On this point, one court has noted that ***"[i]n view*** of the binding effect on absent class members, courts ought to be especially chary about certifying inadequately resourced plaintiffs as class representatives. Plaintiffs must be able adequately (1) to fund discovery and expert testimony (2) to resist inadequate settlements that plaintiffs in more exigent circumstances would feel compelled to accept, and (3) to fund .... notices to class members....
>
> .....
>
> Other courts are increasingly wary of having class representatives before them who, because of their indigency, are impervious to, and therefore unrestrained by, the prospect of being liable for costs."

Id. (quoting Strong v. Arkansas Blue Cross & Blue Shield, Inc., 87 F.R.D. 496, 510 (E.D. Ark. 1980)). The fee agreement submitted by counsel, pursuant to Iowa R. Civ. P. 1.276 offers little comfort on this issue. It provides that the plaintiff is exclusively responsible for any and all expenses incurred during the course of this litigation and may be billed periodically for such expenses during the pendency of the litigation. It further provides that in the event she would be unable to pay an interim billing statement for such expenses, the attorney-client relationship would be considered terminated and she would be obligated to reimburse counsel for the time they have expended on the case at the

hourly rate of $500 per hour ($100 per hour for legal assistant time). While an initial retainer is referenced in the agreement, it is unclear how much, if any, has been paid by the plaintiff for such a retainer.

This lack of financial documentation is particularly troubling to the court for the same reasons as noted in Stone; namely, it leads to the undesirable situation where counsel may acquire a financial interest in the litigation and therefore potentially compromise the interests of the class. Id. at 848-49. While this part of Stone was measured by the predecessor to our current Rules of Professional Conduct, the Iowa Code of Professional Responsibility for Lawyers, Id. at 848, and these rules differ on whether advanced expenses must be repaid, compare DR5-103(B) (client must remain ultimately liable for advanced expenses) with Iowa Court Rule 32.1.8(e)(1) (repayment for advanced litigation costs and expenses may be contingent on outcome of matter), the fact remains that if counsel is required to take on the role of litigation financier because of the inability of their client to do so, there is a real risk that such financial considerations could overtake counsel's proper interest in representing the class.

It may be that the plaintiff and her counsel have provided for the financial contingencies addressed in Stone and by the court in this ruling. However, as has been pointed out, nothing has been provided to the court to minimize its concerns in this regard. There will no doubt be considerable expenses that will need to be incurred, should this case be allowed to proceed as a class action. For now, the court is unable to find that the plaintiff has or can

acquire adequate financial resources to ensure that the interests of the class will not be harmed if she is allowed to serve as its representative. As a result, she has failed in her obligation to prove that she can fairly and adequately protect the interests of the class, as required by Iowa R. Civ. P. 1.262(2)(c).

IT IS THEREFORE ORDERED that the plaintiff's motion for class certification is denied.

Dated this 12th day of January, 2006.

/s/ Michael D. Huppert
Michael D. Huppert
Judge, Fifth Judicial District of Iowa

Copies to:
Brad Schroeder
Mark Godwin

CLASS NOTICE AS APPROVED BY ORDER ON AUGUST 27, 2008.

Gas and Electric Franchise Fee Litigation
P.O. Box _____
Des Moines, Iowa 50____

NOTICE OF CLASS ACTION THE BACK OF THIS CARD PROVIDES A WEBSITE AND AN ADDRESS WHERE YOU CAN OBTAIN ADDITIONAL INFORMATION THIS NOTICE ADVISES YOU F A PENDING CLASS ACTION AGAINST THE CITY OF DES MOINES, IOWA THIS NOTICE MAY AFFECT YOUR LEGAL RIGHTS PLEASE READ IT CAREFULLY	

Lisa Kragnes v. City of Des Moines, Iowa, **Polk County District Court Case No. CE 49273**

(This notice is by order of the Court. The Court has not yet decided the merits of this case and is intended only as a summary of the case before the Court and your rights as a potential class member). Your rights may be affected by a class action brought by Lisa Kragnes of Des Moines, Iowa, as representative, and pending against The City of Des Moines, Iowa (hereinafter "Defendant") in the Iowa District Court for Polk County. The suit claims that the Defendant violated Iowa law by imposing a gas and electric franchise fee in excess of its actual cost of regulation thereby collecting an illegal tax. It seeks a declaration as to the proper amount of fee, an injunction on any future collections in accordance with the determination and a refund of all amounts paid in excess of the legal amount. The Defendant denies the allegations. MidAmerican's records indicate that you may be a member of the class, having paid gas and electric franchise fees in the time from July 27, 1999 and continuing through the conclusion of this litigation. This case is currently set for trial beginning October 27, 2008. The purpose of this notice is to advise you that you may be a member of this class and may thereby be entitled to protection by an injunction prohibiting the Defendant from imposing any illegal portion of the fee and to a refund, if a refund is ordered. Because of the nature of this claim action there is an option to opt out. Any judgment entered, whether favorable or not, will be binding upon all members of the class. Plaintiff's attorney's fees and expenses will be paid out of any recovery in this case pursuant to a contract previously approved by the Court. In

addition attorney's fees and expenses may be recovered from the Defendant if and as ordered by the Court. You may enter an appearance in this case either personally or by our own separate counsel. You can obtain further information on this litigation by reviewing the Court file at the Polk County Courthouse, 5th & Mulberry, Des Moines, Iowa or by writing to attorneys, Brad Schroeder and Bruce H. Stoltze at P.O. Box _____, Des Moines, Iowa 50___; or by going to the following website: _____. All significant pleadings filed with or Orders entered by the Court will be posted on this website for class members to access and review.

EXHIBIT 1 (Amended)