**No. 02-695**

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**MICHAEL FITZGERALD**, Treasurer, State of Iowa,

Petitioner,

v.

**RACING ASSOCIATION OF CENTRAL IOWA,**
**IOWA GREYHOUND ASSOCIATION,**
**DUBUQUE RACING ASSOCIATION, LTD.**
**And IOWA WEST RACING ASSOCIATION**,

Respondents.

On Petition fort A Writ of Certiorari
To the Supreme Court of Iowa

# BRIEF OF THE CITY OF DUBUQUE, IOWA, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICUS CURIAE*

The City of Dubuque, Iowa (Dubuque) is an Iowa municipal corporation. Dubuque owns the greyhound racetrack that is leased to Respondent Dubuque Racing Association, Ltd. (DRA), a non-profit corporation. DRA operates slot machines at the racetrack. Pursuant to the lease, and as required by Iowa Code § 99F.6(4)(a), at the end of its fiscal year, DRA is required to distribute fifty percent (50%) of its net cash proceeds to Dubuque and twenty-five percent (25%) of its net cash proceeds to charity. The lease requires that Dubuque deposit the annual distribution in its capital improvement fund.

The greyhound racetrack employs several hundred employees and is a major tourist attraction for Dubuque.

For the last five years, the DRA distribution to Dubuque and to charities has been as follows:

| | Dubuque | Charities |
|---|---|---|
| 2002 | $ 5,136,000 | $ 2,568,000 |
| 2001 | 7,542,748 | 2,179,000 |
| 2000 | 8,119,962 | 2,558,000 |
| 1999 | 7,278,981 | 2,198,000 |
| 1998 | 6,165,038 | 1,855,000 |

Capital improvement projects that have been funded by the DRA distributions to Dubuque include the following:

| | |
|---|---|
| Civic center restoration | $ 1,456,840 |
| Main Street reconstruction | 1,002,273 |
| Park maintenance and improvements | 1,593,523 |
| Industrial park development | 8,313,939 |
| Airport improvements | 380,460 |
| Riverfront development | 9,069,501 |
| Including construction of education | |

| | |
|---|---|
| and convention center | |
| Public swimming pool improvements | 754,047 |
| Other improvements | 13,066,840 |
| Including improvements to public library, city garage replacement, fire station elevator | |
| Total capital improvement projects funded by DRA distribution to Dubuque | $ 30,762,359 |

The 36% tax on slot machines at racetracks that is the subject of this proceeding would have a substantial impact on DRA's net cash proceeds and in turn on the annual distribution to Dubuque and charities. It is projected that the difference over the next five years between the 36% tax rate and the 20% rate that was the result of the Iowa Supreme Court ruling holding the 36% rate unconstitutional will result in the reduction of DRA distributions to Dubuque and charities of $30,143,232.

It is anticipated by DRA officials that at some point, the increased tax on slot machines will result in the closing of the greyhound racetrack, and the subsequent loss of employment, distributions to Dubuque and local charities, and loss of tourism to Dubuque.

## ARGUMENT

In this proceeding, Iowa racetracks challenge legislation that significantly increased the tax on racetracks, but not on riverboats. The riverboats are taxed at the rate of five percent on the first one million dollars of adjusted gross receipts, at the rate of ten percent on the next two million dollars of adjusted gross receipts, and at the rate of twenty percent on any amount of adjusted gross receipts over three million dollars. The tax rate for racetracks is considerably higher than for riverboats. Beginning on January 1, 1997, the legislature set a rate of twenty-two percent on adjusted gross receipts over three million dollars from gambling games at racetracks. This rate was set to increase by two percent each calendar year until the rate reaches thirty-six percent. *Racing Ass'n of Cent. Iowa,* 648 N.W.2d 555, 557 (Iowa 2002).

The Iowa District Court upheld the unequal taxing scheme. The Iowa Supreme Court, finding no rational basis existed for this differential tax treatment, held that the tax violates the federal and state equal protection clauses. *Racing Ass'n of Cent. Iowa,* 648 N.W.2d 555, 562 (Iowa 2002).

Under Iowa Code § 99F.11, a tax is imposed on the adjusted "gross receipts received annually from gambling" games authorized under this chapter at the rate of five percent on the first one million dollars of adjusted gross receipts, at the rate of ten percent on the next two million dollars of adjusted gross receipts, and at the rate of twenty percent on any amount of adjusted gross receipts over three million dollars. However, beginning January 1, 1997, the rate on any amount of adjusted gross receipts over three million dollars from gambling games "at racetrack enclosures" is twenty-two percent and shall increase by two percent each succeeding calendar year until the rate is thirty-six percent.

Racetracks are only permitted to operate slot machines, not other games of chance or video machines. Iowa Code § 99F.1(9). The effect of Iowa Code § 99F.11 is to tax gross receipts from racetrack slot machines at 36% while taxing gross receipts from slot machines on riverboats at 20%.

The Iowa Supreme Court correctly concluded that, "We cannot justify this tax based on the fact racetracks operate on land whereas riverboats operate on water." *Racing Ass'n of Cent. Iowa*, 648 N.W.2d 555, 562 (Iowa 2002).

As argued by the Respondents, there can be no rational basis for the discriminatory tax because "There is no rational reason for the same revenues from the same machine used in the same way to be taxed at an 80 percent higher rate because of the machine's location." Respondents' Brief in Opposition, p. 13.

Although it may be permissible to treat "the operations of a particular kind of business" one way and treat "some other kind of business closely akin thereto" differently, see *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 584 (1937), this is not a case where slot machines at racetracks are "closely akin" to slot machines on riverboats. It is the *same* business that is being treated differently. The "thing taxed," see *Flint v. Stone Tracy Co.*, 220 U.S. 107, 161 (1911) is, in either instance, gross receipts from slot machines. The only difference between the "things taxes" is the location of the slot machines.

As the Iowa Supreme Court correctly observed:

> The State contends riverboats and racetracks are different classes simply because one is land-based whereas the other floats on water. At first blush, this is an appealing argument. However, in reality the essence of the differential treatment is not rooted in the

> dissimilar scenery surrounding the main activity at both facilities. Rather, the heart of the tax statute is in its disparate treatment of the main activity taking place at both riverboats and racetracks. *That is, the essence of the tax is that it treats racetrack slot machines differently than riverboat slot machines. Where the same activity is being taxed at significantly different rates, a mere difference in location is not sufficient to uphold the discriminatory tax.* (Emphasis added)

*Racing Ass'n of Cent. Iowa*, 648 N.W.2d 555, 559 (Iowa 2002).

With respect to the tax on gross receipts from these two taxpayers – racetracks and riverboats, there is "so much similarity between them that they must be placed in precisely the same classification for tax purposes." The difference in treatment of these taxpayers is *per se* prohibited discrimination. "Varying taxes" cannot be "laid upon taxpayers engaged in precisely the same form of activity." Equal protection does not require identity of treatment but it does require "that classification rest on real and not feigned differences." See *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 236-37 (1954). Here, there are no "real differences;" the "thing taxed" is the same.

## CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Iowa should be affirmed.

Respectfully submitted,

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