IN THE IOWA DISTRICT COURT FOR POLK COUNTY

KELLI JO GRIFFIN, Petitioner, vs. PAUL PATE, in his official capacities as the Secretary of State of Iowa, and DENISE FRAISE, in her official capacities as the County Auditor of Lee County, Iowa, Respondents.	EQUITY CASE NO. EQCE 077368 PETITIONER'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

I. STATEMENT OF THE CASE

The Petitioner, Kelli Jo Griffin, by and through her attorneys, seeks summary judgment granting declaratory judgment and supplemental relief as necessary to protect her right to vote and substantive due process. Mrs. Griffin has two claims, both of which may be resolved upon the determination of purely legal questions:

(1) **Voting Rights Violation**

The statutes, regulations, forms, and procedures which disqualify Mrs. Griffin from registering to vote and voting constitute a complete denial of her right to vote in violation of the Iowa Constitution because her prior felony conviction for delivery of less than 100 grams of cocaine, which sentence she has fully discharged, is not among the category of felonies which qualify as "infamous crimes" under Article II, Section 5 of the Iowa Constitution; and

(2) **Substantive Due Process Violation**

The burden on Mrs. Griffin's fundamental right to vote in Iowa resulting from those statutes, regulations, forms, and procedures that bar her from voting without a grant by the Governor of a restoration of her right to vote, violate her right to substantive due process assured under Article I, Section 9 of the Iowa Constitution because they fail to meet the rigors of strict scrutiny analysis.

II. STIPULATION BY THE PARTIES THAT THE CASE MAY BE RESOLVED ON SUMMARY JUDGMENT

Summary judgment is appropriate when the moving party shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3); *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 501 (Iowa 2013); *Varnum v. Brien*, 763 N.W.2d 862, 874 (Iowa 2009). The Court resolves a matter on summary judgment if the record reveals a conflict concerning only "the legal consequences of undisputed facts." *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 802 (Iowa 2003) (citation omitted). In deciding whether to grant summary judgment, the Court examines "the record in the light most favorable to the nonmoving party" and will "draw all legitimate inferences the evidence bears in order to establish the existence of questions of fact." *Ne. Cmty. Sch. Dist. v. Easton Valley Cmty. Sch. Dist.*, 857 N.W.2d 488, 492 (Iowa 2014).

The parties agree that this case may be resolved on summary judgment because no issues of material fact exist, and they have stipulated to a joint statement of facts and appendix. (Stipulated/Joint Statement of Undisputed Facts, May 15, 2015); (Stipulated/J.A., May 15, 2015).

III. FACTS

The Petitioner, Mrs. Griffin, is a lifelong Iowan who resides in small town Montrose, Iowa, in Lee County, with her husband and four young children, including her stepdaughter. (App. Exs. 1, 9.) Mrs. Griffin has successfully rebuilt her life after a

period of recovery from substance abuse and addiction related to her experiences as a survivor of domestic violence in a past marriage. (App. Exs. 1, 9.) Mrs. Griffin is a homemaker and stay-at-home mother. (App. Exs. 1, 9.) In addition, she is active in her community, volunteers at a child abuse prevention center and a women's drug treatment center, and is a speaker to groups of women who, like her, are domestic violence and rape survivors. (App. Exs. 1, 9.)

Mrs. Griffin has discharged two felony convictions for substance abuse in her past. On February 14, 2001, Mrs. Griffin was convicted of possession of ethyl ether in violation of Iowa Code 124.401(4)(c), a Class D felony. (App. Exs. 1, 12.) She received a suspended prison sentence and was placed on probation, which she discharged on February 14, 2006. (App. Exs. 1, 12.) Upon discharge of her sentence, her voting rights were restored automatically through operation of former Governor Vilsack's Executive Order 42. (App. Ex. 1.) Executive Order 42 "utilized a process that granted the restoration of citizenship rights automatically." (App. Ex. 4; *see* App. Ex. 5.) As a result of Executive Order 42, there was an estimated 81 percent reduction in the number of people disenfranchised in Iowa when an estimated 100,000 Iowans regained the right to vote.[1] The automatic restoration process created by Executive Order 42 remained in effect until January 14, 2011. (App. Exs. 4, 5.) Between the

[1] Nicole D. Porter, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2010* (Oct. 2010), at 12, http://tinyurl.com/prlk28n.

discharge of her sentence in 2006 and the date of her conviction on January 7, 2008, Mrs. Griffin registered to vote and voted twice: both in an August 8, 2006 local election and the November 7, 2006 general election. (App. Ex. 16.)

On January 7, 2008, Mrs. Griffin was convicted of Delivery of 100 Grams or Less of Cocaine, in violation of Iowa Code Section 124.401(1)(c)(2)(b), a Class C felony. (App. Exs. 3, 13.) She was given a suspended sentence and was placed on probation for 5 years. (App. Exs. 3, 13.) Mrs. Griffin successfully discharged her sentence on January 7, 2013. (App. Ex. 15.) At the time of her sentencing in 2008, Mrs. Griffin's defense attorney advised her that her right to vote would be restored automatically upon discharging her criminal sentence. (App. Exs. 1, 9.) That information was accurate at the time it was given in 2008, when Governor Vilsack's Executive Order 42 remained in effect.

On November 5, 2013, Mrs. Griffin registered and voted in an uncontested municipal election held in Montrose, Iowa. (App. Exs. 1, 9.) Mrs. Griffin brought her children to the polling site with her in order to teach them about voting. (App. Exs. 1, 9.) Her daughter had recently learned about voting in school and Mrs. Griffin wanted to show her children how the process worked. (App. Exs. 1, 9.)

Unknown to Mrs. Griffin, when Governor Branstad began his current term in 2011, his second executive order, Executive Order 70, revoked former Governor Vilsack's Executive Order 42. (App. Exs. 4, 5.) Thereby, Executive Order 70 ended

the system of automatic restoration of voting rights for people who completed their criminal sentences. (App. Exs. 4, 5.)

In so doing, Executive Order 70 made Iowa one of three most restrictive states for voting in the country for people with criminal records. Only in Iowa, Kentucky, and Florida are all people with a felony conviction permanently disenfranchised.[2] Executive Order 70 has had a profound impact on civil and political rights in our state.[3] In Iowa currently, only a handful of the thousands of people who have completed their criminal sentences have successfully completed Governor Branstad's application process for an executive commutation restoring their rights of citizenship. *See* Ryan J. Foley, "Iowa Governor Restores More Felons' Voting Rights," *Washington Times*, Jan. 14, 2014, http://tinyurl.com/ob2qkkn (From 2011 to 2013, an estimated 25,000 Iowans completed their sentences, but only 40 regained their voting rights.). The application process is burdensome. It requires the applicant to complete a multi-

[2] *See* National Conference of State Legislatures, "Felon Voting Rights" (July 15, 2014), http://tinyurl.com/p3nrrun. Virginia initiated automatic restoration in 2014. *See* The Brennan Center, Criminal Disenfranchisement Laws Across the United States, http://tinyurl.com/lp48fru.

[3] Prior to the July 4, 2005 Executive Order 42 signed by then-Governor Vilsack, 1 in 4 (24.87 percent) of voting-age African-American citizens in Iowa were disenfranchised. Lynn Eisenberg, *Note: States as Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U. J. Legis. & Pub. Pol'y 539, 563-64 (2012); The Sentencing Project, *Iowa and Felony Disenfranchisement* (2005), at 2, http://tinyurl.com/qy9x2z6. Under Executive Order 42, rescinded by the Defendant, there was an 81 percent reduction in the number of people disenfranchised in Iowa and an estimated 100,000 Iowans regained the right to vote. *See* Porter, *Expanding the Vote*, at 12, http://tinyurl.com/prlk28n.

step paperwork process, demonstrate that he or she has fully paid or is current on any payments for court-imposed fines, fees and restitution, as well as obtain and provide a copy of their Iowa Criminal History Record from the Iowa Division of Criminal Investigation, which costs $15.00 per request. (App. Exs. 6-8.)

Following the decision in *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845 (Iowa 2014), the Iowa Governor's Office is no longer requiring persons convicted of aggravated misdemeanors to apply to have their right to vote restored, but still requires persons convicted of *all* felonies to do so. (App. Ex. 8) ("Any person convicted of a felony is barred from voting or holding office. In order to vote or hold public office, a person convicted of a felony must apply to the Office of the Governor for restoration of citizenship rights – right to vote and hold public office and have the Governor grant a restoration.").

After the 2013 municipal election in Montrose, Auditor Fraise identified Mrs. Griffin's ballot and, after running her information through the voter registration program at the Lee County Auditor's Office, determined that Mrs. Griffin was ineligible to vote because of her prior felony conviction. (App. Ex. 10.) On December 16, 2013, the State charged Mrs. Griffin with Perjury, a class D felony, for registering to vote and voting in the November 5, 2013 election, in violation of Iowa Code Section 720.2. (App. Exs. 1, 14.) Mrs. Griffin pled not guilty. (App. Exs. 1, 14.)

On March 19-20, 2014, Mrs. Griffin was tried by a Lee County jury, which acquitted her of all charges. (App. Exs. 1, 14.)

Now, Mrs. Griffin would like to fully engage in the civic life of her community where she lives, volunteers, and raises her family by voting without fear of criminal prosecution. (App. Ex. 1.) Voting is important to her, and she views voting as a vital part of being a productive member of her community. (App. Ex. 1.) But for her 2008 felony conviction, Mrs. Griffin satisfies the requirements to register to vote under Iowa's existing statutes and regulations. (App. Ex. 1.) Mrs. Griffin has not applied for a restoration of her right to vote by the Governor of Iowa subsequent to her 2008 felony conviction, nor otherwise had her right to vote restored automatically by the Governor of Iowa following the discharge of her sentence in 2013, by which time Executive Order 70 was in effect. (App. Exs. 1, 2.) Mrs. Griffin now wishes to register to vote and vote in elections that impact her, her family, and her community without fear of subsequent criminal prosecution. (App. Ex. 1.)

IV. ARGUMENT

1. The Iowa Constitution Does Not Disqualify All Iowans With a Felony Conviction, But Only Those Convicted of an "Infamous Crime"

The Iowa Constitution assures the right of suffrage to every citizen of the United States who is 21 years of age[4] and an Iowa resident according to the terms laid out by law. Iowa Const. art. II, § 1. In the recent case *Chiodo v. Section 43.24 Panel*, 846

[4] The Twenty-Sixth Amendment to the U.S. Constitution extends the right to vote to those age eighteen or older. U.S. Const. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

N.W.2d 845 (Iowa 2014), Chief Justice Cady, writing for the plurality, summarized the jurisprudence in Iowa governing the right of citizens to vote:

> Voting is a fundamental right in Iowa, indeed the nation. *See Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa 1978). It occupies an irreducibly vital role in our system of government by providing citizens with a voice in our democracy and in the election of those who make the laws by which all must live. *See Wesberry v. Sanders*, [376 U.S. 1, 17 (1964)]. The right to vote is found at the heart of representative government and is "preservative of other basic civil and political rights." *Reynolds v. Sims*, [377 U.S. 533, 562 (1964)]; *accord Yick Wo v. Hopkins*, [118 U.S. 356, 370 (1866)].

Chiodo, 846 N.W.2d at 848 (Cady, C. J., for the plurality).

While the Iowa Constitution broadly guarantees the right to vote, it also expressly disqualifies as electors two classes of persons: those adjudged mentally incompetent to vote and those "convicted of any infamous crime." Iowa Const. art. II, § 5. The Iowa Supreme Court's plurality decision in *Chiodo*, however, makes clear that the disqualification for a conviction of an "infamous crime" does not apply to all felony offenders. *Chiodo*, 846 N.W.2d at 853.

In *Chiodo*, the Court was asked to decide whether a candidate for a state Senate district was disqualified from running for office on account of his conviction of second offense operating while intoxicated (OWI), an aggravated misdemeanor. *Chiodo*, 846 N.W.2d at 847. The Court, for the first time, engaged in a historical and "textual analysis of the meaning of 'infamous crime' in article II, section 5." *Chiodo*, 846 N.W.2d at 851. Five justices in *Chiodo* agreed that the nature of the crime itself, rather than the length of a possible sentence, determines whether a crime is infamous,

holding that aggravated misdemeanors, which are punishable by a maximum two years' imprisonment in the penitentiary, are not infamous crimes that disqualify a person from voting and holding office. *Id.* at 857 (Cady, C. J., for the plurality), 863 (Mansfield, J., for the special concurrence). One justice dissented, and another took no part in the decision. *Id.* at 857. A four-justice majority (the plurality and the dissent, authored by Justice Wiggins), agreed that, because "[t]he legislature may not add to or subtract from the voter qualifications under the constitution," *Chiodo*, 846 N.W.2d at 852, the legislature lacks constitutional authority to define "infamous crime" as used in Article II, Section 5, *see id.* at 855 (Cady, C.J., for the plurality); *see also id.* at 864 (Wiggins, J., dissenting) ("I agree with the plurality that . . . . [t]he legislature cannot disqualify a voter by defining 'infamous crime' under our constitutional scheme because the constitution defines who is and who is not an eligible elector."). The meaning of "infamous crime," therefore, must be derived from the Iowa Constitution itself.

Three justices comprising the plurality determined that the term "infamous crime" was distinct in meaning from the term "felony," and that not all felonies are infamous crimes. *Chiodo*, 846 N.W.2d at 853 ("A review of article II of our constitution reveals the framers clearly understood that an 'infamous crime' and a 'felony' had different meanings.") The text, placement, and legislative history of the Infamous Crimes Clause suggest that Iowa's constitutional founders intended it not as a form of punishment, but as a regulatory measure to ensure the integrity of the

electoral process. *Id.* at 855 ("The overall approach reveals our framers not only understood the importance for Iowans to have a voice in our democracy through voting, but they further understood the fundamental need to preserve the integrity of the process by making sure it was not compromised by voices that were incompetent to meaningfully participate or voices infected by an infamous disposition.")

Therefore, there are two distinct categories of felonies as relating to the right to vote under the Iowa Constitution. There is one category consisting of those felonies that are infamous crimes serving to disqualify a voter, and there is a second category of all the remaining felonies, which are not infamous crimes and therefore do not disqualify a voter. While the plurality did not go so far as to establish what precise test would be used to determine which felonies belonged in each category, it did outline three elements of a "nascent" test to determine which crimes belong to the category of "infamous crimes," and by their exclusion, which crimes do not. *Chiodo*, 846 N.W.2d at 856. That nascent test requires that in order to be categorized as an infamous crime, an offense must meet three criteria:

(1) The offense must be "particularly serious," which the plurality and special concurrence agreed excludes any crime classified as a misdemeanor, *id.* at 856;

(2) The nature of the offense "reveals that voters who commit the crime would tend to undermine the process of democratic governance through elections," *id.*, meaning that the crime must have an actual "nexus to preserving the integrity of the election process," *id.* at 857;

(3) Finally, the plurality suggested that the crime must involve an element of "specific criminal intent," *id.* at 856.[5]

All three requirements of an infamous crime must be met in order to deprive a person of their right as an elector. *See Chiodo*, 846 N.W.2d at 856 ("We only conclude that the crime must be classified as particularly serious, *and* it must be a crime that reveals that voters who commit the crime would tend to undermine the process of democratic governance through elections. We can decide this case by using the first part of this nascent definition.") (emphasis added).

The plurality left for another day the task of articulating a more precise test to determine which felonies are properly categorized as infamous crimes under the Iowa Constitution, and specifically declined to decide whether the statutory definition of "infamous crime" under Iowa Code Section 39.3(8)—which includes all state and federal felonies—is unconstitutional. *Chiodo*, 846 N.W.2d at 856-57 ("It will be prudent for us to develop a more precise test that distinguishes between felony crimes and infamous crimes within the regulatory purpose of article II, section 5 when the facts of the case provide us with the ability and perspective to better understand the needed contours of the test.") Nevertheless, the plurality outlined three possible

[5] Although the test put forward by the *Chiodo* plurality is most simply articulated in three parts, it could be argued that the plurality intended the third element, requiring specific criminal intent, as a subcategory of the first requirement that the crime be particularly serious or the second requirement that the crime have a nexus to voting and elections. The analysis found in this petition applies equally to either formulation of the test.

standards that have been employed by courts in other states to determine which felonies belong to the category of infamous crimes, without deciding which of these three best satisfies the nascent test for infamous crime:

(1) Crimes that are an affront to democratic governance. First, the *Chiodo* plurality observed that "[s]ome courts have settled on a standard that defines an 'infamous crime' as an 'affront to democratic governance or the public administration of justice such that there is a reasonable probability that a person convicted of such a crime poses a threat to the integrity of elections.'" *Chiodo*, 846 N.W.2d at 856 (quoting *Snyder v. King*, 958 N.E.2d 764, 782 (Ind. 2011)). This standard includes only those offenses indicating that the offender is likely to subvert the voting process, such as elections fraud, bribery, and perjury.

(2) *Crimen falsi.* Second, the plurality observed that other state courts limit the definition of "infamous crime" to "a *crimen falsi* offense, or a like offense involving the charge of falsehood that affects the public administration of justice." *Chiodo*, 846 N.W.2d at 856 (quoting *Commonwealth ex rel. Baldwin v. Richard*, 751 A.2d 647, 653 (Pa. 2000)). This standard is broader than the first, encompassing all offenses that bear upon a person's honesty, which includes those described above in category (1), as well as other honesty-related offenses such as forgery, embezzlement, and criminal fraud.

(3) Crimes of moral turpitude. Third, the plurality noted that other state courts establish the standard for infamy as crimes marked by "great moral turpitude." *Chiodo*, 846 N.W.2d at 856 (quoting *Washington v. State*, 75 Ala. 582, 585 (1884)). This standard is the broadest of the three described by the plurality, and encompasses all offenses that could be described as "vile; base; [or] detestable," *Chiodo*, 846 N.W.2d at 854 (quoting *Snyder*, 958 N.E.2d at 780), such as all of the offenses in categories (1) and (2) above, and, in some states, include other particularly heinous offenses such as arson, rape, and murder.

Petitioner's case requires this Court both: (a) to decide which judicial approach to take in categorizing felonies as "infamous" or non-infamous; and (b) to determine if the Petitioner's crime belongs to that category of felonies that are infamous or, instead, if it belongs to the larger category of felonies which are not infamous.

2. Mrs. Griffin's Offense is Not an "Infamous Crime" Under Any Application of The Nascent Test in *Chiodo*

As explained in Section 3 below, the definition of "infamous crime" that best reflects the history of the laws of Iowa as well as the regulatory purpose of Article II to "preserve the integrity of the process of voting," *Chiodo*, 846 N.W.2d at 855, is a crime involving an "affront to democratic governance or the public administration of justice such that there is a reasonable probability that a person convicted of such a crime poses a threat to the integrity of elections," *id.* at 856 (quoting *Snyder,* 958 N.E.2d at 782). As shown below, Mrs. Griffin's offense of delivery of less than 100 grams of cocaine clearly does not qualify as infamous under that standard.

However, the remaining two standards identified by the *Chiodo* plurality—defining infamous crimes as *crimen falsi* or, alternatively, as crimes of moral turpitude—are also discussed below, so that the Court has the information necessary to use any of the standards identified by the Iowa Supreme Court to define Iowa's infamous crimes clause in Article II, Section 5. Ultimately, like OWI (second offense), drug delivery lacks any of the hallmarks of an infamous crime that disqualifies a person from voting under the three prongs of the nascent test: it is not a "particularly serious" offense as understood in the context of Article II's purpose in regulating elections; it does not have a "nexus to preserving the integrity of the election process;" and it does not involve an element of "specific criminal intent."

Thus, Mrs. Griffin's offense cannot be understood as an infamous crime under any of the *Chiodo* plurality's three possible standards.

A. Mrs. Griffin's Offense is Not an Infamous Crime Under Standard 1 (Crimes That Are an Affront to Democratic Governance).

As the *Chiodo* plurality observed, one possible standard for understanding the term "infamous crime" defines it as encompassing only those offenses that bear directly on a person's ability to participate in elections without subverting the integrity of the democratic process: that is, offenses that attempt to abuse or undermine our constitutional government. This approach—which would clearly not include Mrs. Griffin's offense—is illustrated most clearly by the Indiana Supreme Court's decision in *Snyder v. King*, 958 N.E.2d 764 (Ind. 2011), which was cited as persuasive by the *Chiodo* plurality. *See Chiodo*, 846 N.W.2d at 854-56.

In *Snyder*, the Indiana Supreme Court interpreted its own state constitution, adopted in 1851, just six years before Iowa's 1857 Constitution was ratified. *See Chiodo*, 846 N.W.2d at 854-55. The Indiana Constitution reads in relevant part: "The General Assembly shall have power to deprive of the right of suffrage, and to render ineligible, any person convicted of an infamous crime." Ind. Const. Art. II, § 8; *Snyder*, 958 N.W.2d at 774-75. The Indiana Supreme Court, in a meticulous opinion tracing the definition of infamous crime back to its ancient Greek and Roman origins through the Indiana penal code in 1816, found that the Indiana Constitution's infamous crimes provision was a regulatory measure seeking to regulate suffrage and elections

so as to preserve the integrity of elections and the democratic system. *Snyder*, 958 N.W.2d at 781 ("In other words, criminal disenfranchisement protects 'the purity of the ballot box.'"). The Court then described the definition of an infamous offense narrowly as follows:

> We hold that an infamous crime is one involving an affront to democratic governance or the public administration of justice such that there is a reasonable probability that a person convicted of such a crime poses a threat to the integrity of elections. . . . Prototypical examples of infamous crimes are treason, perjury, malicious prosecution, and election fraud . . . . Although most of these examples involve elements of deceit and dishonesty, . . . the critical element is that they attempt to abuse or undermine our constitutional government.

Snyder, 958 N.E.2d at 782 (internal citation omitted); *see also Otsuka v. Hite*, 414 P.2d 412, 422 (Cal. 1966) ("[T]he inquiry must focus more precisely on the nature of the crime itself, and determine whether the elements of the crime are such that he who has committed it may reasonably be deemed to constitute a threat to the integrity of the elective process.").

Under this standard, Mrs. Griffin's offense of drug delivery is not infamous. The nature of the offense does not "reveal[] that voters who commit the crime would tend to undermine the process of democratic governance through elections," and has no "nexus to preserving the integrity of the election process," as required by the plurality opinion in *Chiodo*. 846 N.W.2d at 856-57. While Mrs. Griffin's delivery conviction is classified as a felony, that statutory designation is not dispositive. Rather, the critical factor is that the crime does not directly "attempt to abuse or undermine

our constitutional government." *Snyder*, 958 N.E.2d at 782. There simply is no nexus between delivery of a controlled substance and voting, the electoral process, or democratic governance more generally.

B. Mrs. Griffin's Offense is Not Infamous Under Standard 2 (*Crimen Falsi*).

The second possible standard identified by the *Chiodo* plurality defines "infamous crime" as a *crimen falsi*—a crime involving deceitfulness or falsehood. *Chiodo*, 846 N.W.2d at 856. This standard—which similarly excludes Mrs. Griffin's offense—focuses on the element of the crime consisting of a specific intent to deceive, and would include the public integrity-related offenses described above, as well as other offenses that more generally bear upon a person's honesty, such as forgery, embezzlement, or criminal fraud.

Several states, such as Pennsylvania and Arkansas employ this standard. *See, e.g.*, *Commonwealth ex rel. Baldwin v. Richard*, 751 A.2d 647, 651-52 (Pa. 2000) (observing that, in 1842, the Pennsylvania Supreme Court had explained what types of offenses were infamous as "treason, felony, and every species of the *crimen falsi*—such as forgery, subornation of perjury, attaint of false verdict, and other offenses of the like description, which involve the charge of falsehood, and affect the public administration of justice"); *see also Commonwealth ex rel. Kearney v. Rambler*, 32 A.3d 658, 663-64 (Pa. 2011); *State v. Oldner*, 206 S.W.3d 818, 822 (Ark. 2005) (finding that any

crime involving deceitfulness, untruthfulness, or falsification—including all honesty-related offenses such as theft or forgery—is an infamous crime in Arkansas).

Iowa courts have explained that "[t]he term '*crimen falsi*' 'generally refers to crimes in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense which involves some element of deceitfulness, untruthfulness, or falsification bearing on witness' propensity to testify truthfully.'" *State v. O'Neal*, 822 N.W.2d 745 (Iowa Ct. App. 2012) (quoting Black's Law Dictionary 335 (5th ed. 1979)); *see also State v. Harrington*, 800 N.W.2d 46, 51 n.4 (Iowa 2011).

As explained in Section 3 below, this Court should not adopt the *crimen falsi* standard. But even if it were to do so, a nonviolent drug crime, such as Mrs. Griffin's, clearly does not constitute a *crimen falsi*, because it does not include an element of deceit. *See State v. Dudley*, 856 N.W.2d 668, 681 (Iowa 2014), (citing *State v. Parker*, 747 N.W.2d 196, 208 (Iowa 2008) (distinguishing a previous conviction of drug possession from convictions "found to be probative of credibility, like perjury and theft offenses")). As the *Chiodo* plurality explained, one required element of an infamous offense is that it must have a "specific criminal intent." *Chiodo*, 846 N.W.2d at 857. Unlike a *crimen falsi*, which involves the intent to deceive, Mrs. Griffin's offense is not a specific intent crime. Delivery of 100 grams or less of cocaine, in

violation of Iowa Code Section 124.401(1)(c)(2)(b), is a general intent crime[6] that does not require the state to prove any intent beyond the delivery itself.[7]

Mrs. Griffin pled guilty to delivery of a controlled substance, a general intent crime. (App. Ex. 3.) The offense is not a *crimen falsi* because it includes no element of intent to deceive. Indeed, it includes no specific intent whatsoever and therefore cannot meet the third requirement under the *Chiodo* plurality's nascent test for infamous crime.

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[6] The Iowa Supreme Court has articulated the distinction between general and specific criminal intent as follows:

> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a further consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.

Eggman v. Scurr, 311 N.W.2d 77, 79 (Iowa 1981). The Court continued by saying that "offenses which have no express intent elements may be characterized as general intent crimes." *Id.* at 79 (citation omitted).

[7] Iowa Code Section 124.401(1) creates a crime for three categories of behavior: (1) manufacturing a controlled substance; (2) delivering a controlled substance; and (3) possessing a controlled substance with intent to manufacture or deliver a controlled substance. Iowa Code § 124.401(1) ("[I]t is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance.") The third category, possession with intent to deliver or manufacture, is a specific intent crime because in order to convict a defendant, the State must prove not only that the defendant possessed the controlled substance, but also that he intended to deliver or manufacture it. However, the first two categories, delivery and manufacturing, are general intent crimes, because they only require the State to prove that there was delivery or manufacturing of a controlled substance, and the defendant's intentions about what would happen after are of no consequence.

C. Mrs. Griffin's Offense is Not Infamous Under Standard 3 (Crimes of Moral Turpitude).

The *Chiodo* plurality identified a third standard for defining infamous crimes that has been adopted by other state courts, which treats crimes marked by "great moral turpitude" as infamous. *Chiodo*, 846 N.W.2d at 856 (quoting *Washington*, 75 Ala. at 585). Moral turpitude is a legal concept that attempts to describe "conduct that is inherently base, vile, or depraved, and contrary to the private and social duties man owes to his fellow men or to society in general." *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1068 (9th Cir. 2007); *see also Chiodo*, 846 N.W.2d at 854 (acknowledging that one definition of infamy could encompass those offenses that are "'most vile; base; detestable'") (quoting *Snyder*, 958 N.E.2d at 780).

The Iowa Supreme Court has cited as the "best general definition of the term 'moral turpitude' " conduct that "imports an act of baseness, vileness or depravity in the duties which one person owes to another or to society in general, which is contrary to the usual, accepted and customary rule of right and duty which a person should follow." *Comm. on Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. Patterson*, 369 N.W.2d 798, 801 (Iowa 1985) (citation omitted) (determining that a two-hour assault on an unresisting victim involves "moral turpitude," leading to suspension of the perpetrator's license to practice law). In the twentieth and twenty-first centuries in Iowa, the term has "never been clearly defined because of the nature of the term," *Patterson*, 369 N.W.2d at 801, but has been understood, in contexts such as attorney

misconduct proceedings, to include both crimes of violence and crimes involving fraudulent or dishonest intent. *See, e.g., Sup. Ct. Bd. Prof'l Ethics & Conduct v. Ruth*, 636 N.W.2d 86 (Iowa 2001) (domestic abuse); *Patterson*, 369 N.W.2d 798 (Iowa 1985) (assault); *Comm. on Prof'l Ethics & Conduct v. Lindaman*, 449 N.W.2d 341 (Iowa 1989) (lascivious acts with a child); *Sup. Ct. Att'y Disciplinary Bd. v. Carroll*, 721 N.W.2d 788 (Iowa 2006) (misappropriating money from a non-profit organization); *Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Romeo*, 554 N.W.2d 552 (Iowa 1996) (falsifying written record of transaction in order to protect client); *Comm. on Prof'l Ethics & Conduct v. Pappas*, 313 N.W.2d 532 (Iowa 1981) (first degree theft); *Comm. on Prof'l Ethics & Conduct v. Bromwell*, 221 N.W.2d 777 (Iowa 1974) (failure to file income tax returns).

The moral turpitude standard for defining infamous crime could be understood as broadly consistent with a statute adopted by the 1839 territorial legislature. *See Chiodo*, 846 N.W.2d at 854-55. As the *Chiodo* plurality observed, however, the territorial legislation is not dispositive because it "preceded our constitutional convention by nearly a generation," and is merely a statute and "not a constitutional test." *Id.* Nevertheless, it offers "a limited window into some specific understanding of the meaning of 'infamous crime[s],' " and provided that

> Each and every person in this Territory who may hereafter be convicted of the crime of rape, kidnapping, wilful [sic] and corrupt perjury, arson, burglary, robbery, sodomy, or the crime against nature, larceny, forgery, counterfeiting, or bigamy, shall be deemed infamous, and shall forever thereafter be rendered incapable of holding any office of honor, trust, or profit, of voting at any election, of serving as a juror, and of giving testimony in this Territory.

Id. at 854 (quoting The Statute Laws of the Territory of Iowa, Code of Criminal Jurisprudence, Tenth Div., § 109, at 182 (1839)).

For reasons stated in Section 3 below, this Court should not adopt the moral turpitude standard to define infamy. But even if it were to do so, such a definition of infamous crimes could not include Mrs. Griffin's offense. Her crime, delivery of less than 100 grams of cocaine, is neither "particularly serious" as required under the nascent test, *Chiodo,* 846 N.W.2d at 856-57, nor dispositive of an infamous character, to warrant the loss of the fundamental right to vote under Article II, Section 5 of the Iowa Constitution. Drug delivery is not among those "particularly serious" offenses that were considered heinous under the 1839 code in Iowa, such as rape, kidnapping, and arson.

Delivery, like most drug crimes, is often driven by various factors including addiction, poverty, and mental health issues. As a disease, substance addiction is a facet of an individual's health—for which our founders had no concept—not indicative or dispositive of a vile, base, or detestable character. The mass criminalization of drug usage and incarceration of those convicted of drug related offenses are relatively recent phenomena without root in our common law; there is no long tradition of treating drug usage and addiction as crimes dating back to our state's founding. Only in the last 40 years during the so-called War on Drugs have such tremendous resources have been expended to arrest, convict, and incarcerate people

for substance abuse and related behaviors. *See* Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. Gender Race & Just. 315 (2012); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271 (2004); *see also* Mark W. Bennett and Mark Osler, "America's mass incarceration: The hidden costs," *Minneapolis Star Tribune*, June 27, 2013, http://tinyurl.com/nvrevxx.

Like the crime of operating a vehicle while intoxicated, delivery of cocaine has no analogue in the crimes understood as particularly heinous by our founders or others who came before them. The requirement that a crime be particularly heinous speaks to the wide understanding of the offender's character as untrustworthy, vile, or detestable in the community. Neither our historical nor contemporary treatment of persons who are recovered from a history of substance dependency supports application of the loss of voting rights to this category of crimes.

3. This Court Should Adopt The "Affront To Democratic Governance" Standard For Defining "Infamous Crime"

As explained above, none of the possible standards for defining infamy set forth by the *Chiodo* plurality would include delivery of less than 100 grams of cocaine, and this Court should therefore hold that Mrs. Griffin's offense is not an infamous crime. In so ruling, this Court should adopt the "affront to democratic governance" standard, which is the standard that is most consistent with the text and history of the Iowa Supreme Court. It is also the only standard that is consistent with the nascent

test the plurality adopted in *Chiodo*, 846 N.W.2d at 856-57 (infamous crimes are particularly serious, "reveal[] that voters who commit the crime would tend to undermine the process of democratic governance through elections," have an actual "nexus to preserving the integrity of the election process," and involve an element of "specific criminal intent").

A. The "Affront to Democratic Governance" Standard Best Comports With The Text and History of The Iowa Constitution

The *Chiodo* plurality indicated that the "affront to democratic governance" approach would be most consistent with Iowa's constitutional jurisprudence and history. *See Chiodo*, 846 N.W.2d at 855. As the plurality explained, Article II, Section 5 of the Iowa Constitution was designed as a regulatory measure to protect the sanctity of the democratic process, not as an additional punishment for the commission of an offense. *Chiodo*, 846 N.W.2d at 855 ("As recognized by other courts, infamous crimes clauses found in many state constitutional voting provisions are properly understood as a regulatory measure, not a punitive measure. Article II of the Iowa Constitution appears compatible with this approach.") (internal citation omitted). "Within this context and setting, the concept of disenfranchisement was not meant to punish certain criminal offenders or persons adjudged incompetent, but to protect 'the purity of the ballot box.'" *Chiodo*, 846 N.W.2d at 855-56 (internal citation omitted).

> Thus, disenfranchisement of infamous criminals parallels disenfranchisement of incompetent persons under article II, section 5.

> The infamous crimes clause incapacitates infamous criminals who would otherwise threaten to subvert the voting process and diminish the voices of those casting legitimate ballots. As a result, the regulatory focus of disenfranchisement under article II reveals the meaning of an "infamous crime" under article II, section 5 looks not only to the classification of the crime itself, but how a voter's conviction of that crime might compromise the integrity of our process of democratic governance through the ballot box.

Chiodo, 846 N.W.2d at 856.

A review of which crimes were classified as infamous in the days prior to Iowa's statehood supports this interpretation of our Infamous Crimes Clause. *See Chiodo*, 846 N.W.2d at 851. For example, the Organic Act for the Territory of Iowa (1838) extended all the same laws, rights, privileges, and immunities as granted to Wisconsin and its inhabitants to Iowa. Act of June 12, 1835, 5 Stats., 235. Chap. XCVI (Sec. 12), at 71, http://tinyurl.com/ncpfoxr. Legislation passed at the first assembly of the Territory of Wisconsin (1836)[8]—which included part of the territory that became the state of Iowa—includes the phrase "infamous crime" three times. In all instances, infamous crime is used to indicate unreliability to conduct duties related to democratic governance: to practice law and hold office as justice of the peace, serve

[8] The Organic Act for the Territory of Wisconsin (1836) did not exclude persons convicted of certain crimes from right to vote or run for office, but vested the legislature of the Territory of Wisconsin with the power to define the qualifications of voters for all elections after the first election. Territory of Wisconsin Acts of April 20, 1836 and June 12, 1838; 5 Stats., 10, 235. Chap. LIV–An Act establishing the Territorial Government of Wisconsin, at 57, http://tinyurl.com/nacpso4 (republished pursuant to Act of the Legislature of 1967)("the qualifications of voters at all subsequent elections shall be such as shall be determined by the Legislative Assembly").

as a juror, or serve as a witness. Territory of Wisconsin Acts of April 20, 1836 and June 12, 1838; 5 Stats., 10, 235. Chap. LIV, at 57, http://tinyurl.com/nacpso4. The words "infamous crime" are also used as distinct from either "felony" or "misdemeanor." *Id.* The Wisconsin Territorial Acts provided for the striking of attorneys admitted to practice law on account of "any misdemeanor or infamous crime." Acts No. 24, § 1, pp. 80-81, http://tinyurl.com/pu5puxb. Second, the Acts provide for the removal of justices of the peace for conviction of "bribery, perjury or any other infamous crime, or convicted of any willful misdemeanor in office." Acts No. 58, § 17, pp. 311-12, http://tinyurl.com/qj8qaar. Last, the Acts provided that persons convicted of infamous crimes be disqualified from serving on a jury, along with other persons whose presence on a jury would constitute a conflict, whose presence would necessarily be required elsewhere, who possessed mental or physical infirmity, or whose reliability might reasonably be questioned. Acts No. 73, § 1, pp. 432-33, http://tinyurl.com/p862ug7. The ability to serve on a jury, in turn, was tied directly to the status of being a qualified elector. *Id.* ("[A]ll person who are qualified electors in this territory, shall be liable to serve as jurors in their respective counties as hereinafter provided . . . [Exceptions] . . . and all persons shall be disqualified from serving as jurors who have been convicted of any infamous crime.").

Similarly, the 1851 Code of Iowa[9]—which was the first law the state adopted after ratifying the 1846 Constitution, and was still the law of the land when the 1857 Constitution was passed—conceived of infamous crimes in relation to the integrity of democratic governance. In at least three places, the legislature went out of its way to state that crimes already punishable by a year or more of imprisonment in the penitentiary *further* disqualified the individual from holding public office in the future. Chapter 140, § 2618 stated that officers convicted of embezzling public money "shall be imprisoned in the penitentiary not exceeding five years and fined in a sum equal to the amount of money embezzled, *and moreover he is forever afterward disqualified from holding any office* under the laws or constitution of this state." Iowa Code Ch. 140 § 2618 (1851) (emphasis added). Likewise, Chapter 142, "Offenses Against Public Justice," created crimes for "Bribery of public officers" (Iowa Code Ch. 142 § 2647 (1851)) and "Acceptance of bribes, etc., by such officers" (Iowa Code Ch. 142 § 2648 (1851)) that were punishable by terms of imprisonment of 5 and 10 years, respectively.

Transcripts of the 1857 Constitutional Convention Debates[10] show that every time Article II, Section 5 was brought before the floor, it was adopted without discussion. But while the meaning of the term "infamous crime" was not defined

[9] The 1851 Code of Iowa is available at http://tinyurl.com/qhxs9gu.

[10] Volumes I and II of the transcripts of the 1857 Constitutional Convention Debates are available at http://tinyurl.com/7qlnnj3.

during those debates, the framers at times used the term "infamous" in a way that connotes an inconsistency with or subversion of a democratic and free system of government. For example, Mr. Ells, a member of the Republic Party, described the Fugitive Slave Law as "infamous" because it unconstitutionally deprived men of their life, liberty, and property without a fair judicial proceeding. Transcript of the Debates of the Iowa Constitutional Convention of the State of Iowa, Vol. I, at 102. In the same vein, he described slavery as "infamous" in the context of its incompatibility with the equality of all people that underpins Jeffersonian ideas of democracy:

> I had lived in Virginia in my boyhood, and had seen slavery in its mildest forms; and having seen it, I know what it is. I say this to show that my feelings in early boyhood were opposed to slavery. . . . I had seen enough to teach me, as a boy, that the institution was an infamous one—that it was degrading to human nature. . . . I had learned there, too, that [Thomas Jefferson] defined the word "Democracy" to mean, equal and exact justice to all men.

Transcript of the Debates of the Iowa Constitutional Convention of the State of Iowa, Vol. II, at 907. James F. Wilson described the exclusion of African Americans from the right to vote as infamous for disgracing the state of Iowa:

> The Legislature of our own state has once blackened our statute book with a most infamous law, depriving one whole class and race of men from being witnesses in courts of law, against the spirit and letter of this same first section, and that, too, under our old Constitution. . . . That law remained in full force, a disgrace and reproach to our state, yet sanctioned in all our courts, until it was repealed at the last session of our legislature.

Id. at 652. Likewise, when discussing the drawing of electoral districts, Mr. Hall described the proposal under consideration as "infamous" because it gave an unfair amount of political power to a powerful minority of voters:

> I can tell gentlemen for what purpose I think it was done. It is an apportionment for party purposes, carried to the very extreme, so as to provide for the election of the United States Senator, which comes off in 1859. An equitable apportionment of the state would not give a majority of this convention quite as sure and certain success in that election, as it would if they took up *this infamous project*, got up the late general assembly. There was no other plan they could devise, by which they could give to so large a minority of this state the control of this election.

Id. at 1041 (emphasis added).

This understanding of infamous crime as it related to the right of suffrage was also found by a number of state supreme courts when interpreting their own state constitutions. The California Constitution adopted in 1849 included language similar to Iowa's and provided that "no person convicted of any infamous crime . . . shall ever exercise the privileges of an elector in this State."[11] In *Otsuka v. Hite*, 414 P.2d 412 (Cal. 1966), the California Supreme Court interpreted "infamous crime," which appeared in its state constitution in language very similar to Iowa's, to necessarily "be limited to conviction of crimes involving moral corruption and dishonesty, thereby branding their perpetrator as a threat to the integrity of the elective process." *Id.* at

[11] That language was changed in 1974. *See Ramirez v. Brown*, 528 P.2d 378 (Cal. 1974) (discussing generally the amendment to the California constitution following the U.S. Supreme Court decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974), determining that the Fourteenth Amendment of the U.S. Constitution did not prohibit the states from depriving persons convicted of a felony of the right to vote).

414. *See also* Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*, at 407 (Table A.7 Suffrage Exclusions for Criminal Offenses: 1790-1857), Revised Ed. 2009) (noting the California legislature applied the infamous crimes clause to exclude from the right of suffrage those persons convicted of "*bribery, perjury, forgery, or other high crime*") (emphasis added).

Similarly, the Illinois Constitution of 1818 provided the legislature with the "full power to exclude from the privilege of electing or being elected any person convicted of *bribery*, *perjury*, or any *other* infamous crime." *Id.* (emphasis added). The 1820 Missouri Constitution also disqualified "persons convicted of *electoral bribery*, for ten years," and empowered its legislature to "exclude . . . from the right of suffrage, all persons convicted of *bribery, perjury, or other infamous crime*." *Id.* (emphasis added). Like these states, Iowa's history and constitutional text demonstrate that "infamous crimes" are crimes involving an "affront to democratic governance" such that to allow that person to vote and run for public office would undermine the regulatory purpose of maintaining the integrity of the ballot box.

B. The "*Crimen Falsi*" Standard is Inconsistent With The Text And History of The Iowa Constitution

A careful review of the text and legislative history of the Iowa Constitution does not provide any particular indication that the *crimen falsi* standard is the most appropriate standard for interpreting the Infamous Crime clause. Furthermore, the commonplace and often petty nature of many theft crimes, which are considered

crimes of dishonesty for purposes of impeaching a witness under the Iowa Rules of Evidence, Iowa R. Evid. 5.609(*a*)-(*b*); *State v. Dudley,* 856 N.W.2d 668 (Iowa 2014), militate against the *crimen falsi* standard, because it is inconsistent with the prospect of lifetime disenfranchisement. *See* Iowa R. Evid. 5.609(b) (limiting admission of evidence of a crime of dishonesty to ten years since the date of conviction or release from confinement). The same is true of petty crimes involving dishonesty and their relationship to the integrity of the ballot box.

Notably, unlike Iowa, the states that utilize a *crimen falsi* standard automatically restore citizens' voting rights upon completion of sentence. *See Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Commw. Ct. 2000), *aff'd*, 783 A.2d 763 (Pa. 2001) (per curiam) (the right to vote is automatically restored after completion of the term of imprisonment in Pennsylvania); Ark. Const. amend. 51, § 11(d)(2)(D) (restoring rights upon completion of sentence). In other words, the states that employ the *crimen falsi* standard for disenfranchisement do not, like Iowa, disenfranchise such offenders for life, and with good reason: permanent expulsion from the democratic process is entirely unnecessary to maintain the integrity of elections for an offense for a crime like larceny.

C. The "Moral Turpitude" Standard is Inconsistent With The Text And History of The Iowa Constitution, And Fails to Provide a Constitutionally Valid Standard For Disenfranchisement

A ruling adopting the "moral turpitude" standard for defining infamous crime would be inconsistent with the text and history of the Iowa Constitution. Moreover,

the notion of "moral turpitude" is prohibitively vague, rife with a history of racial discrimination, and incompatible with an understanding of the regulatory purpose of protecting the integrity of the democratic process.

Drafted at the halfway mark between our constitutional conventions of 1846 and 1857, the text of the 1851 Iowa Code shows that Iowa lawmakers were familiar with the legal concepts of "infamous crime" and "moral turpitude" as separate and distinct. *See* Iowa Code Chapter 30, § 339(3) (1851) (allowing for an election to be contested on the grounds that the winner had "been duly convicted of an infamous crime"); Iowa Code Chapter 95, § 1621(1) (1851) (allowing for the suspension or revocation of an attorney's license to practice law "[w]hen he has been convicted of a felony or misdemeanor involving moral turpitude"[12]). The language used in the 1851 Code was adopted wholesale in the Iowa Code of 1860, the first code written after the 1857 constitutional convention. *See* Iowa Code Chapter 37, § 569(3) (1860); Chapter 114, § 2711(1) (1860). Likewise, the Iowa Supreme Court also applied the concept as early as 1851. *See Burton v. Burton*, 3 Greene 316 (Iowa 1851) (because poisoning a neighbor's livestock was an act of moral turpitude, an accusation of such was actionable as slander). Significantly, in Iowa, the concept of moral turpitude evolved

[12] This text further illustrates why the terms "moral turpitude" and "infamous" are not synonymous. As the text states, there are at least some misdemeanors that involve "moral turpitude." Yet as the plurality held in *Chiodo*, misdemeanors can never be infamous crimes. *Chiodo*, 846 N.W.2d at 857 (Cady, C. J., for the plurality); *see also id.* at 860 (Mansfield, J., for the special concurrence).

not in the context of regulating voting, but, like in many states, as a test for claims of per se slander. Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 Utah L. Rev. 1001, 1002, 1018 (2012).

The lawmakers in attendance at the 1857 constitutional convention were aware of "moral turpitude," understood it as a legal concept distinct from "infamous," and chose only to disenfranchise those convicted of infamous crimes, not all crimes involving moral turpitude. Had the founders meant to disenfranchise the larger category of all persons convicted of crimes involving moral turpitude, they would have done so by using those words. *See Miller v. Marshall Cnty.*, 641 N.W.2d 742, 749 (Iowa 2002) ("We assume the legislature intends different meanings when it uses different terms in different portions of a statute.") (citing Norman J. Singer, *Sutherland Statutory Construction* § 46:06, at 194 (6th ed. 2000)); *Dolphin Residential Coop., Inc. v. Iowa City Bd. of Review*, No. 13-1031, 2015 WL 2261250, at *16 (Iowa May 15, 2015) ("The legislature's use of distinct terms to refer to different classes of persons who take part in the process . . . manifests its intent that these participants serve different functions.")

While it is true that some states did adopt a moral turpitude standard for disqualifying voters, this did not occur until a generation after the Iowa Constitution was written, and was done for the impermissible purpose of barring African Americans from voting. Georgia was the first state to disenfranchise citizens convicted of crimes of moral turpitude in 1877. Ga. Const. of 1877, Art. II, § 2,

para. 1 (disqualifying individuals convicted "of any crime involving moral turpitude"). Alabama followed suit in 1901. Ala. Const. of 1901, Art. VIII, § 182. When it reviewed this provision of Alabama's Constitution, the U.S. Supreme Court found that there was overwhelming historical evidence that crimes of moral turpitude had been included because these crimes "were believed by the [Alabama] delegates to be more frequently committed by blacks." *Hunter v. Underwood*, 471 U.S. 222, 226 (1985). The Court held that the Alabama provision had used the ambiguous term moral turpitude specifically to advance the lawmakers' racial animus against African Americans, and struck it down as a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 233. Moral turpitude laws are rife with racial discrimination, at the ballot box and beyond, and incompatible with the modern understanding of the integrity of the democratic process.

4. Because Her Conviction Was Not Infamous, Defendants' Enforcement of Statutes, Regulations, Practices, And Forms Violates Mrs. Griffin's Right to Vote.

Iowa Code section 39.3(8), as well as related statutes, regulations, practices and forms that disqualify persons convicted of any felony, are unconstitutional as applied to those persons, like Petitioner, who are convicted of a felony that does not meet the definition of infamous crimes under our state constitution. Because Mrs. Griffin's conviction for delivery of less than 100 grams of cocaine does not meet the nascent test outlined in *Chiodo* as an offense that undermines the process of democratic governance through elections—or any of the other possible standards through which

that test could be applied—Mrs. Griffin has not been convicted of an infamous crime. Accordingly, it is an unconstitutional deprivation of her right to vote for the Defendants to enforce Iowa's statutes, regulations, practices, and forms to prohibit Mrs. Griffin from exercising the franchise.

The Iowa legislature may not add to nor subtract from the qualifications of voters set forth in the Constitution, and regulations limiting the right to vote of qualified electors must survive "careful and meticulous" scrutiny and must be shown to be purposed to facilitate and secure, rather than subvert or impede, the right to vote. Iowa Code Sections 39.3(8), 43.18(9), 48A.6, 48A.14, 48A.30(1)(d), 49.79, and 57.1(2)(c), as well as the current voter registration forms and related regulations, and the Governor's Executive Order 70 and related procedures, all serve to disqualify persons convicted of any felony offense as electors, regardless of whether the felony is an infamous crime. Because those statutes, regulations, practices, and forms are both an unlawful statutorily imposed modification of the constitutional qualifications of voters, and are intended to impede the rights of those persons who are convicted of a non-infamous felony from voting, they are unconstitutional as applied to those Iowans. Mrs. Griffin's underlying felony offense, delivery of less than 100 grams of cocaine, is not an infamous crime, but nonetheless disqualifies Mrs. Griffin as an elector pursuant to those statutes, regulations, forms, and procedures. Accordingly, they serve to unconstitutionally deprive Mrs. Griffin of her right to vote.

"[T]he right to vote is a fundamental political right. It is essential to representative government." *Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa 1978) (overturning most of the Iowa district court's denial of provisional ballots in a contest for Keokuk County supervisor in favor of counting the disputed ballots, even when the ballots failed to strictly comply with the statute, on the grounds that the voters' intent could be clearly discerned) (citing *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964)). "The legislature may not add to or subtract from the voter qualifications under the constitution." *Chiodo*, 846 N.W.2d at 852 (citing *Coggeshall v. City of Des Moines*, 117 N.W. 309, 311 (Iowa 1908) (first case establishing women's then-limited statutory right of suffrage prior to 1920 ratification of the Nineteenth Amendment to the U.S. Constitution). "The right of suffrage is a political right of the highest dignity, abiding at the fountain of governmental power, and is for the consideration of the people in their capacity as creators of the Constitution, save as that instrument may authorize a regulation of its mode of exercise." *Coggeshall*, 117 N.W. 309, 312. "The doctrine that, as the Constitution of the state is a limitation of power, the Legislature may enact laws not prohibited, has no application, for, the section quoted having designated the precise qualifications of electors, it thereby determines who shall exercise the privilege of voting, and necessarily prohibits others or disqualifying those so endowed with that privilege." *Id.*

"[R]egulatory measures abridging the right to vote 'must be carefully and meticulously scrutinized.'" *Chiodo*, 846 N.W.2d at 856 (quoting *Devine*, 268 N.W.2d at

623). Measures that limit the right to vote "must be 'necessary to promote a compelling governmental interest.'" *Chiodo*, 846 N.W.2d at 856 (citing *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969))). "Statutory regulation of voting and election procedure is permissible so long as the statutes are calculated to facilitate and secure, rather than subvert or impede, the right to vote." *Devine*, 268 N.W.2d at 623. Legislation that regulates voting must also be shown to have a legitimate purpose. *Id.* "Among legitimate statutory objects are shielding the elector from the influence of coercion and corruption, protecting the integrity of the ballot, and insuring the orderly conduct of elections." *Id.* Disputes are resolved in favor of the protection of a voter's right to exercise the franchise: "However, because the right to vote is so highly prized, these statutes must be construed liberally in favor of giving effect to the voter's choice, and every vote cast enjoys the presumption of validity." *Id.*

Once it is clear that Mrs. Griffin's underlying offense does not serve to disenfranchise her pursuant to the state constitution, those measures must be necessary to promote a compelling governmental interest to survive as applied to Mrs. Griffin. *See Chiodo*, 846 N.W.2d at 856. They fail to meet the rigors this "careful and meticulous[]" scrutiny. *Id.* (quoting *Devine*, 268 N.W.2d at 623).

The measures are clearly calculated and have the effect of prohibiting all citizens with a felony conviction from voting based on an understanding of the infamous crimes clause that we now know is flawed and overbroad. That intent—to

"subvert and impede" the right of Mrs. Griffin to vote, rather than to "facilitate and secure" voting rights—is impermissible. *See Chiodo*, 846 N.W.2d at 856 (citing *Dunn*, 405 U.S. at 343 (quoting *Shapiro*, 394 U.S. at 634)). Applied to an elector entitled to vote by our state constitution, those measures fail to accomplish any of the legitimate purposes provided by the court: "shielding the elector from the influence of coercion and corruption, protecting the integrity of the ballot, and insuring the orderly conduct of elections." *Devine*, 268 N.W.2d at 623. Iowa Code § 39.3(8)—as well as related statutes, regulations, practices and forms which disqualify persons convicted of any felony—are unconstitutional as applied to the category of felony crimes, including Mrs. Griffin's offense, that do not meet the definition of infamous crimes under Article II, Section 5 of the Iowa Constitution.

5. Defendants' Interference With Mrs. Griffin's Fundamental Right to Vote Constitutes a Denial of Due Process Under The Iowa Constitution.

Among the fundamental interests protected by the Iowa Constitution's due process clause is the right of franchise. *Chiodo*, 846 N.W.2d at 848; *Devine,* 268 N.W.2d at 623; *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665-66 (1966); *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (noting that the right to vote is "a fundamental political right, because [it is] preservative of all rights"); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" (quoting *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184

(1979)); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983)(the right to vote is one of the liberty interests protected by the due process clause).

The Defendants' denial of Mrs. Griffin's fundamental right to vote is also a violation of her substantive rights of due process under the state constitution. Iowa's Due Process Clause provides that "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. Art. I, § 9. The substantive due process inquiry is two-step. First, the Court determines the nature of the individual right that is affected by the challenged government action. *See State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005). Second, if the Court determines that the right implicated is fundamental, it applies strict scrutiny to the government action; if non-fundamental, it applies rational basis review. *Id.; State v. Groves*, 742 N.W.2d 90, 93 (Iowa 2007); *State v. Krier*, 772 N.W.2d 270, 2009 WL 2184825 (Iowa Ct. App. 2009) (unpublished). For a government action to survive strict scrutiny, it must be narrowly tailored to serve a compelling state interest. *Seering*, 701 N.W.2d at 662; *State v. Hartog*, 440 N.W.2d 852, 854 (Iowa 1989); *State v. Sanders*, No. 08-1981, 2009 WL 3337616, at *5 (Iowa Ct. App. Oct. 7, 2009); *In the Interest of J.L., L.R., and S.G.*, 779 N.W.2d 481, 491 (Iowa Ct. App. 2009)(finding the state Indian Child Welfare Act's prohibition on a child's ability to object to a motion to transfer based upon their best interests, and from introducing evidence of their best interests, violated the children's substantive due process rights in familial association and personal safety).

The due process clauses of the United States and Iowa Constitutions "are nearly identical in scope, import, and purpose." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002). However, the Iowa Supreme Court has jealously guarded its constitutional independence in the area of protection of fundamental rights and liberties, and has on occasion interpreted state due process to be more protective of its citizens than under the U.S. Constitution. *See State v. Cox*, 781 N.W.2d 757, 761-62 (Iowa 2010); *Callender v. Skiles*, 591 N.W.2d 182, 187, 189 (Iowa 1999).

Compelling governmental interests in regulating voting include "shielding the elector from the influence of coercion and corruption, protecting the integrity of the ballot, and insuring the orderly conduct of elections." *Devine*, 268 N.W.2d at 623. Thus, statutes limiting the franchise to those electors entitled to vote under our state constitution would serve a compelling governmental interest. However, those statutes must be sufficiently narrowly tailored to meet that interest without serving to "subvert or impede" the right to vote qualified electors to survive the due process inquiry.

By including all felonies, not just those which are infamous, under Article II, Section 5, the governing Iowa statutes, regulations, forms and procedures are not narrowly tailored to accomplish a compelling governmental interest, because they unnecessarily block thousands of constitutionally qualified Iowa electors of their right to vote. Those persons, including Mrs. Griffin, who are wrongly barred from the ballot box, must apply to the Governor of Iowa for restoration of their right to vote, a right of which they should never have been deprived. (App. Exs. 4, 5.) The

application process is a multi-step paperwork process, requiring proof that the applicant has fully paid or is current on their payments for court-imposed fines, fees and restitution, a copy of their Iowa Criminal History Record from the Iowa Division of Criminal Investigation, which costs $15.00 per request, and can take months to complete. (App. Exs. 6-8.) Thus, in addition to the financial costs of submitting an application, the process significantly delays an applicant from registering to vote, given the administrative requirements for the applicant as well as processing time on the part of the Department of Public Safety to conduct a criminal background check, and the Governor's Office to review applications.

In Mrs. Griffin's case, the burden was especially heavy, resulting in the additional harm of a terrifying and traumatic criminal prosecution for perjury, which, in turn, required her to spend thousands of dollars in attorney's fees to successfully defend. The heavy nature of the burden is further illustrated by the extremely low numbers of potentially eligible Iowans who have applied for a restoration of rights. *See* Ryan J. Foley, "Iowa Governor Restores More Felons' Voting Rights," *Washington Times*, Jan. 14, 2014, http://tinyurl.com/ob2qkkn (from 2011 to 2013, an estimated 25,000 Iowans discharged their sentences, but only 40 regained their voting rights.)

Accordingly, those statutes and regulations do not meet the rigors of strict scrutiny due process analysis under the Iowa constitution and are unconstitutional as applied to the Petitioner.

V. CONCLUSION

While the Court should adopt the "Affront to Democratic Governance" standard to determine which felonies are infamous crimes, Mrs. Griffin's crime is not an infamous crime under any application of the test set forth by the plurality in *Chiodo*. It fails to meet the nascent test because it is not a "particularly serious" offense as understood in the context of Article II's purpose in regulating elections, does not have a "nexus to preserving the integrity of the election process," and does not involve an element of "specific criminal intent." Because Mrs. Griffin has not been convicted of an "infamous crime" under the Iowa Constitution, the statutes, regulations, forms, and procedures which disqualify Mrs. Griffin from registering to vote and voting constitute a complete denial of her right to vote in violation of the Iowa Constitution. Defendants' complete and permanent deprivation of Mrs. Griffin's voting rights, as well as the high burden that the rights restoration process places on her exercise of the right to vote, violates her right to substantive due process assured the Iowa Constitution.

This matter is appropriate for declaratory relief pursuant to Iowa Rule of Civil Procedure 1.1101 and granting such relief would terminate the legal dispute that gave rise to this Petition. This matter is also appropriate for permanent injunctive relief pursuant to Iowa Rules of Civil Procedure 1.1106 and 1.1501. Absent injunctive relief, Mrs. Griffin will suffer irreparable injury for which there is no adequate remedy at law

for every future election in this state for which the Petitioner would otherwise be able to exercise her fundamental right to vote.

The Plaintiff respectfully prays this Court enter judgment as follows.

(1) Declaring that:

a. Iowa's statutory and regulatory prohibitions, including registration forms and departmental processes, that prohibit from voting and holding public office Iowans who have completed sentences for a crime classified as a felony which is not an infamous crime, are invalid and unconstitutional; and

b. Iowa residents who have completed their sentence for a criminal conviction that is classified as a felony but which does not meet the constitutional threshold of infamous crimes, including Mrs. Griffin, may not be denied the right to register to vote and vote or hold public office;

(2) Enjoining Defendants from:

a. Refusing to allow Iowans who have completed a criminal sentence that is classified as a felony but which is not an infamous crime under the Iowa Constitution to register to vote, cast a ballot, have that ballot counted, and run for public office; and

b. Criminally prosecuting for election misconduct, registration fraud, voter fraud, perjury, or otherwise imposing civil or criminal sanctions on persons who have registered to vote or voted in Iowa who at the time

had completed a criminal sentence that is classified as a felony but which is not an infamous crime under the Iowa Constitution;

(3) Issuing a Writ of Mandamus requiring that Defendants immediately permit Iowa residents who have completed their sentence for a criminal conviction that is classified as a felony, but do not meet the constitutional threshold test for infamous crimes, including Mrs. Griffin, to register to vote and to vote in upcoming elections held in our state;

(4) For Plaintiff's costs incurred herein; and,

(5) For such other and further relief as the Court deems just and proper.

WHEREFORE, the Petitioner, Kelli Jo Griffin, ask this Court to recognize and protect her constitutional rights to vote and due process by granting summary judgment in her favor.

Respectfully submitted,

/s/Rita Bettis
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*Motion for admission *pro hac vice* pending

CERTIFICATE OF SERVICE

The undersigned certifies a copy of this application was served on the following parties (list names and addresses below) on the 8th day of June 2015 by _____ personal delivery __X___ deposit in the U.S. mail ___X___ EDMS.

/s/Rita Bettis

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