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 RESISTANCE TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Respondents' Motion for Summary Judgment should be denied because neither the *Chiodo* decision nor a textual and historical analysis of the Infamous Crimes Clause supports Respondents' position as to the meaning of the Clause. The Petitioner, Kelli Jo Griffin, has not been convicted of an infamous crime. Likewise, the Respondents' claims that a declaration by this Court recognizing Petitioner's right to vote in Iowa would lead to 'logistical difficulties' in other cases are beyond the scope of this action and unfounded. Finally, this Court has the authority to provide such supplemental injunctive and mandamus relief as necessary to protect the Petitioner's fundamental right to vote and due process rights.

II. ARGUMENT

1. The *Blodgett* Line of Cases Does Not Control as to The Meaning of Infamous Crime.

The Respondent contends that "the Court in *Chiodo* was at equipoise" on the issue of whether *Blodgett v. Clarke*, 159 N.W. 243 (Iowa 1916), should control the decision in *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845 (Iowa 2014).[1] (Resp't Pate's

[1] All six justices involved in the *Chiodo* decision agree, and the Respondents acknowledge, that neither *Flannagan v. Jepsen*, 158 N.W. 641 (Iowa 1916), nor *State ex rel. Dean v. Haubrich*, 83 N.W.2d 451 (Iowa 1957), control the present case, because those cases only considered the definition of "infamous crime" within the context of the federal Constitution. *Chiodo*, 846 N.W.2d at 851 (Cady, C.J., plurality op.) ("This background reveals that we have never engaged in a textual analysis of the meaning of 'infamous crime' in article II, section 5 . . . and its surrounding context."). While the two justices writing the *Chiodo* concurrence argued that *Flannagan* and *Haubrich* remain good law, they did not dispute the plurality's understanding that both cases turned on

Br. in Supp. of Mot. for Summ. J., June 8, 2015 ("Resp'ts' Br."), at 8.) A close reading of *Chiodo* shows otherwise.

The *Chiodo* plurality explicitly concluded that *Blodgett* was clearly erroneous. *See Chiodo*, 846 N.W.2d at 852 (Cady, C.J., plurality op.) ("We conclude *Blodgett* was clearly erroneous and now overrule it."). And while the three opinions in *Chiodo* disagreed as to the exact parameters of the holding of *Blodgett*, a majority decidedly disapproved of *Blodgett*'s definition of "infamous crime." Indeed, on many issues central to the present case, there is majority agreement in *Chiodo*:

- Four justices (the three-justice plurality and the dissent) agree that the Court in *Blodgett* interpreted "infamous crime" as it is used in article II, section 5 of the Iowa Constitution to mean "any crime punishable by imprisonment in the penitentiary." *Chiodo*, 846 N.W.2d at 851-52 (Cady, C.J., plurality op.); *id.* at 863-64 (Wiggins, J., dissenting). Only Justice Wiggins, in dissent, adopted that definition as consistent with the Iowa Constitution. *See id.* (Wiggins, J., dissenting).[2]

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the definition of "infamous crime" within the context of the U.S. Constitution, and not on the meaning of that term within the Iowa Constitution. Respondents concede this point. (Resp't Pate's Br. in Supp. of Mot. for Summ. J., June 8, 2015 ("Resp'ts' Br.") at 6) ("The constitutional provision at issue in *Flannagan*, however, was the Fifth Amendment of the U.S. Constitution and not the Infamous Crime Clause of the Iowa Constitution. . . .The issue in [*Haubrich*] was not, however, the meaning of Iowa's Infamous Crime Clause.") Thus, the only remaining potentially relevant case is *Blodgett*.

[2] The concurrence, by contrast, would uphold *Blodgett* only as to its outcome on the question of whether felonies are disqualifying crimes for purposes of voting, but not as to its rationale. *Chiodo*, 846 N.W.2d at 861 (Mansfield, J., concurring specially) (determining that *Blodgett* remains 'good law' for the proposition that "felons cannot vote or hold elective office" but is not controlling on whether all crimes punishable by imprisonment in a penitentiary—aggravated misdemeanors—are disqualifying).

- Five justices (the plurality and the two-justice concurrence) agree that "infamous crime" as it is used in article II, section 5 of the Iowa Constitution does NOT mean "any crime punishable by confinement in prison," thus overruling *Blodgett* as it was interpreted by a majority of the Court. *Id.* at 852 (Cady, C.J., plurality op.); *id.* at 861 (Mansfield, J., concurring specially).

- Four justices (the plurality and the dissent) explicitly agree that the definition of "infamous crime" is a matter of constitutional interpretation for the courts, not the Iowa Legislature. *Id.* at 855 (Cady, C.J., plurality op.) (explaining that the drafters at Iowa's 1857 constitutional convention knew how to delegate authority over defining electors to the legislature and chose not to); *id.* at 864 (Wiggins, J., dissenting) ("I agree with the plurality that the legislature cannot write a constitutional definition of 'infamous crime' . . . . The 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 prevailing rule of interpreting plurality decisions is, "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [a majority of] Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *See, e.g.*, *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks omitted). The narrowest ground agreed upon in *Chiodo* is that the *nature* of the crime, not the potential punishment, determines whether a crime is infamous under article II, section 5 of the Iowa Constitution. *Chiodo*, 846 N.W.2d at 860 (Mansfield, J., concurring specially). Because *Chiodo* only considered if an aggravated misdemeanor could be an infamous crime, the Court did not expressly decide whether or not all felonies are "infamous." *Id.* at 851 (Cady, C.J., plurality op.); *id.* at 857 (Wiggins, J., dissenting).

Thus, the case at hand is one of first impression. It is up to this Court to determine whether delivery of 100 grams or less of cocaine, which is statutorily

classified as a felony, constitutes an infamous crime, and thus permanently disqualifies the Petitioner from participating in the democratic process. As a majority of justices on the Iowa Supreme Court have held, this is a constitutional, rather than statutory, determination. *See Chiodo*, 846 N.W.2d at 854-55 (Cady, C.J., plurality op.); *id.* at 864 (Wiggins, J., dissenting). Given that a four-justice majority (the plurality and the dissent) agreed that the legislature may not define the scope of the term "infamous crime," it is clear that an offense cannot be considered "infamous" based solely on whether the legislature statutorily classifies the offense as a felony.

"There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (Roberts, C.J., plurality op.); *see also Chiodo*, 846 N.W.2d at 848 (Cady, C.J., plurality op.). Because voting is the fundamental building block of political power, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *see also Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (Voting is a fundamental right, inherently "preservative of other basic civil and political rights."); *Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa 1978) (Voting is a fundamental right in Iowa.). Nowhere is judicial protection for constitutional rights in Iowa more important than in the voting arena, where legislative tinkering with the definition of "infamous crime" may exclude a class of electors from holding their legislators accountable through the legislative process. It is for this reason that "[t]he legislature may not add to or subtract from the voter qualifications under the

constitution." *Chiodo*, 846 N.W.2d at 852-53 (Cady, C.J., plurality op.) (citing *Coggeshall v. City of Des Moines*, 117 N.W. 309, 311 (Iowa 1908)). Because the legislature determines which crimes are classified as felonies under the Iowa Code, a decision holding that the term "infamous crime" is synonymous with "felony" would, in essence, grant the legislature ultimate authority over who can vote, and would leave this most essential right subject to its whims. Because the qualifications for voting are not subject to legislative determination, the scope of the term "infamous offense" cannot be coextensive with the list of crimes that, at any given time, the legislature happens to classify as a felony.[3]

Finally, in a footnote, the Respondents assert "the Petitioner is essentially arguing that a provision of the Iowa Constitution is unconstitutional." (Resp'ts' Br. at 5 n.1.) That argument reflects a basic misunderstanding of Petitioner's claim. As

[3] Such a result is incompatible with an analysis that defines infamous crime by the nature of the crime and not the length of its punishment. Examples demonstrating the arbitrary and untenable results when the line of who is permanently deprived from exercising their right to vote and who is not is drawn at what the legislature defines as a felony versus a misdemeanor can be found throughout the Code. A few of those include: (1) second offense OWI (as in *Chiodo)* in violation of Iowa Code § 321J.2(2)(b) (2015) but not third offense OWI in violation of Iowa Code § 321J.2(2)(c) (2015); (2) theft of a newer car in violation of Iowa Code § 714.2(2) (2015) but not theft of an older car in violation of Iowa Code § 714.2(3) (2015), based on the value of the car; or (3) exposing a sexual partner to a "reasonable possibility" of transmission of HIV where no transmission occurs in 2014 under the now-repealed Iowa Code § 709C.4 (2014) (violation is a class B felony); *Rhoades v. State*, 848 N.W.2d 22, 28 (Iowa 2014), but not engaging in the same activity in 2015 under Iowa Code § 709D.3(4) (2015) (violation is a serious misdemeanor). The fundamental right to vote cannot be preserved or lost based on such arbitrary, constitutionally irrelevant details.

expressly stated in her Amended Petition and Motion and Brief for Summary Judgment, the Petitioner makes two distinct claims arising under the Iowa Constitution. First, because the crime she was convicted of is not "infamous" under any constitutional test, the statutes, regulations, forms, and procedures that bar her from voting exceed legislative authority and unlawfully deny her right to vote under the Iowa Constitution. (Pet'r's Br. in Supp. of Mot. for Summ. J., June 8, 2015 ("Pet'r's Br.") at 1.) Second, her substantive due process rights under the Iowa Constitution have and are being violated, because the burden on her fundamental right to vote—consisting of the complete denial of her access to voter registration and the ballot box, the credible threat of serious criminal sanction should she vote, and the requirement that she undertake extensive paperwork, pay a fee, and wait, potentially through elections, to apply for a "restoration" of a right she never should have "lost" in the first place—fails strict scrutiny analysis. (*Id.*)

2. Mrs. Griffin Was Not Convicted of an Infamous Crime.

The Respondents argue that the Petitioner's crime is infamous, relying on cursory arguments already rejected by a majority of the justices in *Chiodo* (the plurality, joined in relevant portions by the dissent). First, the Respondents make the textual argument that a 2008 amendment to the Iowa Constitution, which replaced the word "idiot" with the words "person adjudged mentally incompetent to vote" amounted to a constitutional ratification of the 2008 Iowa legislature's definition of infamous crime as any crime categorized as a felony under either state or federal law. (Resp'ts' Br. at 9-

10.) This argument was unpersuasive to a majority of the Iowa Supreme Court in *Chiodo*. The plurality recognized that, "[w]ithout any question," the amendment was "technical and intended only to update the descriptions of mentally incompetent persons we no longer use." *Chiodo*, 846 N.W.2d at 854 n.3 (Cady, C.J., plurality op.) ("There was no intention to update the substantive meaning of the infamous crimes clause, and the companion judicial interpretations accordingly continued in force unaffected by the amendment."). Similarly dispensing with that argument, the dissent delved further into the legislative intent at the time of passage and ratification, and determined that "[t]here is no indication in the official legislative history that the legislature considered the clause of article II, section 5 dealing with infamous crimes when it proposed the amendment" examining the explanation to the House Joint Resolution of the proposed constitutional amendment. *Id.* at 864 n.10 (Wiggins, J., dissenting) (noting that H.J. Res. 5, 81st G.A., 2nd sess. (2006) "confirms my doubts" that the 2008 amendment considered the legislature's definition of infamous crime when the amendment passed). Rather, as simply put by the plurality, "the [2008] amendment did nothing but what it was intended to do: replace offensive descriptions of people with new descriptions." *Chiodo*, 846 N.W.2d at 854 n.3. The legislature and people of Iowa did not ratify a definition of all crimes defined as a felony under state law and all crimes classified as a felony by federal law.[4]

[4] Nor is the outcome of the *Chiodo* case logically consistent with the argument that the 2008 amendment ratified the legislature's statutory definition under Iowa Code

Respondents' next textual argument to support their assertion that "infamous crime" and "felony" have identical meaning is that the words "infamous crime" and "felony" are never used in the same *clause* of the Iowa Constitution, even though they are used in the same *article* and in close proximity to one another. (Resp'ts' Br. at 11.) Notably, Respondents cite no authority for this novel 'different clause' theory of textual interpretation. In fact, both terms are found in the same article very close to one another, in article II of the Iowa Constitution, entitled "Right of Suffrage." *See* Iowa Const. art. II, § 2 (privileging from arrest electors on days of election except in case of felony); Iowa Const. art. II, § 5 (disqualifying electors based on conviction of infamous crime). This proximity was cited by the plurality in *Chiodo* in finding that "[a] review of article II of our constitution reveals the framers clearly understood that an 'infamous crime' and a 'felony' had different meanings. . . . If the drafters intended the two concepts to be coextensive, different words would not have been used." 846 N.W.2d at 853.[5]

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§ 39.3(8), because that section included both felonies and aggravated misdemeanors, which are classified as felonies under federal law. In 2008, Iowa Code § 39.3(8) was widely understood to include aggravated misdemeanors. (*See, e.g.*, App. Ex. 5, Executive Order 42, Gov. Vilsack, 2005 ("Whereas, under the Constitution of the State of Iowa, an individual convicted of a felony or aggravated misdemeanor is denied the right to vote . . .")).

[5] The Respondents also cite *Richardson v. Ramirez*, 418 U.S. 24 (1974), for the proposition that states may disqualify from voting persons convicted of a felony without violating the Fourteenth Amendment to the U.S. Constitution. (Resp'ts' Br. at 11.) It is not clear what argument the Respondents are responding to. The Petitioner has not asserted a Fourteenth Amendment claim; rather, this action is brought under

Next, the Respondents engage in a cursory historical analysis, arguing that the framers must have defined infamous crime in accordance with the 1839 territorial code, which disqualified all persons convicted of rape, kidnapping, willful and corrupt perjury, arson, burglary, robbery, sodomy, or the crime against nature, larceny, forgery, counterfeiting, or bigamy from voting. (Resp'ts' Br. at 10) (citing the State Laws of the Territory of Iowa, Code of Criminal Jurisprudence, Tenth Div., § 109, at 182 (1839).) This argument fails on three grounds.

First, as found by the plurality in *Chiodo*, with agreement from the dissent, any statutory definition of "infamous crime," whether enacted in 1939 or 2002, is not determinative of the constitutional question. *Chiodo*, 846 N.W.2d at 854-55 (Cady, C.J., plurality op.) ("Of course, like Iowa Code section 39.3(8) (2013) today, this statute is not a constitutional test. Moreover, the judgment captured by the statute in 1839 preceded our constitutional convention by nearly a generation, and it was repealed before 1851." (footnote and citations omitted)). This is because the legislature was specifically divested of the authority to define the qualifications of voters. *Id.* at 855 (Cady, C.J., plurality op.) ("More directly, it appears the drafters at our 1857 constitutional convention intended to deprive the legislature of the power to

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the Iowa Constitution. The fact that the U.S. Constitution permits felon disenfranchisement has no bearing whatsoever on Mrs. Griffin's claim that Iowa statutes, regulations, forms, and procedures that bar her from voting on the basis of a felony conviction violate her right to vote and substantive due process rights, as assured *by the Iowa Constitution*, because the Iowa Constitution disenfranchises only those convicted of infamous crimes, not all felonies.

define infamous crimes."); *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."). A *majority* of the justices—the plurality and the dissent—have already directly rejected the Respondents' argument, which ignores that the drafters were well-aware of the option of denying voting rights to all "persons declared infamous by act of the legislature" and chose not to adopt it. *See id.* at 855 (Cady, C.J., plurality op.) (drawing a contrast to Iowa Const. art. III, § 5 (1844), which employed such language).

Second, Respondents' argument that "there is no reason not to conclude that Iowa's Infamous Crime Clause was not intended as punitive," (Resp'ts' Br. at 12), also fails. Notably, Respondents do not provide any reason to conclude that the Clause was intended to be punitive. To the contrary, there *is* reason to conclude, as the plurality in *Chiodo* did, that Iowa's Infamous Crimes Clause was intended and understood to serve a regulatory purpose at the time of drafting. *Chiodo*, 846 N.W.2d at 855 (Cady, C.J., plurality op.); (Pet'r's Br. at 14-15) (citing *Snyder v. King*, 958 N.E.2d 764 (Ind. 2011) (finding 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)); 1818 Illinois Constitution (allowing disenfranchisement based on "bribery, perjury, or any other infamous crime"); 1820 Missouri Constitution (allowing disenfranchisement based on "electoral

bribery," "perjury, or any other infamous crime").[6] (*See* Pet'r's Br. at 29 for further discussion.) Thus, historical evidence points to the framers' understanding of infamous crimes as preservative of the integrity of democratic governance, supporting the Affront to Democratic Governance Standard. (*See* Pet'r's Br. at 26-28 (discussing 1838-39 territorial statutes as well as 1851 state laws that denominate some crimes as infamous that relate to preserving the integrity of the administration of justice and public office).)

Third, rather than supporting the Respondents' claim, the 1839 territorial code they cite, (Resp'ts' Br. at 10), supports the Petitioner's argument that the framers did not understand the terms "infamous crime" and "felony" to be coextensive. The 1839 territorial code classified several crimes as felonies, but, decidedly, did not include them among the list of infamous crimes disqualifying voters. *Compare* The Statute Laws of the Territory of Iowa, Code of Criminal Jurisprudence, Tenth Div., § 109, at 182 (1839), http://tinyurl.com/qgnf8fn ("Each and every person . . . 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."), *with id.* at 150-79 (including various 1839 felonies that were punishable by a term of more than a year's imprisonment, but were not included in

[6] Constitutional provisions drawn from 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).

that list of infamous crimes: *e.g.*, manslaughter; attempt to poison; mayhem; false imprisonment; assisting person in jail to escape; libel; swindling; and selling lands a second time).[7] Thus, rather than supporting Respondents' argument that the framers intended the words "infamous crime" to be synonymous with all felonies, the 1839 territorial code supports the Petitioner's argument that those words carried distinct meaning to the framers, and specifically, that not all felonies are infamous crimes.

Last, the Respondents make a policy argument that the Court should find that Mrs. Griffin's crime is infamous because of an asserted difficulty in applying anything but a bright-line rule to determine which crimes are infamous. (Resp'ts' Br. at 13-14.) As an initial matter, the absence or presence of a bright line rule is not dispositive as to the meaning of the Constitution, which ultimately is what binds this Court. *See Chiodo*, 846 N.W.2d at 853 (Cady, C.J., plurality op.) ("The felony–misdemeanor distinction does offer a clean bright-line rule. The benefits of such a rule are obvious, and the allure is tempting. Yet, our role is to interpret our constitution. . . . If the words of the constitution do not support a bright-line rule, neither can we.") Ease of application does not justify a rule that disenfranchises eligible voters. In any event, Respondents are mistaken. As set forth in the Petitioner's Brief, there are at least three different bright-line standards that the court could employ, consistent with the *Chiodo*

[7] Respondents quip, "Not on the list? Election misconduct." (Resp'ts' Br. at 10.) Of course, neither are many other 1839 felonies, nor, pointedly, is delivery of 100 grams or less of cocaine, the crime at issue in this case, or any analogous offense.

plurality, to define the outer limit of infamous offenses. (*See generally* Pet'r's Br.) And while the Affront to Democratic Governance standard is most consistent with the text, purpose, and history of Iowa's Infamous Crimes Clause, (*see* Pet'r's Br. at 23-29), the Petitioner's conviction for delivery of 100 grams or less of cocaine falls outside any of the three standards posited by the *Chiodo* plurality, (Pet'r's Br. at 13-22).

3. Respondents' Assertions about "Logistical" Difficulties are Beyond the Scope of This Action and Are Unfounded.

Respondents next argue that this Court should refrain from ruling that the term "infamous crimes" excludes some felonies, because doing so would result in "logistical" problems. (Resp'ts' Br. at 14.) Notably, they do not cite any authority for the proposition that constitutional requirements can be set aside because of possible "logistical" problems. This Court cannot, as Respondents suggest, adopt a definition of infamy that is contrary to the Constitution simply to ease election administration. Nor can a court delegate the power to the legislature to establish new qualifications for voting that conflict with the Iowa Constitution itself, which would be the necessary result of Respondents' position that any crime classified by the legislature as a felony is "infamous." *Chiodo*, 846 N.W.2d at 852-53 (Cady, C.J., plurality op.) (citing *Coggeshall*, 117 N.W. at 311).

In any event, following the guidance of the majority of justices in *Chiodo* will not result in the parade of horribles envisioned by Respondents, for the three reasons. First, and most importantly, Mrs. Griffin's case does not raise the issue of incarcerated

citizens' eligibility to vote, and this Court need not rule on Respondents' hypotheticals. (*See* Resp'ts' Br. at 15.) Mrs. Griffin was never incarcerated for the conviction at issue in this case. She was given a suspended sentence and placed on probation on January 7, 2008, and did not serve any time in prison. (App. Exs. 3, 13.) She discharged her sentence of probation on January 7, 2013 (App. Ex. 15), prior to filing the current petition. Petitioner does not in this case claim that, had she been incarcerated, she could have voted while incarcerated. Whether citizens with a felony conviction can vote while incarcerated is not a claim before the court at this time. *See Feld v. Borkowski*, 790 N.W.2d 72, 78 n.4 (Iowa 2010) (a court should not decide an issue not raised by the parties or a claim not before it). The issue of whether or not there may be another basis for prohibiting voting by otherwise qualified electors during their term of incarceration is not presented in this case. *See State v. Iowa Dist. Ct. for Warren Cnty.*, 828 N.W.2d 607, 619 (Iowa 2013) (Appel, J., dissenting) (recognizing that lack of briefing and argumentation can lead to problems in the development of the law).

Second, had Mrs. Griffin raised the issue of voting while incarcerated, which she did not, Iowa law already provides clear, simple answers to Respondents' assortment of hypotheticals. The fact is, incarcerated Iowans already vote in some circumstances. In Iowa, eligible voters who are incarcerated pre-trial or who are serving an incarcerative sentence for a misdemeanor conviction may vote by absentee ballot. *See* Iowa Code § 53.2 (providing that any registered voter may submit a written

application for an absentee ballot); Iowa Code § 53.17 (providing that absentee ballots may be submitted by mail); *see also* Iowa Secretary of State, Auditors' Handbook (Mar. 2015), at 106, http://tinyurl.com/pobb4zy ("If you receive an absentee ballot request from a person who is in jail or prison, follow the usual procedures for mailing the ballot. You have no obligation to research the reason the person is incarcerated."). If a court were to determine that citizens serving an incarcerative sentence for a non-infamous felony conviction remain eligible to vote, and that there is no other legal prohibition against such individuals voting, then those electors could be treated in the same manner as other incarcerated eligible voters under the existent absentee balloting procedures. Auditor Fraise need not "establish a new polling station at the Iowa State Penitentiary" as Respondents suggest. (Resp'ts' Br. at 15.)

Respondents are similarly misinformed in their fear that "inmates would suddenly become a large voting bloc in several districts." (Resp'ts' Br. at 15.) Although incarcerated individuals are counted in the U.S. Census at their places of confinement, the Census's internal definition of residence does not define a state's legal definition of residence for voting purposes. Incarcerated Iowans who are eligible to vote continue to define their residence, for purposes of voting, according to the location of their pre-incarceration home. Iowa Code § 48A.5(2)(b) ("A person's residence, for voting purposes only, is the place which the person declares is the person's home with the intent to remain there permanently or for a definite, or indefinite or indeterminable length of time."); *see also State v. Savre*, 105 N.W. 387, 387 (Iowa 1905)

("The word 'residence' as employed in the election statutes is synonymous with 'home' or 'domicile,' and means a fixed or permanent abode or habitation to which the party, when absent, intends to return."). Protecting incarcerated citizens' voting rights would not redistribute political influence among districts, and would not create new voting blocs within districts, as Respondents fear.

Third, Respondents seek guidance on how the *Chiodo* test would apply to an assortment of felony convictions not at issue in this case, including election crimes, perjury, theft, murder, rape, and child molestation. (*See* Resp'ts' Br. at 14.) Petitioner sets forth in her brief the three standards of the nascent test outlined in *Chiodo* and demonstrates that none of the three applications of the test render her crime "infamous." (*See* Pet'r's Br. at 13-22.) Although it is unnecessary to address all of Respondents' hypotheticals, the various bright lines for defining "infamous crime" offered by the *Chiodo* plurality offer guidance as to how these other offenses could be treated for purposes of determining voter eligibility. Indeed, the Court can eliminate uncertainty about what effect, if any, a ruling in Petitioner's favor would have by adopting one of the three standards proposed in Petitioner's brief in support of summary judgment.

Courts in other states have made such determinations. For example, Respondents cite the Pennsylvania Supreme Court's interpretation of its state constitutional definition of "infamous crimes." (Resp'ts' Br. at 14) (quoting *Commonwealth ex rel. Corbett v. Griffin*, 946 A.2d 668 (Pa. 2008).) In *Griffin*, the

Pennsylvania Supreme Court determined that, based on an 1842 decision interpreting Article II, section 7 of the Pennsylvania Constitution, either a felony conviction or *crimen falsi* offense was a constitutionally infamous crime that rendered a person ineligible to hold office.[8] *See* 946 A.2d at 673-74 (citing *Commonwealth v. Shaver*, 3 Watts & Serg. 338, 1842 WL 4918 (Pa. 1842). *Griffin* was distinguished three years later by *Commonwealth ex rel. Kearney v. Rambler*, 32 A.3d 658, 665 (Pa. 2011), establishing that there is no bright-line rule for determining whether an "extra-jurisdictional" federal felony constitutes an infamous crime. The court in *Rambler* rejected a rule that would have rendered a federal felony an "infamous crime" based on the federal definition, and instructed reviewing courts to make a case-by-case assessment of extra-jurisdictional felonies by looking at the nature of the offense and the underlying conduct. *Id.* Pennsylvania courts ably apply the *crimen falsi* standard articulated in *Griffin* and the moral turpitude standard outlined in *Rambler* to determine whether a crime meets the state constitutional definition of "infamy." Iowa courts could similarly apply a judicial interpretation of "infamous crimes" that is not dependent on the legislature's definition of "felony."

[8] Pennsylvania citizens disenfranchised due to a felony conviction automatically regain their right to vote upon release from prison. *See Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Commw. Ct. 2000), *aff'd*, 783 A.2d 763 (Pa. 2001) (per curiam).

4. Injunctive and Mandamus Relief are Appropriate in this Case.

The Respondents assert that supplemental injunctive and mandamus relief are not necessary to protect Mrs. Griffin's right to vote and substantive due process rights. (Resp'ts' Br. at 16-17.) However, the supplemental injunctive and mandamus relief the Petitioner seeks are entirely within the province of this Court and necessary to protect the Petitioner's interests. *See* Iowa R. Civ. P. 1.1102 ("Any person . . . whose rights, status or other legal relations are affected by any statute, . . . rule, [or] regulation . . . may have any question of the construction or validity thereof or arising thereunder determined, and obtain a declaration of rights, status, or legal relations thereunder.") Supplemental relief is expressly provided for in the Iowa Rules of Civil Procedure. *See* Iowa R. Civ. P. 1.1106 ("Supplemental relief based on a declaratory judgment may be granted wherever necessary or proper."). The Petitioner properly seeks such a declaration construing the validity of the statutes, rules, forms, and procedures which bar her from registering to vote and voting, as well as such supplemental equitable relief as necessary to secure those rights.

Mandamus is the type of equitable action brought to compel an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station. Iowa Code §§ 661.1, 661.3 (2015). The Respondents admit that if the Petitioner was not convicted of an "infamous crime," she is otherwise eligible to register to vote and vote. (Stipulated Joint Statement of Undisputed Facts, May 15, 2015, at ¶ 24.) Here, Petitioner asserts that, because she was not convicted of an

infamous crime, and because she is otherwise eligible, the Respondents have a duty to allow Mrs. Griffin to vote. Both her underlying right to vote and her substantive due process rights preexist this suit even though the Respondents have barred the Petitioner from exercising those rights. Moreover, the Iowa Code only requires that a legal right to damages already be complete at the commencement of the action when the duty sought to be enforced by mandamus "is *not* one resulting from an office, trust, or station." Iowa Code § 661.6 (2015) (emphasis added). Here, an injunction to protect Mrs. Griffin's right to vote and due process rights is also necessary and appropriate. In her case, the deprivation of her right to vote is ongoing. And Mrs. Griffin has clearly established a credible fear of sanction for voting. (*See* Pet'r's Br. at 6) (detailing Respondents' prior prosecution of Petitioner for voting.)

Perplexingly, the Respondents state that "even assuming Griffin's rights as an elector are established by a future declaratory order, she would need to register to vote before either Secretary Pate or Auditor Fraise had a duty to act." (Resp'ts' Br. at 17.) The voter registration form itself wrongly requires the Petitioner to swear, under penalty of perjury, that she has not been convicted of a felony or has had her right to vote restored following a felony in order to register, rather than an infamous crime. The Respondents' statement is deeply troubling since the Petitioner cannot register to vote but for the performance of duties by the Respondents to accept and process her voter registration form. Iowa Code § 47.7 (2015) (duties of Secretary of State to prepare, preserve, and maintain voter registration records and maintain single,

computerized statewide voter registration file; duty of county auditor to conduct voter registration and elections). (Stipulated Joint Statement of Undisputed Facts, at ¶¶ 2-5.) The statement is also on its own indicative of the need for this Court to make the duty owed by the Respondents to the Petitioner clear and express by granting mandamus relief, which is simply an order for the Respondents to comply with their duty to allow the Petitioner to register and vote, and to count her ballot if validly cast.

Without an order of this Court requiring Respondents to allow the Petitioner to register to vote and vote once registered, *despite* Iowa statutes, rules, procedures, and forms to the contrary, the Petitioner has no basis to believe she would not continue to be barred by Respondents from exercising her constitutional rights, much less that she would be protected from criminal liability for doing so. Thus, the Petitioner rightly and reasonably seeks assurance and protection by the Court that she will be able to vote, and that the state will be enjoined from bringing criminal charges as a result of her casting a ballot consistent with her constitutional rights, but inconsistent with Respondents' current policy.

Finally, the Respondents assert that the state is not a named party to the suit and therefore the court cannot enjoin the state from further wrongful criminal prosecution of Mrs. Griffin for registering to vote and voting without first obtaining a "restoration" of the right to vote by the Iowa Governor. (Resp'ts' Br. at 17.) The Respondents cite no authority for this assertion. Petitioner need not redundantly name the state of Iowa when she names state officials in their official capacity. When

officials are named in their official capacity, they represent the State of Iowa as the "real party in interest." *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 166 (1985); Iowa R. Civ. P. 1.201 ("Every action must be prosecuted in the name of the real party in interest."); *see also* Iowa R. Civ. P. 1.207 (Actions by and against state: "The state may sue in the same way as an individual."). Indeed, that proposition underpins the necessity of naming officials in their individual capacity in claims for damages brought under 42 U.S.C. § 1983 for violations of U.S. constitutional rights: state officials, standing in the place of the state, possess sovereign immunity when named in their official capacity under the Eleventh Amendment, unless the state has waived its immunity. *See Chiavetta v. Iowa Bd. of Nursing*, 595 N.W.2d 799, 801 (Iowa 1999) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989)); *Hafer v. Melo*, 502 U.S. 21, 25-26 (1991). By contrast, when a state official is named in his official capacity for purposes of injunctive relief, the state, not just the official named, is enjoined by a successful outcome. *See Graham*, 473 U.S. at 165-66 ("Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" (quoting *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity." *Graham*, 473 U.S. at 166 (citation omitted).

The Iowa Rules governing this suit for declaratory and other supplemental equitable relief are clear that "'person' shall include any individual or entity capable of suing or being sued under the laws of Iowa." Iowa R. Civ. P. 1.1109. Thus, the named Respondents, in their official capacities, representing the state of Iowa, are appropriately named 'persons' subject to such equitable relief as the court deems "necessary and proper" to secure rights of the Petitioner.

III. CONCLUSION

For the foregoing reasons and those contained in her Brief in Support of her Motion for Summary Judgment, Petitioner respectfully asks that this Court deny the Respondents' Motion for Summary Judgment, grant summary judgment in favor of the Petitioner, and order such supplemental relief as necessary to secure her constitutional right to vote and due process rights.

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 29th day of June 2015 by _____ personal delivery __X___ deposit in the U.S. mail ___X___ EDMS.

/s/Rita Bettis

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