ELECTRONICALLY FILED JAN 14, 2016 CLERK OF SUPREME COURT

SUPREME COURT NO. 15-1661
POLK COUNTY CASE NO. EQCE 077368

IN THE SUPREME COURT OF IOWA

KELLI JO GRIFFIN,
Petitioner-Appellant,

vs.

PAUL PATE, in his official capacities as **IOWA SECRETARY OF STATE**, and
DENISE FRAISE, in her official capacities as **LEE COUNTY AUDITOR,**
Respondents-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE ARTHUR E. GAMBLE

Proof Reply Brief of Petitioner-Appellant

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ARGUMENT

Article II of the Iowa Constitution uses the terms "infamous crime" and "felony"—different words, in different places, for different for purposes. Under basic principles of textual interpretation, these two terms are therefore presumed to have different meanings. *See Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 853 (Iowa 2014). Throughout their brief, however, Respondents-Appellees ("Appellees") cannot decide if they agree with that simple proposition. At times, Appellees argue that "infamous crime" is simply "defined as felonies." (Appellees' Br. at 14.) At other times, in an about-face from the state's position in *Chiodo* two years ago, Appellees now take the position that the framers intended Iowa's Infamous Crimes Clause to disenfranchise people convicted of all felonies and some misdemeanors. (*See id.* at 23-25.) In support of their shifting arguments, Appellees rely on a dramatically ahistorical account of the common law definitions of infamous crime as set forth by the amicus brief of the Iowa County Attorneys Association ("ICAA"). (*Id.* at 25.) They further argue that the 2008 technical amendment to article II changed the meaning (although not the actual words) of the Infamous Crimes Clause to reflect a 1994 statutory definition of "infamous crime," (*see id.* at 13), or alternatively, that the Iowa Constitution has devolved over time to disenfranchise a growing class of Iowa voters according to the whims of the legislature. (*Id.* at 15-17.) As a last resort, they argue that

Mrs. Griffin has not preserved her state constitutional voting rights or due process claims, (Appellees' Br. at 11 n.3), and that this Court should not grant the supplemental mandamus or injunctive relief she seeks. (*Id.* at 30-32.)

In the end, each of the Appellees' alternative arguments fail. Mrs. Griffin has not been convicted of an infamous crime under the Iowa Constitution. This Court should reverse the district court's grant of summary judgment in favor of Appellees below. In so ruling, this Court should set forth a precise and accurate definition of infamous crime as used by article II to disenfranchise voters on the basis of specified criminal convictions.

I. MRS. GRIFFIN HAS PRESERVED ERROR ON ALL HER CLAIMS.

In a footnote, Appellees imply that Mrs. Griffin has not preserved error on her voting rights and due process claims, as presented in Sections II and III of her brief. (*Id.* at 11 n.3.) Appellees have then determined not to respond at all to those arguments. (*See id.*) To the contrary, the record shows that Mrs. Griffin has properly preserved both claims for appeal, because Mrs. Griffin raised them both clearly and consistently below, and the district court ruled on them. (Pet. for Declaratory J. and Suppl. Inj. and Mandamus Relief at 9-17; First Am. Pet. for Declaratory J. and Suppl. Inj. and Mandamus Relief at 8-16; 16-18, Feb. 26, 2015; Pet'r's Mot. for Summ. J. at 2-3; Br. in Supp. of Pet'r's Mot. for Summ. J. at 33-40; App. ___; Dist. Ct. Order at 5, 14, 17 Sept. 25,

2015; App. ___.) *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (holding issues both raised and decided by the district court are preserved for appellate review.) *See also Lamasters v. State,* 821 N.W.2d 856, 864 (Iowa 2012) ("If the court's ruling indicates that the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved.") Therefore, both her voting rights and due process claims under the Iowa Constitution are properly before this Court.

II. THE 2008 IOWA CONSTITUTIONAL AMENDMENT DID NOT ALTER THE INFAMOUS CRIMES CLAUSE.

As a plurality of this Court has observed, "[a] review of article II of our constitution reveals the framers [in 1857] clearly understood that an 'infamous crime' and a 'felony' had different meanings," *Chiodo*, 846 N.W.2d at 853 (Cady, C. J., for the plurality.). Nevertheless, Appellees argue that the 2008 Constitutional Amendment to article II—which did nothing more than change the words "idiot or insane person" to "person adjudged mentally incompetent to vote"—somehow also served to make the terms "infamous crime" and "felony" synonymous, by constitutionalizing the legislature's statutory definition of "infamous crime" from a bill passed in 1994. (Appellees' Br. at 13.).

A majority of the Justices of this Court have already rightly rejected that position. 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., for the plurality) ("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." *Id.* at 864 n.10 (Wiggins, J., dissenting) (noting that Iowa 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). The 2008 Amendment was not in any way a referendum on the Infamous Crimes Clause. *Id.* Rather, as simply put by the *Chiodo* 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. Indeed, Appellees admit "the amendment was intended to remove the offensive and outdated 'idiot' language from the Iowa Constitution and did not alter the Infamous Crime Clause." (Appellees' Br. at 13.)

The outcome of the *Chiodo* decision itself additionally refutes Appellees' position. *Chiodo* held that people convicted of aggravated misdemeanors are not disqualified from voting by article II, even though aggravated misdemeanors are treated as felonies under federal law, and were considered disqualifying offenses under Iowa Code § 39.3(8) until this Court decided *Chiodo*. Iowa Code § 39.3(8) (2015) (as amended by Iowa Acts 1994 (75 G.A.) ch. 1180, § 1). When the 2008 constitutional amendment passed, 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 . . ."; App. ___.). No more was that interpretation ratified into constitutionally binding law than was an interpretation of the Infamous Crimes Clause that disenfranchises for any and all felony convictions.

Had the intent of the people and the legislature—in either 1857 or 2008—been to disenfranchise otherwise eligible voters for the commission of any felony offense, "we must presume they would have used the word 'felony' instead of the phrase 'infamous crime.'" *Chiodo*, 846 N.W.2d at 853. Instead, the text of the Infamous Crimes Clause and its constitutional meaning, which incorporates only those few specific felonies that are "infamous" (*i.e.*, those that are an affront to democratic governance), remained unaltered. Simply put,

in 2008, the legislature and people of Iowa did not ratify a definition of "infamous crime" that encompasses all crimes classified as a felony under state or federal law.

III. THE MEANING OF THE INFAMOUS CRIMES CLAUSE IS NOT SUBJECT TO LEGISLATIVE CONTROL AND IS THUS NOT 'DEVOLVING' TO DISQUALIFY AN EVER-GROWING NUMBER OF VOTERS.

Although Appellees argue that the definition of infamous crime must be subject to a bright-line test, they also argue this line may shift at any time: that the constitutional definition of infamous crime is subject to constant redefinition by the legislature. (Appellees' Br. at 18-20.) The Appellees ascribe to this theory the concept of an "evolving" constitutional standard, but actually mean that it is a *devolving* standard without any constitutional analog—disqualifying an ever-increasing class of voters since the 1857 Constitution, according to the whims of the legislature.

In support of this proposition Appellees cite *Ex Parte Wilson*, which found that "what punishments shall be considered infamous may be affected by the changes of the public opinion from one age to another." *Ex Parte Wilson*, 114 U.S. 417, 427 (1885). However, in *Wilson* the U.S. Supreme Court adopted a definition of "infamous crime" that, for purposes of the Grand Jury Indictment Clause of the Fifth Amendment of the U.S. Constitution, is determined by the punishment of the crime, which necessarily is "affected by

the changes of the public opinion from one age to another" and not the nature of the crime. In *Chiodo*, this Court soundly rejected the test for infamy that is determined by a crime's punishment as adopted by *Wilson*. Accordingly, Iowa has now joined many other state courts in recognizing that whether or not a crime is infamous is fixed by the Constitution and depends on the nature of the crime itself, not on the penalty assigned to the crime by the General Assembly, which is subject to periodic change. *Chiodo*, 846 N.W.2d at 850-52 (Cady, C.J., for the plurality) and 860 (Mansfield, J., specially concurring) ("I agree with the plurality . . . [that] our framers' use of the word 'infamous' and especially the phrase 'infamous crime' suggest that our interpretive focus should be on the category of *crime*, not the type of *punishment*.") (emphasis in original); *see also A Double Test for Infamous Crimes*, 24 Wash. & Lee L. Rev. 145, 148 (1967).

In support of their devolving theory, Appellees cite the Pennsylvania Supreme Court's interpretation of its state constitutional definition of "infamous crimes." (Appellees' Br. at 16) (quoting *Commonwealth ex rel. Corbett v. Griffin*, 946 A.2d 668 (Pa. 2008).) First of all, the Pennsylvania *Griffin* case concerns the right to hold public office, not the right to vote, which are constitutionally distinct both in Pennsylvania and in Iowa.[1] Second, the

[1] Being an elector is a necessary but not sufficient qualification to hold many public offices. Where the qualifications to vote laid out in the Constitution set the ceiling on the government's ability to regulate, the Iowa Constitution sets minimum qualifications, or a floor, for electors to hold public office where

Pennsylvania Supreme Court has also since rejected a felony-misdemeanor rule. In *Griffin*, the Pennsylvania Supreme Court determined that either a felony conviction or *crimen falsi* offense was a constitutionally infamous crime that rendered a person ineligible to hold office.[2] *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 Pennsylvania Supreme 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

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additional qualifications to hold office may be established by legislative action. *See, e.g,* Iowa Const. art. III. §4 (members of the House of Representatives must be 21 years old, citizens, and have "actual residence" in their districts for 60 days preceding election to office.; *id.* art. III, § 5 (requiring state senators to satisfy the same residence requirement as state representatives); *Id.* art. IV, § 6 (requiring the Governor attain the age of 30, be a citizen, and resident of the state for two years prior to the election); *Id.* art. III, § 2 (requiring physical presence to convene for the assembly of sessions); Iowa Const. art. III. § 19 (granting the General Assembly power to impeach duly elected members); 2015 IA H.R. 4, Div. I, Rules 2-12 (establishing times to convene, allowing roll calls, requiring presence unless excused for good cause).

[2] 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. 2000), *aff'd*, 783 A.2d 763 (Pa. 2001) (per curiam).

offense and the underlying conduct. *Id. See also Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Cmwlth. 2000), *aff'd*, 783 A.2d 763 (Pa. 2001) (per curiam) (upholding disenfranchisement of incarcerated felons but striking down a provision of state law that deprived ex-felons who were incarcerated within the past five years of the right to register to vote under federal rational basis review). What's more, the Pennsylvania Supreme Court's analysis of its 1874 state constitutional infamous crimes definition, adopted after the U.S. Civil War and the ratification of the 14th Amendment, has little if anything to tell us about the minds of the constitutional framers in 1857 here in Iowa. A finding by the Pennsylvania Supreme Court that the Pennsylvania constitution vests the Pennsylvania legislature to define "infamous crime" does not at all change the analysis of a majority of the Justices of this Court finding that the Iowa Constitution specifically divested the Iowa legislature of this power.

Last, Appellees cite the 1839 Territorial Code's statutory definition of infamous crime as the basis for their argument that the constitutional text changes over time to disqualify voters for a growing class of crimes.[3]

[3] Notably, Appellees argued the opposite below, claiming that the framers of the 1857 Constitution 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't Pate's Br. in Supp. of Mot. for Summ. J. at 10; App. ___) (citing the State Laws of the Territory of Iowa, Code of Criminal Jurisprudence, Tenth Div., § 109, at 182 (1839).)

(Appellees' Br. at 15-16.) This argument fails the Appellees 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., for the plurality) ("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., for the plurality) ("More directly, it appears the drafters at our 1857 constitutional convention intended to deprive the legislature of the power to 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 of this Court—the plurality and the dissent—have already directly rejected Appellees' 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 made a deliberate choice not to do so. *See id.* at 855 (Cady, C.J., for the plurality) (drawing a contrast to Iowa Const. art. III, § 5 (1844), which employed such

language). Third, rather than supporting their claim, the 1839 territorial code that Appellees cite supports Mrs. Griffin'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 importantly 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 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 twice). Thus, rather than supporting Appellees' argument that the framers intended the words "infamous crime" to be synonymous with all felonies, and subject to frequent changes with each new legislative session, the 1839 territorial code supports Mrs. Griffin's argument that those words carried distinct meaning to the framers, and specifically, that not all felonies are infamous crimes.

To the extent that the definition of "infamous crime" under the Iowa Constitution might, *arguendo*, evolve—and there is no authority for this argument—it must of course evolve within the framework instituted by the founders of the 1857 Constitution, consistently with article II's regulatory purpose and without diminishing constitutional rights. That is, even if the scope of "infamous crimes" evolves, there is no support for the notion that it must "devolve" in the manner dictated by the legislature. Indeed, as explained above, the legislature may not—as it has done here—define infamous crimes more broadly than the Iowa Constitution, because doing so violates the rights of all Iowans convicted of non-infamous felony crimes, who are entitled to vote under the Iowa Constitution. The "devolving" standard as envisioned by Appellees would make the permanent disenfranchisement of an Iowa voter on account of conviction of a felony entirely subject to legislative whims. That result is inconsistent with the finding of a majority of the Court in *Chiodo* that the legislature lacks this power.

IV. THE APPELLEES' RECITATION OF THE COMMON LAW HISTORY OF THE CONCEPT AND FUNCTION OF 'INFAMOUS CRIME' IS WRONG.

The Appellees attempt to dismiss the textual, structural, and historical analysis of the *Chiodo* plurality by supplanting it with their own misstatement of legal history. In so doing, Appellees not only fail to respond to any of the historical evidence cited by Mrs. Griffin in her brief and misstate her argument,

they throw all caution to the wind by asking this Court to reverse its holding in *Chiodo* that the nature of the crime, not its punishment, determines whether it is infamous, and assert that the definition of infamous crime as utilized by our framers encompassed misdemeanor offenses. (Appellees' Br. at 23-30.)

The Appellees begin by citing *Richardson v. Ramirez*, 418 U.S. 24 (1974) to glean "the original source" of the Iowa Constitution, (Appellees' Br. at 22-23). *Richardson v. Ramirez* interprets the Fourteenth Amendment of the U.S. Constitution, which was ratified in 1868 after the U.S. Civil War, and thus cannot be the the source for the Infamous Crimes Clause of the Iowa Constitution, drafted by our framers 11 years earlier, in 1857.[4] Perhaps Appellees intend that statement toward the Grand Jury Indictment Clause of the Fifth Amendment of the U.S. Constitution as interpreted by the U.S. Supreme Court in *Ex Parte Wilson*, 114 U.S. 429, which defined an infamous crime not by its nature but by its potential punishment. *Id.* But a majority of the Justices of this Court have already soundly rejected extending that definition to the Iowa Constitution. *See Chiodo*, 846 N.W.2d at 850-52 (Cady, C.J., for the plurality) and 860 (Mansfield, J., specially concurring) ("I agree with the

[4] Mrs. Griffin has not asserted a Fourteenth Amendment claim; rather, this action is brought under the Iowa Constitution. The fact that the U.S. Constitution permits nondiscriminatory state felon disenfranchisement policies 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*.

plurality . . . [that] our framers' use of the word 'infamous' and especially the the phrase 'infamous crime' suggest that our interpretive focus should be on the category of *crime*, not the type of *punishment*.") (emphasis in original); *see also A Double Test for Infamous Crimes*, at 148.

Indeed, Appellees intend to persuade this Court that the underpinning of the *Chiodo* decision was in error, and that the framers' definition of "infamous crime" included misdemeanors. (Appellees' Br. at 23 ("In the nineteenth century infamous crimes were thought to include a *broader* spectrum of offenses than simply felonies.") and 25 (citing Br. of ICAA.).) As this Court found in *Chiodo*, however, while the classification of a crime as a felony is not sufficient to find that it is infamous, no crime that is classified merely as a misdemeanor bears the hallmarks of particular seriousness sufficient to meet even the first prong of the nascent definition. *Chiodo*, 846 N.W.2d at 9 (Cady, C.J., for the plurality.)

The Appellees similarly engage in a lengthy exposition on the differences between the Indiana and Iowa Constitutions in an effort to persuade this Court to disregard as persuasive in its analysis the decision in *Synder v. King*, 958 N.E.2d 764 (Ind. 2011). (Appellees' Br. at 26.) As Appellees doubtless understand, Mrs. Griffin—and the *Chiodo* plurality—cite the *Synder* case not as precedential but as persuasive in its thorough analysis and as one of a number of state constitutions which disenfranchise solely on the basis of crimes that are

an affront to democratic governance. *See Chiodo*, 846 N.W.2d at 855-56. The Appellees fail to address the purpose for which *Synder* is cited by the plurality,[5] and entirely ignore the numerous other state constitutions cited by Mrs. Griffin which illustrate this approach, including California, Illinois, and Missouri. (Appellant's Br. at 28-29.)

What both Appellees and Amicus ICAA ask this Court to find, as an alternative theory to their 'devolving Constitution' theory, is that there is but a single definition of infamous crime, as utilized both in the common law in England, in the colonies, then in the individual states, both before and after the U.S. Civil War, and that the definition includes both misdemeanors and felonies.

For example, the ICAA brief cites a 1910 Black's Law Dictionary definition of infamous crime, some two or three generations after Iowa's 1857 Constitutional Convention, and which definition is concerned solely with witness disqualification. (ICAA Br. at 13 ("'The term 'infamous' . . . , upon the conviction of which a person became incompetent to testify as a witness.").)

[5] Peculiarly, Appellees cite a decision from Pennsylvania interpreting the Pennsylvania Constitution to argue that the Indiana Supreme Court in *Snyder* misinterpreted the Indiana Constitution (Appellees' Br. at 27-28.) The Pennsylvania case is inapplicable to the question of the contours of the Affront to Democratic Governance Standard for which it is cited by Appellees, because the Pennsylvania Supreme Court adopted a Pennsylvania-specific version of the *Crimen Falsi* Standard—not the Affront to Democratic Governance Standard. *Commonwealth v. Shaver*, 3 Watts & Serg. 338, 342 (Pa. 1842).

They also cite a 1922 Cyclopedic Law Dictionary, even further removed from 1857, which adopts the definition of infamous crime for purposes of voting as set forth by the U.S. Supreme Court in *Ex Parte Wilson* defining infamous crime by its potential punishment, not its nature, which this Court rejected in *Chiodo*. (ICAA Br. at 13 ("The test is the possible punishment…")) The ICAA brief relies in equal measure on a dramatic oversimplification and misstatement of the operation of the concept of infamous crime at common law in Europe. (ICCA Br. at 13-14). The brief even cavalierly cites a history of racial animus in Iowa to support disenfranchisement on account any felony conviction, while simultaneously attempting to disclaim racial animus to avoid the implication that the Infamous Crimes Clause should be invalidated under the Fourteenth Amendment. (ICAA Br. at 32-33.) With a wave of the hand, the brief then concludes with the admission "[P]erhaps, this argument is wrong." (ICAA Br. at 43.) Indeed, it is wrong.

In fact, the concept of infamy in the context of voting has differed throughout place and time, such that comparisons of the sort found in the ICAA's brief are grossly misleading. For example, under the common law in England, infamy could be cured both by literacy and by wealth, and punishment in the penitentiary was considered by definition to be non-infamous, private punishment (as opposed to whipping, mutilation, or execution). Pippa Holloway, *Living in Infamy* 13 (Oxford Univ. Press 2014).

Certainly the idea of infamy at English common law cited by the ICCA and by reference the Appellees was not the infamy operating in the mind of the Iowa framers in 1857. Historians have also traced the diverging regional differences in the development of the concept of infamous crime as related to suffrage in the United States. Holloway, at 29-30.

Similarly, motivations for disenfranchisement for crime were different during different time periods. Notably for our purposes, between 1840 and 1865, in particular, policymakers enacting restrictions on voting for crime tended to be motivated by a concern about protecting the integrity of the voting system after property tests were eliminated, and "[i]n particular, those who committed electoral fraud or other election-related crimes were seen as threatening to the ballot box." Holloway, at 19 (citing Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* 50-54 (Oxford Univ. Press 2006). And, as explained in Mrs. Griffin's opening brief, the regulatory purpose of disenfranchisement—which *Chiodo* confirmed underpins the Infamous Crimes Clause under the Iowa Constitution, *see Chiodo*, 846 N.W.2d at 856-57—is consistent with an understanding of infamous crimes that is narrower than "all felonies."

The Appellees and ICAA also ignore the 1851 Code of Iowa and the 1838 territorial statute cited by Mrs. Griffin, both of which disenfranchised voters for a range of offenses that was narrower than all felonies, as many

felony offenses punished by imprisonment were not disqualifying from voting or holding office. In fact, even in the post Civil War South, not all felonies were infamous. Holloway, at 58. Notably, historians find that it was not until after 1890 that state disenfranchisement provisions "reflected a growing view that all who committed felonies, not just infamous crimes, were degraded and unworthy of suffrage." Holloway, at 101. This represented a "legal redefinition of 'infamous' to include all felonies." *Id.* Facilitated by this redefinition, reclassifying misdemeanors as felonies to disenfranchise voters was one tactic used by Southern States. *Id.* at 60. But the Iowa Legislature, by contrast, does not and has never had the authority to do the same under the Iowa Constitution, because the definition of infamous crime is constitutional and not subject to legislative redefinition.

In support of its argument, the Appellees ask this Court to further find that the purpose of article II is—or "can be"—punitive. (Appellees' Br. at 26.) Iowa Const. art. II. 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., for the plurality.) The Appellees overlook that article II, section 5 is not a criminal law provision but instead is concerned with, and titled, "Right of Suffrage." Iowa Const. art. II. To find that section 5 was intended to be punitive also assumes that incompetent persons,

disenfranchised by the same sentence, are disqualified as a punishment. The Appellees cite no authority to support this assertion of a punitive intent. By contrast, Mrs. Griffin can cite not only the text and function of the Iowa Constitution itself as support, but numerous analogous state constitutional provisions. *See 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] Thus, both textual, structural, and 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).)

[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).

Ultimately, the question here is not what the single and unified understanding of infamous crime is, true at all times in history in all places, and for all purposes. There is no such uniform definition. Once it is accepted that the legislature in Iowa lacks the constitutional authority to add to or subtract from the qualification of voters, the question is: what did the framers of the 1857 Iowa Constitution intend in using the term "infamous crime" rather than "felony"? As set forth in Mrs. Griffin's opening brief, the best understanding of their intent is one that is limited to those offenses that are an affront to democratic governance. But under any possible standard (*e.g. crimen falsi* or crimes of moral turpitude), Mrs. Griffin's offense is not infamous.

V. THE WITNESS TESTIMONY CASES ARE NOT RELEVANT TO THIS CASE.

Neither the *Palmer v. Cedar Rapids* case from 1901, two generations after the Iowa Constitution, nor the *Carter v. Cavenaugh* case from 1848 prior to the 1851 Code or the 1857 Constitution, purport to interpret the Infamous Crimes Clause of the Iowa Constitution. *Palmer v. Cedar Rapids & M.C. RY. Co.*, 113 Iowa 442, 85 N.W. 756 (Iowa 1901); *Carter v. Cavenaugh*, 1 Greene 171, 1848 WL 195 (Iowa 1848). The cases also do not stand for the proposition they are cited for by the Appellees or ICAA. (Appellees' Br. at 17-18; ICAA Br. passim.) Rather, the *Palmer v. Cedar Rapids* case looks at the common law definition for infamous crime as used to disqualify a witness at trial, and the opinion if

anything supports Mrs. Griffin's argument that there are two overarching categories of infamy at common law—one defined by punishment, and the other based on the nature of the crime. The language at issue in *Palmer* is:

> Without controversy, conviction for treason or felony will disqualify [as a witness], but as to other crimes it has been said that they must be in their nature infamous; and this has been interpreted to include only those crimes involving the element of falsifying, such as perjury or forgery, or other crimes which tend to the perversion of justice in the courts.

Palmer, 85 N.W. at 757. The 1901 Iowa statute at issue in *Palmer* provided that "A witness may be interrogated as to his previous conviction for a felony;" *Id.* at 756 (citing Iowa Code § 4613 (1901)). The *Palmer* decision goes on to say:

> In none of the cases which we have been able to find has it been held that conviction of an offense not a felony, and involving no greater infamy than that shown by the breach of the revenue laws or police regulations, will render the witness incompetent to give testimony.

Palmer, 85 N.W. at 757.

This is hardly evidence for interpreting article II, section 5 to disenfranchise tens of thousands of Iowans. As the *Chiodo* plurality has recognized, *Chiodo*, 846 N.W.2d at 855-56, the Infamous Crimes Clause must be read in light of its purpose to regulate voting, whereas the *Palmer* case construes common law rules of evidence and a 1901 Iowa statute. In other words, infamous crime for purposes of giving testimony may or may not be *crimen falsi* at common law or under long repealed statutes—the issue in

Palmer—but that is not the same as infamous crime for purposes of voting under the Iowa Constitution at issue in this case, which are only those felonies that are an Affront to Democratic Governance. What's more, since the statute at issue disqualified on the basis of felony, the language cited in *Palmer* is just as likely to mean that, as in *Chiodo*, being a felony is a necessary, but not sufficient, determination of what is infamous.

Likewise, the *Carter v. Cavenaugh* case from 1848**,** prior to the 1857 Iowa Constitutional Convention, again defines infamous crime for purposes of witness testimony, not voting:

> [W]hen a witness has been legally and finally adjudged guilty of an infamous crime, he is rendered incompetent [to testify] unless rehabilitated by pardon. Such infamy results only from the heinous crimes classed as treason, felony, and the *crimen falsi* as understood at common law. Formerly the punishment was considered the cause of infamy, but now it appears settled that the infamy arises from the enormity of the crime. . . . But this question infamy, that adverted to in the arguments by counsel, has but little bearing upon the leading point involved in this case.

Carter v. Cavenaugh, 1 Greene at 176. Again, there is nothing here to suggest that all felonies are infamous for purposes of witness testimony; rather, it might as well mean only "heinous" felonies are. The discussion is by its own admission dicta unrelated to the case, without any citation to historical jurisprudence, and in the context of evidence, and not the Infamous Crimes Clause of the Iowa Constitution, which did not exist at the time of the *Cavenaugh* case.

Examining the actual legislative history of Iowa, it is clear that nonviolent drug delivery generally, and delivery of cocaine specifically, is not an infamous crime, independent, even, of which of the three alternative standards for defining infamous crime this Court adopts. (Appellant's Br. at 20-43.) Predating the 1857 Constitutional Convention and up until 1897, the Iowa Code only criminalized the sale of poisons when not properly labeled. *See, e.g.,* Iowa Code § 2728 (1851) (punishable only by a fine of $20–$100); Iowa Code § 4374 (1860) (punishable by a fine up to $100 or up to 30 days in jail). Following the 1896 Code revision, the 1897 Code criminalized the sale of certain poisons without a prescription, with no mention of coca or its derivatives. *See* Iowa Code § 2593 (1897). The offense was a misdemeanor punishable by a fine of $25–$100, imprisonment for 30–90 days, or both. *See* Iowa Code § 2593 (1897). The only mention of narcotics in the 1897 Code specified that educational programs and the enforcement of school laws would include the study of the physiological effects of narcotics. *See, e.g.*, Iowa Code §§ 2675, 2706, 2736, 2740, 2775 (1897). The first mention of cocaine specifically as a controlled substance appeared in the 1902 Iowa Code Supplement, which criminalized the sale or giving away of cocaine, punishable by a fine of $25–$100 for a first offense and a fine of $100–$300 or up to three months imprisonment for subsequent offenses. Iowa Code §§ 2596-a, 2596-b (1902 Supp.). It was not

until 1923 that the legislature first classified the unauthorized delivery of cocaine as a felony. Iowa Code § 1432-a2 (1923).

According to Appellees, this nonviolent activity—which was not even recognized as criminal in 1857, let alone as a felony—may today constitute a basis for permanent excommunication from civic life under article II, purely by virtue of legislative fiat. That position is wholly inconsistent with the incontrovertible principle that the legislature lacks constitutional authority to later alter the qualifications for voting set forth in the Iowa Constitution.

VI. THE AFFRONT TO DEMOCRATIC GOVERNANCE TEST IS A BRIGHT-LINE DEFINITION OF INFAMOUS CRIME.

The Iowa State Association of Counties ("ISAC") filed an amicus brief in which they argued as a matter of policy that "a bright line definition of infamous crime is necessary for county commissioners of elections to effectively administer the elections in Iowa." (ISAC Br. at 2.) As briefed in Section IV of Mrs. Griffin's opening brief, (Appellant's Br. at 53-56), the asserted concerns regarding administrative ease neither trump Mrs. Griffin's constitutional rights, nor are the asserted difficulties insurmountable or proven. Rather, a number of states already disqualify on the basis of some but not all felonies. (Appellant's Br. at 55.) Regardless, Mrs. Griffin also asks this Court to adopt a bright-line test, deciding which specific felony crimes are an affront to democratic governance (treason, perjury, elections fraud, bribery of a public

official or other corruption in office, and malicious prosecution.) The offenses not included in that list would not be disqualifying from voting. This bright-line test is not only easy to administer, it protects the constitutional voting rights of tens of thousands of Iowans after they have fully discharged their sentences for felony offenses. Finally, there are two alternative standards for infamous crime that allow this Court to precisely designate which crimes are disqualifying under the Iowa Constitution. (*See* Appellant's Br. at 22 (describing the *crimen falsi* and moral turpitude standards), 30; 35-36; 42-44 (showing her crime is not infamous under any of the standards).

VII. INJUNCTIVE AND MANDAMUS RELIEF ARE APPROPRIATE IN THIS CASE.

In their conclusion, the Appellees assert that even if Mrs. Griffin succeeds on her claim for declaratory relief, this Court should not grant supplemental injunctive and mandamus relief to protect her right to vote and substantive due process rights. (Appellees' Br. at 30-32.) However, the supplemental injunctive and mandamus relief Mrs. Griffin seeks is entirely within the province of this Court, and is necessary to protect her interests.

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."). Mrs. Griffin properly seeks such a declaration construing the validity of the statutes,

rules, forms, and procedures which bar her from registering to vote and voting, *see* Iowa R. Civ. P. 1.1102, as well as such supplemental equitable relief as necessary to secure those rights pursuant to Iowa R. Civil P. 1.1106. *Id.* Mandamus is 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 Appellees admit that if Mrs. Griffin 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; App. ___.) Here, Mrs. Griffin asserts that, because she was not convicted of an infamous crime, and because she is otherwise eligible, the Appellees have a duty to allow her to vote. Both her underlying right to vote and her substantive due process rights preexist this suit even though the Appellees have barred Mrs. Griffin from exercising those rights. Moreover, the Iowa Code only requires that a legal right 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, the duty does arise from the Appellees' public offices. 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; Am. Pet. at 5-6; App. ___) (detailing the state's prior prosecution of Mrs. Griffin for voting.)

The Appellees made the same argument below, perplexingly stating 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't Pate's Br. in Supp. of Mot. for Summ. J. at 17; App. ___.) The Appellees' statement is deeply troubling since Mrs. Griffin cannot register to vote but for the performance of duties by the Appellees 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; duty of county auditor to conduct voter registration and elections). (Stipulated Joint Statement of Undisputed Facts, at ¶¶ 2-5; App. ___.) The statement alone indicates the need for this Court to make the duty owed by Appellees to Mrs. Griffin express. The voter registration form itself wrongly requires Mrs. Griffin 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.

Without an order of this Court requiring Appellees to allow Mrs. Griffin to register to vote and vote once registered, *despite* Iowa statutes, rules, procedures, and forms to the contrary, Mrs. Griffin has no basis to believe she would not continue to be barred by Appellees from exercising her

constitutional rights, much less that she would be protected from criminal liability for doing so. Thus, Mrs. Griffin 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 validly casting a ballot consistent with her constitutional rights, but inconsistent with the Appellees' current policy.

CONCLUSION

For the foregoing reasons and those contained in the Appellant's Brief, Mrs. Griffin respectfully asks that this Court reverse the district court's order granting Appellees' Motion for Summary Judgment, and grant declaratory and such supplemental relief as necessary to secure her constitutional right to vote and due process rights.

Respectfully submitted,

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