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

**IN THE SUPREME COURT OF IOWA**

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**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.

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

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# Proof Brief of Petitioner-Appellant

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**Rita Bettis**
ACLU of Iowa Foundation
505 Fifth Ave., Ste. 901
Des Moines, IA 50309
Phone: (515) 207-0567
Fax: (515) 243-8506
Email: rita.bettis@aclu-ia.org

**Dale E. Ho***
**Julie A. Ebenstein***
ACLU Foundation, Inc.
Voting Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2686
Fax: (212) 549-2649
Email: jebenstein@aclu.org
Email: dale.ho@aclu.org

* *Pending Admission Pro Hac Vice*

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I. THE DISTRICT COURT ERRED IN FINDING THAT MRS. GRIFFIN WAS CONVICTED OF AN "INFAMOUS CRIME."

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## ROUTING STATEMENT

Petitioner-Appellant respectfully asks the Court to retain this case because it presents substantial constitutional questions as to the validity of Iowa statutes and administrative rules, fundamental and urgent issues of broad public importance requiring ultimate determination by the Supreme Court, and substantial questions of enunciating legal principles. Iowa R. App. P. 6.1101(2) (2015).

## STATEMENT OF THE CASE

The Petitioner-Appellant, Kelli Jo Griffin ("Mrs. Griffin"), seeks reversal and remand of the district court's ruling granting summary judgment in favor of the Respondents-Appellees, the Honorable Paul Pate, Iowa Secretary of State, and Denise Fraise, Auditor of Lee County, Iowa (collectively "Appellees"), upholding as constitutional Iowa's statutes, regulations, and procedures that permanently bar all Iowans with a felony conviction from voting unless the Iowa Governor has restored their right to vote. (Dist. Ct. Order at 14, 17, Sept. 25, 2015; App. ___.) Mrs. Griffin challenged those statutes, regulations, and procedures as violative of her state constitutional right to vote and to substantive due process, and sought declaratory judgment and supplemental injunctive and mandamus relief to affirm and protect those fundamental rights. (First Am. Pet. for Declaratory J. and Suppl. Inj. and Mandamus Relief at 19-20, Feb. 26, 2015; App. ___.) At the heart of this case is

a single constitutional question: whether Mrs. Griffin's prior felony conviction for a nonviolent, general intent drug offense unrelated to voting is an "infamous crime," as used in Article II Section 5 of the Iowa Constitution, permanently disqualifying her from voting. (First Am. Pet. for Declaratory J. and Suppl. Inj. and Mandamus Relief at 3, Feb. 26, 2015; App. ___.)

## RELEVANT FACTS

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. (Stip. App. on Summ. J. Exs. 1, 9; App. ___.) Mrs. Griffin has successfully rebuilt her life after recovery from a period of substance abuse related to her experiences as a survivor of domestic violence in a past marriage. (Stip. App. on Summ. J. Exs. 1, 9; App. ___.) Mrs. Griffin is now a homemaker and stay-at-home mother. (Stip. App. on Summ. J. Exs. 1, 9; App. ___.) 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. (Stip. App. on Summ. J. Exs. 1, 9; App. ___.)

Mrs. Griffin has discharged two felony convictions related to her past substance abuse. On February 14, 2001, she was convicted of possession of ethyl ether in violation of Iowa Code Section 124.401(4)(c), a Class D felony.

(Stip. App. on Summ. J. Exs. 1, 12; App. ___.) She received a suspended prison sentence and was placed on probation, which she discharged on February 14, 2006. (Stip. App. on Summ. J. Exs. 1, 12; App. ___.) Upon discharge of her sentence, her voting rights were restored automatically through operation of former Governor Vilsack's Executive Order 42, issued in 2005. (Stip. App. on Summ. J. Exs. 1, 5; App. ___.) Executive Order 42 "utilized a process that granted the restoration of citizenship rights automatically." (Stip. App. on Summ. J. Ex. 4; App. ___; *see* Stip. App. on Summ. J. Ex. 5; App. ___.) As a result of automatic restoration pursuant to Executive Order 42, an estimated 100,000 Iowans regained the right to vote, an estimated 81 percent reduction in the number of people disenfranchised in Iowa.[1] The automatic restoration process created by Executive Order 42 remained in effect until January 14, 2011. (Stip. App. on Summ. J. Exs. 4, 5; App. ___.) Between the discharge of her sentence in 2006 and the date of her subsequent conviction on January 7, 2008, Mrs. Griffin registered to vote and voted in two elections: in an August 8, 2006 local election and the November 7, 2006 general election. (Stip. App. on Summ. J. Ex. 16; App. ___.)

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

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. (Stip. App. on Summ. J. Exs. 3, 13; App. ___.) She was given a suspended sentence and was placed on probation for 5 years. (Stip. App. on Summ. J. Exs. 3, 13; App. ___.) Mrs. Griffin successfully discharged her sentence on January 7, 2013. (Stip. App. on Summ. J. Ex. 15 at 35; App. ___.) 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. (Stip. App. on Summ. J. Exs. 1, 9 at 106-07; App. ___.) That information was accurate at the time it was conveyed to her 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. (Stip. App. on Summ. J. Exs. 1, 9 at 102; App. ___.) Mrs. Griffin brought her children to the polling site with her in order to teach them about voting. (Stip. App. on Summ. J. Exs. 1, 9 at 102; App. ___.) Her daughter had recently learned about voting in school and Mrs. Griffin wanted to show her children how the process worked. (Stip. App. on Summ. J. Exs. 1, 9 at 102; App. ___.)

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, thereby ending the system of automatic restoration of voting rights for people who discharged their sentences and replacing it with a system that requires individuals who have been convicted of any felony offense to apply individually to the Governor for restoration of their voting rights. (Stip. App. on Summ. J. Exs. 4, 5, 8; App. ___.) In so doing, Executive Order 70 made Iowa one of the most restrictive states for voting in the country for people with criminal records: Iowa is one of only two states, along with Florida, in which a single conviction for any felony results in permanent disenfranchisement, unless a person obtains clemency from her state's governor.[2]

Executive Order 70 has had a profound impact on civil and political rights in our state.[3] The application process for restoration of the right to vote

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[2] *See* National Conference of State Legislatures, *Felon Voting Rights* (Dec. 2, 2015), http://tinyurl.com/p3nrrun. Virginia initiated automatic restoration in 2014. *See* Brennan Center, *Criminal Disenfranchisement Laws Across the United States*, http://tinyurl.com/lp48fru. On November 24, 2015, the Kentucky governor issued an executive order restoring the right to vote to most people disqualified by virtue of nonviolent felony convictions, and established automatic restoration upon discharge for Kentuckians with nonviolent offenses moving forward. *See* Erik Eckholm, *Kentucky Governor Restores Voting Rights to Thousands of Felons*, N.Y. Times, Nov. 24, 2015, http://tinyurl.com/z5jamed; The Honorable Steven L. Beshear, Governor, Commonwealth of Kentucky, Executive Order Number 2015-871, Nov. 24, 2015, http://tinyurl.com/nz33ekk.

[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*

is burdensome. It requires the applicant to complete a multi-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. (Stip. App. on Summ. J. Exs. 6-8; App. ___.) In Iowa currently, only a handful of the tens of thousands of people who have completed their sentences—approximately 0.16%—have successfully completed Governor Branstad's application process for an executive commutation restoring their rights of citizenship.[4]

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 2008 felony conviction. (Stip. App. on Summ. J. Ex. 10 at 71-72; App. ___.) On December 16, 2013, the State charged Mrs. Griffin with Perjury, a class D felony, for registering to vote

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*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.

[4] *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.)

and voting in the November 5, 2013 election, in violation of Iowa Code Section 720.2. (Stip. App. on Summ. J. Exs. 1, 14; App. ___.)

Mrs. Griffin pled not guilty. (Stip. App. on Summ. J. Exs. 1, 14; App. ___.) On March 19-20, 2014, Mrs. Griffin was tried by a Lee County jury, which acquitted her of all charges. (Stip. App. on Summ. J. Exs. 1, 14; App. ___.)

Now, Mrs. Griffin would like to fully engage in the civic life of her community where she lives, volunteers, and raises her family. (Stip. App. on Summ. J. Ex. 1; App. ___.) Mrs. Griffin views voting as a vital part of being a productive member of her community. (Stip. App. on Summ. J. Ex. 1; App. ___.) But for her 2008 felony conviction, Mrs. Griffin satisfies the requirements to register to vote under Iowa's existing statutes and regulations. (Stip. App. on Summ. J. Ex. 1; App. ___.) She 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 following the discharge of her sentence in 2013. (Stip. App. on Summ. J. Exs. 1, 2; App. ___.) Mrs. Griffin now wishes to register to vote and vote in all elections for which she is eligible—elections that impact her, her family, and her community—without fear of subsequent criminal prosecution. (Stip. App. on Summ. J. Ex. 1; App. ___.)

## ARGUMENT

The Iowa Constitution fiercely protects the right of suffrage. Article II prohibits the legislature from altering the qualifications for voting beyond those set forth in the Constitution itself, and permits disenfranchisement of a qualified elector in only two circumstances, one of which is for conviction of an "infamous crime."[5] Iowa Const. art. II, § 5. Yet the statutes, regulations, and practices challenged in this case as unconstitutional over-broadly treat all felonies—a wide swath of offenses that the legislature has steadily and dramatically increased during the more than 150 years since the adoption of the Constitution—as permanently disqualifying otherwise eligible citizens from participation in our democracy. Iowa now stands as one of only two states in the country to permanently disqualify citizens from voting based on a single conviction for any felony offense. Today, nearly six percent of this state's citizens can be expected to face lifetime disenfranchisement as a result of a felony conviction.[6]

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[5] The other circumstance is adjudication that an elector is mentally incompetent to vote. Iowa Const. art. II, § 5.

[6] *See* Sarah Shannon, *et al.*, *Growth in the U.S. Ex-Felon and Ex-Prisoner Population 1948 to 2010*, at 9 (Fig. 7), Paper delivered at the Population Ass'n of Am. 2011 Annual Meeting (Apr. 1, 2011), http://tinyurl.com/j6hxo5u; *see also* John Schmitt & Kris Warner, Ctr. for Econ. & Policy Research, *Ex-offenders and the Labor Market*, at 3-4 (Nov. 2010), http://tinyurl.com/3nep6zy; Christopher Uggen, *et al.*, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 Annals of the Am. Acad. of Pol. & Soc. Sci. 281, 281-91 (May 2006).

Yet, as a plurality of this Court recently explained in *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845 (Iowa 2014), *as corrected* (Apr. 16, 2014), this state of affairs does not comport with the Iowa Constitution. The text, structure, and history of Article II reveal that the framers used the terms "infamous crime" and "felony" for different purposes and did not understand the two terms to be coextensive. Unlike felonies, which may be designated by statute, the scope of offenses that are "infamous" is fixed by the Constitution itself. Put differently, the determination of whether an offense is infamous—upon which the right to vote rests—is not subject to the changing whims of the legislature.

The *Chiodo* plurality set forth a three-part "nascent" test for determining what crimes are infamous within the meaning of the Iowa Constitution: a crime that (1) is "particularly serious," (2) bears a "nexus to preserving the integrity of the election process," and (3) involves an element of "specific criminal intent." *Id.* at 856-57. Mrs. Griffin's offense bears none of those hallmarks. Because she has not been convicted of an infamous crime, and thus remains qualified to register to vote and vote under the Iowa Constitution, this Court should reverse the decision of the District Court below and hold that the Iowa statutes, regulations, forms, and procedures that disqualify Mrs. Griffin from registering to vote and voting constitute a complete denial of her voting and due process rights under the Iowa Constitution.

This case also offers this Court the opportunity to define with precision exactly which offenses fall within the meaning of the term "infamous crime" as used in Article II. The *Chiodo* plurality opinion described three possible standards for understanding the scope of the Infamous Crimes Clause, each of which could form the basis for a categorical bright-line rule defining the term "infamous crime": (1) offenses that are an affront to democratic governance; (2) *crimen falsi*; and (3) crimes of moral turpitude. *See id.* at 856. While the "Affront to Democratic Governance" standard best comports with the text, structure, and history of the Iowa Constitution and should be adopted by this Court, Mrs. Griffin's nonviolent drug crime is not an infamous crime under any of the standards. Accordingly, under any application of the *Chiodo* plurality's nascent test, her offense does not disqualify her from voting.

Finally, the district court erred in basing its denial of Mrs. Griffin's request for protection of her fundamental right to vote under the Iowa Constitution in part on policy grounds related to the ease of election administration and asserted logistical difficulties for the Court to determine which crimes are infamous. The assurance of constitutional rights does not depend on ease of administration. Moreover, the district court's speculation about administrative difficulties is belied by the experience of 48 states that do not permanently disenfranchise citizens based on a single conviction of any felony offense.

In sum, the right to vote is the most fundamental right in our democracy. The qualifications for its exercise may not be altered by the legislature. But the District Court's decision in this case grants the legislature authority to narrow the pool of Iowans who are qualified to vote at any time, simply by changing the statutory classification of a crime from a misdemeanor to a felony, or, as it steadily has done since the adoption of this state's 1857 Constitution, by inventing new felony offenses altogether. That position is inconsistent with the Constitution, which limits the grounds for criminal disenfranchisement to a fixed category of infamous offenses that is narrower than simply "all crimes currently designated by the legislature as felonies." The judgment of the District Court should be reversed.

## I. THE DISTRICT COURT ERRED IN FINDING THAT MRS. GRIFFIN WAS CONVICTED OF AN "INFAMOUS CRIME."

### A. Standard of Review

This Court reviews summary judgment decisions on the constitutional claims de novo. *Homan v. Branstad*, 812 N.W.2d 623, 628-29 (Iowa 2012); *Chiodo*, 846 N.W.2d at 848.

### B. Preservation of Error

Mrs. Griffin preserved error on her claim that her conviction of delivery of 100 grams or less of Cocaine was not an infamous crime. (Dist. Ct. Order at

11, Sept. 25, 2015; First Am. Pet. for Declaratory J. and Suppl. Inj. and Mandamus Relief at 16, 19, Feb. 26, 2015; App. ___.)

### C. The Iowa Constitution Only Disqualifies Those Convicted of an "Infamous Crime" from Voting, Not Any and All Crimes Classified by the Legislature as Felonies.

The Iowa Constitution assures the right of suffrage to every citizen of the United States who is 21 years of age[7] and an Iowa resident. Iowa Const. art. II, § 1. As this Court recently elucidated in *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845 (Iowa 2014), the right to vote is the foundation of citizenship and participation in our democratic society:

> 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)].

*Id.* at 848 (Iowa 2014) (Cady, C.J., for the plurality).

The legislature lacks authority to alter the qualifications for voting set forth in the Constitution. *See Coggeshall v. City of Des Moines*, 117 N.W. 309, 311-12 (Iowa 1908); *see Chiodo*, 846 N.W.2d at 855 (Cady, C.J., for the plurality); *see*

[7] The Twenty-Sixth Amendment to the U.S. Constitution extends the right to vote to those aged eighteen or older. U.S. Const. amend. XXVI.

*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."). It is for this Court, not the legislature, to interpret Article II's meaning. *Chiodo*, 846 N.W.2d at 853; *see generally Varnum v. Brien*, 763 N.W.2d 862, 875 (Iowa 2009). The only grounds for disenfranchisement in Iowa are set forth in the Constitution itself, which 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.

**i. The nature of the crime and not its potential punishment determines whether it is "infamous" under Article II.**

In *Chiodo*, the Court was asked to decide whether a candidate for the Iowa Senate was disqualified from running for office on account of his conviction of second offense operating while intoxicated (OWI), an aggravated misdemeanor. 846 N.W.2d at 847-48. The Court, for the first time, engaged in a historical and "textual analysis of the meaning of 'infamous crime' in article II, section 5." *Id.* at 851. A majority of this Court 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. *Id.* at 857 (Cady, C.J., for the plurality), 863 (Mansfield, J., specially concurring).

In so holding, this Court abandoned the reasoning of three cases dating back nearly 100 years that incorrectly and over-broadly interpreted the Infamous Crimes Clause as disqualifying persons to vote for a conviction of "any crime punishable by imprisonment in the penitentiary," a term encompassing all crimes classified by the Iowa legislature as felonies as well as aggravated misdemeanors. *Chiodo*, 846 N.W.2d at 850-52 (citing *State ex rel. Dean v. Haubrich*, 83 N.W.2d 451, 452 (Iowa 1957); *Blodgett v. Clarke*, 159 N.W. 243, 244 (Iowa 1916) (per curiam); *Flannagan v. Jepson*, 158 N.W. 641, 643-44 (Iowa 1916)).

Thus, while the federal courts (followed by some state courts) have interpreted "infamous crime" according to the potential punishment imposed for that crime, *see, e.g.*, *Ex parte Wilson*, 114 U.S. 417 (1885), Iowa has now joined 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, and not on the penalty assigned to the crime by the legislature, 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 A Double Test for Infamous Crimes*, 24 Wash. & Lee. L. Rev. 145, 148 (1967) (citing *Cty. of Schuylkill v. Copley*, 67 Pa. 386, 390-91 (Pa. 1871); *Butler v. Wentworth*, 24 A. 456 (Me. 1891)).

**ii. The term "Infamous Crime" cannot be coextensive with "Felony," because the Legislature lacks constitutional authority to define the qualifications of voters.**

The statutes, regulations, and practices challenged by Mrs. Griffin as unconstitutional in this case treat the term "infamous crime" as coextensive with "felony," meaning that all crimes currently designated by the legislature as felonies are treated as permanently disenfranchising. *See* Iowa Code § 39.3(8) (2015); Iowa Code § 48A.6(1) (2015); Iowa Code § 48A.14(1)(e) (2015); Iowa Code § 48A.30(1)(d) (2015); Iowa Code § 49.79(2)(f) (2015); *see also* State of Iowa Official Voter Registration Form (revised Apr. 9, 2014), http://tinyurl.com/hyy4uzu (requiring registrants to aver under penalty of perjury "I have not been convicted of a felony (or I have received a restoration of rights).").

As the *Chiodo* plurality explained, however, the terms "felony" and "infamous crime" as employed in Article II are not in fact synonymous, as the term "infamous crime" has a fixed definition that is narrower than "all felony crimes." *See Chiodo*, 846 N.W.2d at 853 (Cady, C.J., for the plurality) ("A review of article II of our constitution reveals the framers clearly understood that an 'infamous crime' and a 'felony' had different meanings."). Like the particular

penalty associated with a crime, whether or not a particular offense is a felony is subject entirely to the whims of the legislature, and is in constant political flux. As a result, if the Constitutional prohibition on legislative alterations to the qualifications to voting is to have any force, the term "infamous crime" cannot be coextensive with felony.

Nowhere is judicial protection for constitutional rights in Iowa more important than in the voting arena. Permitting the legislature to tinker with the definition of "infamous crime" essentially would empower the legislature to exclude entire classes of electors from holding their legislators accountable through the election process. The legislature could alter the qualifications for voting simply by designating certain crimes as felonies. Once it is accepted that the legislature is not authorized to alter the qualifications for voting, it follows that the term "infamous crime" must have a fixed meaning unalterable by statute, and that the legislature cannot disqualify voters based simply on its ever-changing statutory designations of crimes as felonies.[8] As a consequence,

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[8] 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 of crimes under state law that are identical in nature of offense but categorized as either felonies or misdemeanors based on incidence of offense include second offense operating while intoxicated (OWI) (as in *Chiodo*), which is not disqualifying, while third offense OWI leads to lifetime disenfranchisement. Iowa Code § 321J.2(2) (2015). Similarly, state law classifies theft crimes as either felonies or misdemeanors based only on negligible differences in value, as theft of property valued at $1000 is not disqualifying, while theft of property

the statutes, regulations and practices that treat all felonies are permanently disenfranchising are inconsistent with Article II of the Iowa Constitution.

#### iii. The text, structure, and history of the Iowa Constitution confirm that "Infamous Crime" is defined more narrowly than all crimes classified as felonies.

The *Chiodo* plurality's recognition that whether a crime is infamous depends on the nature of the crime itself, and not on the potential punishment assigned to it by the legislature, follows from an analysis of the text, structure, and history of Article II.

First, as a textual and structural matter, the terms "infamous crime" and "felony" are used separately in the Iowa Constitution for different purposes, indicating that they have different meanings. *See Chiodo*, 846 N.W.2d at 853 (Cady, C.J., for the plurality) ("A review of article II of our constitution reveals the framers clearly understood that an 'infamous crime' and a 'felony' had different meanings."). As the plurality noted, section 5 of Article II refers to "infamous crimes," disqualifying electors convicted of such offenses. Iowa Const. art. II, § 5. Section 2 of Article II, however, refers specifically to felony offenses, privileging from arrest electors going to or coming from the polls "in all cases except treason, *felony*, or breach of the peace." Iowa Const. art. II, § 2 (emphasis added). Similarly, section 11 of Article III also specifically refers to

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valued at a single penny more strips a person of their voting rights. Iowa Code § 714.2 (2015).

felonies, privileging legislators from arrest during session "in all cases, except treason, *felony*, or breach of the peace." Iowa Const. art. III, § 11 (emphasis added). The fact that the framers used "infamous crime" in one section of the Constitution, and "felony" in two other sections evidences their intent that the two terms have distinct meanings. "If the drafters intended the two concepts ["infamous crime" and "felony"] to be coextensive, different words would not have been used." *Chiodo*, 846 N.W.2d at 853. Thus, "the legislature's decision to define an 'infamous crime' as a 'felony' cannot stand alone to define the constitutional meaning of 'infamous crime' because the two terms unquestionably have different meanings." *Id.*

The history of the Iowa Constitution also demonstrates that the terms have different meanings, and that the founders intended to deprive the legislature of the ability to define the scope of "infamous crimes." *Chiodo*, 846 N.W.2d at 855. The proposed 1844 Iowa Constitution would have expressly granted the legislature authority to determine the range of electors who could be disenfranchised by virtue of a criminal conviction, disqualifying as electors all those who were "declared infamous *by an act of the legislature*." *Id.* (quoting Iowa Const. art. III, § 5 (1844) (proposed) (emphasis added)). Primarily due to a disagreement with the federal Congress regarding the state's proposed northern border, however, the 1844 proposed Constitution was never approved by the voters for adoption. Benjamin F. Shambaugh, *History of the*

*Constitutions of Iowa* 244-45, 255, 265-71; 279-83 (1902). ) Notably, the 1846 Iowa Constitution, which was adopted, specifically deleted this grant of power to the legislature to declare a crime "infamous," instead stating simply that "[n]o idiot, or insane person, or persons convicted of any infamous crime, shall be entitled to the privileges of an elector." Iowa Const. art. III, § 5 (1846), http://tinyurl.com/jqlb64e. That change indicates that the framers sought to deprive the legislature of any authority to determine what is "infamous," instead vesting the definition of "infamous crime" in the Constitution itself. *See Chiodo*, 846 N.W.2d at 855.

This reading of the 1846 Constitution—that the founders intended to deprive the legislature of the power to remove citizens' voting rights—is consistent with historical evidence suggesting the 1846 convention was influenced by "radically egalitarian and inclusive voices." *Id.* (citing Benjamin F. Shambaugh, *History of the Constitutions of Iowa* 301 (1902). And, critically, in adopting the current Iowa Constitution in 1857, the founders employed the same language, maintaining a fixed constitutional definition of infamous crime, rather than committing to the legislature the authority to declare any offense infamous. *Chiodo*, 846 N.W.2d at 855. Furthermore, as the *Chiodo* plurality elucidated, the founders were not operating in a vacuum: while the 1851 Indiana Constitution vested this authority in its legislature, our founders, aware of the Indiana Constitution, decidedly rejected that formulation. *Id.*

Therefore, there are two distinct categories of felonies as relating to the right to vote under the Iowa Constitution: those that are infamous crimes serving to disqualify a voter, and all the remaining felonies, which are not infamous crimes and therefore do not disqualify a voter.

### D. Mrs. Griffin's Offense is Not Infamous Under Any of the Three Common Law Standards for Defining "Infamous Crime" Set Forth by the *Chiodo* Plurality.

In examining the Infamous Crimes Clause in light of its text, placement, and historical purpose, the *Chiodo* plurality outlined 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 (Cady, C.J., for the plurality). 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 856-57 (Cady, C.J., for the plurality) 860 (Mansfield, J., specially concurring);

(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.* at 856, 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.*[9]

[9] Although the test is articulated most simply in three parts, the plurality may have intended the third element, requiring specific criminal intent, as a subcategory of the first requirement that the crime be particularly serious or the

The opinion indicates that all three requirements of an infamous crime must be met in order to deprive a person of their rights as an elector. *See Chiodo*, 846 N.W.2d at 856 (Cady, C.J., for the plurality) ("[T]he 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 *Chiodo* plurality left for another day the task of articulating a more precise test to determine which crimes are infamous under the Iowa Constitution, and specifically declined to decide at that time 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 Court outlined the three possible standards that have been employed by courts in other states to determine which felonies belong to the

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second requirement that the crime have a nexus to voting and elections. Mrs. Griffin's analysis herein applies equally to either formulation of the test.

category of infamous crimes, without deciding which of these three is consistent with Article II:

(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, includes other particularly heinous offenses such as arson, rape, and murder.

Having been convicted of a nonviolent drug offense classified as a felony, Mrs. Griffin's case presents this Court for the first time with an opportunity "to better understand the needed contours of the test." *Chiodo*, 846 N.W.2d at 857. The resolution of Mrs. Griffin's case poses two constitutional

questions that only the Iowa Supreme Court can decide: (a) which of the three standards described above is the appropriate formulation for understanding which felonies are "infamous" under Article II; and (b) whether Mrs. Griffin's nonviolent drug crime belongs to that category of felonies that are infamous or, instead, if it belongs to the larger category of felonies that are not infamous.

These questions are addressed below. Regardless of which test the Court adopts to define "infamous crime," however, Mrs. Griffin's offense of delivery of less than 100 grams of cocaine clearly does not qualify as infamous under Article II, section 5. Ultimately, like OWI (second offense), the crime at issue in *Chiodo*, nonviolent 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." As explained below, this is true under any of the *Chiodo* plurality's three possible standards for defining the scope of infamous crimes.

**i. The term "Infamous Crime" should be understood as encompassing only those offenses that are an "Affront to Democratic Governance," which excludes Mrs. Griffin's offense.**

**1. The "Affront to Democratic Governance" standard best comports with The Iowa Constitution.**

The "affront to democratic governance" approach is consistent with Iowa's constitutional text, jurisprudence, and history. *See Chiodo*, 846 N.W.2d at 854-56 (Cady, C.J., for the plurality). This test defines the term "infamous crime" 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 directly undermine our constitutional government, such as treason, perjury, and elections fraud.

This approach 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, 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 (Cady, C.J., for the plurality); *Snyder*, 958 N.W.2d at 774-75; Ind. Const. art. II, § 8 ("The [Indiana] General Assembly shall have power to deprive of the right of suffrage, and to render ineligible, any person convicted of an infamous crime."). The Indiana Supreme Court found that the Indiana Constitution's infamous crimes provision was a regulatory measure 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.

*Id.* at 782 (citation omitted); *see also Otsuka v. Hite*, 414 P.2d 412, 422 (Cal. 1966) (en banc) ("[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.").

Ample evidence indicates that the term "infamous crime" should be defined narrowly as encompassing only those offenses that are an affront to democratic governance. First, as the *Chiodo* plurality explained, Article II, section 5 of the Iowa Constitution, like Indiana's similar and contemporary provision, was not designed as a punitive measure for punishing the "worst" or most serious criminal offenders, but rather as a regulatory measure to protect the sanctity of the democratic process. *See Chiodo*, 846 N.W.2d at 855-56 (Cady,

C.J., for the plurality) ("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.'" (citation omitted)). Given the regulatory purpose of the Infamous Crimes Clause, a narrow definition limited only to those offenses directly related to the democratic process is appropriate in construing Article II, rather than a broader one that seeks to capture and punish all "serious" offenders.

History confirms this regulatory understanding of the term "infamous crime." The 1851 Code of Iowa[10]—which was the first law the state adopted after ratifying the 1846 Constitution, and which was still the law of the land when the 1857 Constitution was drafted—conceived of infamous crimes in relation to the integrity of democratic governance, and not in relation to the particular penalty associated with an offense. In at least two places, the legislature went out of its way to state that certain crimes punishable by a year or more of imprisonment in the penitentiary were *also* grounds for disqualifying the individual from holding public office in the future. Chapter 140, entitled "Larceny, and Receiving Stolen Goods," stated that any officer convicted of embezzling public money "shall be imprisoned in the penitentiary not exceeding five years . . . *and moreover he is forever afterward disqualified from holding*

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

*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, and separately disqualified violators from holding public office. Iowa Code Ch. 142, § 2649 (1851) ("Every person who is convicted under either of the two preceding sections of this chapter shall forever afterward be disqualified from holding any office under the laws or constitution of this state."). Thus, imprisonment in a penitentiary—the distinguishing hallmark for felony offenses at the time—did not result in automatic disqualification from holding public office. Rather, crimes posing an affront to democratic governance were disqualifying.

Transcripts of the 1857 Constitutional Convention Debates[11] 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 during those debates, the framers at times used the term "infamous" in a way that connotes a subversion of a democratic and free system of government. Debates of the Constitutional Convention of the State

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

of Iowa (1857), Vol. I, at 102, and Vol. II, at 907 (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, and described slavery as "infamous" in that it is incompatible with the principle of equality of all people that underpins democracy.); Vol. II, at 652 (James F. Wilson described the exclusion of African Americans from the right to vote as "infamous"); *id.* at 1041 (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.)

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 idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector." California Const. art. II, § 5 (1849) (repealed), http://tinyurl.com/juwmtp8.[12] In *Otsuka*, the California Supreme Court

[12] That language was changed in 1974. *See Ramirez v. Brown*, 528 P.2d 378 (Cal. 1974) (en banc) (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).

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." 414 P.2d at 414; *see also* Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 324 (Table A.7, Suffrage Exclusions for Criminal Offenses: 1790-1857) (rev. 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.* (emphases 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.

### 2. Mrs. Griffin's crime is not infamous under the Affront to Democratic Governance test.

Under the Affront to Democratic Governance standard, Mrs. Griffin's offense of drug delivery is clearly not infamous. While Mrs. Griffin's low-level 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.

Her offense is very different in kind from the infamous crimes identified in *Snyder*, such as treason, perjury, malicious prosecution, and election fraud. 958 N.E.2d at 782. Nor does it share the elements of those crimes classified as infamous by the early Iowa statutes, such as bribery by or of public officials, perjury, or embezzlement by a public official. The nature of her 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. Therefore, under the Affront to Democratic Governance standard, Mrs. Griffin remains a qualified voter under Article II, section 5.

### ii. Even if the Court were to adopt the *Crimen Falsi* standard, Mrs. Griffin's offense is not infamous.

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 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 embezzlement or criminal fraud. As explained below, this is not the appropriate standard for understanding the term "infamous crime" under Article II; nevertheless, even if this Court were to adopt the *Crimen Falsi* standard, Mrs. Griffin's offense would not qualify as infamous.

#### 1. The *Crimen Falsi* standard is not the appropriate standard for defining infamous crimes.

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'[s] propensity to testify truthfully.'" *State v. O'Neal*, 822 N.W.2d 745, 2012 WL 4513809, at *5 (Iowa Ct. App. Oct. 3, 2012) (unpublished) (quoting Black's Law Dictionary 335 (5th ed. 1979)); *see also State v. Harrington*, 800 N.W.2d 46, 51 n.4 (Iowa 2011).

Several states, such as Pennsylvania and Arkansas, employ this standard. *See, e.g.*, *Baldwin v. Richard*, 751 A.2d at 651-52 (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).

In oral arguments on cross motions for summary judgment, below, the Appellees argued that the district court should apply the *Crimen Falsi* standard to the definition of the Infamous Crimes Clause. (Hr'g on Mots. for Summ. J. Tr. at 29-30, Aug. 6, 2015; App. ___.) The Respondents cited two early cases, *Palmer v. Cedar Rapids & M.C. Ry. Co.*, 85 N.W. 756 (Iowa 1901) and *Carter v. Cavenaugh*, 1 Greene 171 (Iowa 1848), for the proposition that the definition of "infamous crime" as it was used to impeach a witness in the 1840s and 1900s should govern the Court's understanding of Article II's Infamous Crimes Clause as it pertains to voting rights. While both cases are interesting in tracking the development of the *Crimen Falsi* common law evidentiary standard

to determine witness credibility, neither case is relevant to the question of the Infamous Crimes Clause as it regulates voting specifically, nor sheds light on the intent of the framers in crafting Article II. Indeed, there is nothing in the text or history of the Iowa Constitution that provides any indication that the framers intended the Infamous Crimes Clause to embody a *Crimen Falsi* standard.

The *Crimen Falsi* standard does not comport with the nascent test for infamy outlined by the *Chiodo* plurality for several reasons. First, not all crimes merely involving an element dishonesty have a "nexus to preserving the integrity of the election process," as many have nothing to do with government or civic life whatsoever. *Chiodo*, 846 N.W.2d at 857 (Cady, C.J., for the plurality). Moreover, many offenses falling within the category of *crimen falsi* are minor or petty crimes that are not "particularly serious," as required by the *Chiodo* plurality's nascent test for defining infamy. *Chiodo*, 846 N.W.2d at 856 (Cady, C.J., for the plurality). Lifetime disenfranchisement for a single offense, as prescribed by Article II for infamous crimes, is grossly disproportionate to the commission of a single offense that could be defined as a *crimen falsi*. The Iowa Rules of Evidence, for example, allow for the impeachment of a witness based on crimes of dishonesty, *see* Iowa R. Evid. 5.609(*a*); *State v. Dudley*, 856 N.W.2d 668 (Iowa 2014), but only if the offense was committed within the last ten years, *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). If a crime of dishonesty is insufficient to taint a person's ability to testify beyond ten years, it is difficult to see how such an offense should constitute grounds for permanent revocation of the most fundamental right of citizenship.

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) (the right to vote is automatically restored after completion of the term of imprisonment in Pennsylvania), *aff'd*, 783 A.2d 763 (Pa. 2001) (per curiam); 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 for good reasons: permanent expulsion from the democratic process is grossly disproportionate for an offenses that are not particularly serious, and is entirely unnecessary to maintain the integrity of elections for crime like larceny.

**2. Mrs. Griffin's offense is not infamous under the *Crimen Falsi* standard.**

Nevertheless, even if the Court were to adopt the *Crimen Falsi* standard for defining the scope of the Infamous Crimes Clause, Mrs. Griffin's offense is not infamous. A nonviolent drug crime, such as Mrs. Griffin's, clearly does not

constitute a *crimen falsi*, because it does not include an element of a specific intent to deceive or consist of a crime of dishonesty in the general sense. *See Dudley*, 856 N.W.2d at 681 (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. Mrs. Griffin's offense, however, is not a specific intent crime as required to meet the *Chiodo* plurality's nascent test. Delivery of 100 grams or less of cocaine, in violation of Iowa Code § 124.401(1)(c)(2)(b), is a general intent crime[13] that does not require the state to prove any intent beyond the delivery itself.[14] (Stip. App. on Summ. J. Ex. 3; App. ___.)

**iii. Even if the Court were to adopt the Moral Turpitude standard, Mrs. Griffin's offense is not infamous.**

The third standard identified by the *Chiodo* plurality treats crimes marked by "great moral turpitude" as infamous. *Chiodo*, 846 N.W.2d at 856 (quoting

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[13] *Eggman v. Scurr*, 311 N.W.2d 77, 79 (Iowa 1981) ("[O]ffenses which have no express intent elements may be characterized as general intent crimes.").

[14] 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."). 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.

*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." Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 Utah L. Rev. 1001, 1006 (2012)); *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)). As explained below, the Court should not adopt this standard, but even if it were to do so, such a standard would exclude Mrs. Griffin's offense.

**1. 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.**

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 & Conduct 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 (citation omitted), 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. of 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); *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).

A ruling adopting the "Moral Turpitude" standard for defining infamous crime would be inappropriate for two reasons. First, it is inconsistent with the text and history of the Iowa Constitution. Second, the notion of "moral turpitude" is 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 used the terms "infamous

crime" and "moral turpitude" in separate places,[15] showing that Iowa lawmakers at the time understood these two terms to represent separate and distinct legal concepts. *See* Iowa Code Ch. 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 Ch. 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 of a misdemeanor involving moral turpitude"[16]). This language used in the 1851 Code—distinguishing felonies and crimes of moral turpitude—was adopted wholesale in the Iowa Code of 1860,[17] the first code written after the 1857 constitutional convention. *See* Iowa Code Ch. 37, § 569(3) (1860); Ch. 114, § 2711(1) (1860).

In Iowa, the terms "infamous crime" and crime of "moral turpitude" signify different concepts that serve different functions. As noted above, in Iowa, the concept of infamy evolved in relation to a person's ability to participate in the democratic process. The concept of moral turpitude, however, evolved in Iowa not in the context of regulating voting, but, like in

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

[16] This text further illustrates why the terms "crime of moral turpitude" and "infamous crime" 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., specially concurring).

[17] The 1860 Code of Iowa is available at http://tinyurl.com/p48ngaf.

many other states, as a way for defining the scope of serious offenses for which a wrongful accusation amounted to *per se* slander. *See* Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 Utah L. Rev. 1001, 1002, 1018 (2012). Indeed, the Iowa Supreme Court applied the concept of moral turpitude in precisely that manner 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.).

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 to disenfranchise only 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 Cty.*, 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*, 863 N.W.2d 644, 660 (Iowa 2015) ("The legislature's use of distinct terms . . . manifests its intent that these participants serve different functions.").

The sparse historical evidence that could be construed as supporting a Moral Turpitude approach to the Infamous Crimes Clause is ultimately

unpersuasive. For example, a Moral Turpitude standard for defining infamous crime could be characterized as broadly consistent with a statute adopted by the 1839 territorial legislature. *See Chiodo*, 846 N.W.2d at 854-55 (Cady, C.J., for the plurality).[18] 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."[19] *Chiodo*, 846 N.W.2d at 854-55. More significant than the statute itself for

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[18] The statute provided:

> 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.

*Chiodo*, 846 N.W.2d at 854 (alteration in original) (quoting The Statute Laws of the Territory of Iowa, Code of Criminal Jurisprudence, Tenth Div., § 109, at 182 (1839)).

[19] The 1839 Territorial Law does, however, support the finding 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. *Compare* The Statute Laws of the Territory of Iowa, Code of Criminal Jurisprudence, 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 a second time).

understanding Article II is that it had been abandoned by the time of the 1857 Constitutional Convention.

Second, laws that disenfranchise citizens based on crimes of moral turpitude are tainted with a history of racial discrimination, at the ballot box and beyond, and are incompatible with an approach to disenfranchisement that is limited to protecting integrity of the democratic process, such as that embodied in Article II. Although some states adopted a Moral Turpitude standard for disqualifying voters, this did not occur until a generation after the Iowa Constitution was written, and was done by Southern states for the impermissible purpose of barring African Americans from voting. Georgia was the first state to disenfranchise citizens convicted of crimes of moral turpitude, but did not do so until in 1877. Ga. Const. of 1877, art. II, § 2, para. 1 (disqualifying individuals convicted "of any crime involving moral turpitude"), http://tinyurl.com/jakn5m2. Alabama followed suit, but not until 1901. Ala. Const. of 1901, art. VIII, § 182, http://tinyurl.com/ztjnopr. 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, 227 (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.

**2. Mrs. Griffin's offense is not infamous under the Crime of Moral Turpitude standard.**

For the reasons stated, 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 crime" 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 (Cady, C.J., for the plurality), 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, for example, were considered heinous under the 1839 code in Iowa, such as rape, kidnapping, and arson. Indeed, drug delivery was not even a criminal offense in the nineteenth century, let alone among the most heinous.

While the district court failed to adopt any test to define infamous crime other than the statutory definition it upheld, it erred in impliedly adopting something akin to a moral turpitude by asserting Mrs. Griffin's nonviolent drug crime was somehow similar to crimes of violence or participation in terrorism. (Hr'g on Mots. for Summ. J. Tr. at 17-18, Aug. 6, 2015; App. ___; Dist. Ct. Order at 13, Sept. 25, 2015; App. ___.) Mrs. Griffin's low level drug delivery

offense involved no element of violence; it was not particularly serious—indeed, by way of illustration she was given a sentence of probation for her offense and served no prison time—and has absolutely no nexus or specific criminal intent related to showing an 'evil mind' or unredeemable character.

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 & 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. Therefore, Mrs. Griffin has not been convicted of an infamous crime under any of the constitutional definitions.

## II. BECAUSE MRS. GRIFFIN WAS NOT CONVICTED OF AN "INFAMOUS CRIME," IOWA LAW DISQUALIFYING HER FROM REGISTERING TO VOTE AND VOTING IS A COMPLETE DEPRIVATION OF HER STATE CONSTITUTIONAL RIGHT TO VOTE WITHOUT ANY VALID JUSTIFICATION.

### A. Standard of Review

The standard of review is de novo. *Homan*, 812 N.W.2d at 628-29; *Chiodo*, 846 N.W.2d at 848.

### B. Preservation of Error

Mrs. Griffin preserved error on her state constitutional voting rights claim. (Dist. Ct. Order at 5, 14, Sept. 25, 2015; First Am. Pet. for Declaratory J. and Suppl. Inj. and Mandamus Relief at 8-16, Feb. 26, 2015; App. ___.)

### C. Iowa Statutes, Regulations, Practices, and Forms That Disqualify All Iowans With Felony Convictions Deprive Mrs. Griffin of Her State Constitutional Right to Vote.

Iowa Code Sections 39.3(8), 43.18(9), 48A.6(1), 48A.14(1)(e), 48A.30(1)(d), 49.79(2)(f), 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 felony offense that is not an infamous crime from voting, they are unconstitutional as applied. 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, the Respondents-Appellees' enforcement of Iowa's statutes, regulations, practices, and forms to prohibit Mrs. Griffin from exercising the franchise unconstitutionally deprives her of her right to vote beyond a reasonable doubt.

"[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 852-53 (citing *Coggeshall*, 117 N.W. at 311); *see also Coggeshall*, 117 N.W. at 312 ("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 . . .").

"[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 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 342 (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. *Id.* ("[B]ecause 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.")

Once it is clear that Mrs. Griffin's underlying offense does not serve to disenfranchise her pursuant to the Iowa 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 Devine*, 268 N.W.2d at 623; *Chiodo*, 846 N.W.2d at 856. 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 Section 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.

## III. BECAUSE MRS. GRIFFIN WAS NOT CONVICTED OF AN "INFAMOUS CRIME," IOWA LAW DISQUALIFYING HER FROM REGISTERING TO VOTE AND VOTING VIOLATES HER RIGHT TO SUBSTANTIVE DUE PROCESS UNDER THE IOWA CONSTITUTION.

### A. Standard of Review

The standard of review is de novo. *Homan*, 812 N.W.2d at 628-29; *Chiodo*, 846 N.W.2d at 848.

### B. Preservation of Error

Mrs. Griffin preserved error on her state constitutional due process claim. (Dist. Ct. Order at 14, 17, Sept. 25, 2015; First Am. Pet. for Declaratory J. and Suppl. Inj. and Mandamus Relief at 16-18, Feb. 26, 2015; App. ___.)

### C. Iowa Statutes, Regulations, Practices, and Forms That Disqualify All Iowans With Felony Convictions Deprive Mrs. Griffin of State Constitutional Due Process.

While the district court was not required even to reach the issue of the acceptability of the process of applying to have one's right to vote restored under Executive Order 70 once it had determined to uphold the statutes

disqualifying all people with felony convictions, it erred in dramatic fashion in finding this process was narrowly tailored to accomplish a compelling governmental interest, an argument the Respondent never even asserted. (Dist. Ct. Order at 17, Sept. 25, 2015; App. ___.)

The Respondents-Appellees' denial of Mrs. Griffin's fundamental right to vote is also a violation of her substantive rights of due process under the Iowa 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, 92-93 (Iowa 2007); *State v. Krier*, 772 N.W.2d 270, 2009 WL 2184825, at *4 (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 re J.L., L.R., & 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).

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. 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).

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 from 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. (Stip. App. on Summ. J. Exs. 4, 5; App. ___.) The application 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, as well as 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. (Stip. App. on Summ. J. Exs. 6-8;

App. ___.) Thus, in addition to financial costs, 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 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: of the estimated 25,000 Iowans who discharged their sentences between 2011 and 2013, only 40 regained their voting rights. *See* Foley, *Iowa governor restores more felons' voting rights*, http://tinyurl.com/ob2qkkn.

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 Mrs. Griffin.

## IV. THE DISTRICT COURT ERRED IN DENYING MRS. GRIFFIN RELIEF FOR VIOLATIONS OF HER FUNDAMENTAL CONSTITUTIONAL RIGHTS ON ERRONEOUS AND IRRELEVANT POLICY GROUNDS.

### A. Standard of Review

This Court reviews summary judgment decisions on the constitutional claims de novo. *Homan*, 812 N.W.2d at 628-29; *Chiodo*, 846 N.W.2d at 848.

### B. Preservation of Error

Mrs. Griffin preserved error on the inability of the district court to permit constitutional violations of fundamental rights on policy grounds related to ease of governmental administration. (Dist. Ct. Order at 13-14, Sept. 25, 2015; Pet'r's Br. in Supp. of Resistance to Resp'ts' Mot. for Summ. J. at 13, June 29, 2015; App. ___.)

### C. Administrability Concerns Do Not Trump Constitutional Rights, Nor Are They Inevitable or Insurmountable.

The District Court erred in basing its denial of Mrs. Griffin's Petition in part on policy grounds related to asserted logistical difficulties in properly construing her fundamental right to vote under the Iowa Constitution. (Dist. Ct. Order at 13-14, Sept. 25, 2015; App. ___.) No authority supports the proposition that constitutional requirements can be set aside because of possible—not even proven—logistical or administrability problems. The District Court cannot, as it did, adopt a definition of infamy that is contrary to

the Constitution simply to ease election administration, as clearly stated by the *Chiodo* plurality opinion:

> If the words of the constitution do not support a bright-line rule, neither can we. Additionally, we recognize that we are dealing with a constitutional provision that disqualifies persons from voting. Ease of application does not justify a rule that disenfranchises otherwise eligible voters.

*Chiodo*, 846 N.W.2d at 853 (Cady, C.J., for the plurality). Nor can a court delegate the power to the legislature to establish new qualifications for voting that conflict with the Iowa Constitution itself, *id.* at 852-53 (citing *Coggeshall*, 117 N.W. at 311), which would be the necessary result of the district court's ruling that any crime classified by the legislature as a felony is "infamous."

The district court also erred in determining that the constitutionally appropriate test for "infamous crime" would necessarily "have to be answered by Iowa courts on a case-by-case, felony-by-felony, basis . . . ." (Dist. Ct. Order at 13, Sept. 25, 2015; App. ___.) Certainly the felony-misdemeanor distinction is a bright line, but it is inconsistent with the Constitution. There are other bases for bright line rules, which the *Chiodo* plurality articulated, and the one that is most consistent with the Iowa Constitution is a clear rule that disqualifies from voting only those individuals who have committed crimes that are an affront to democratic governance. Applying the Affront to Democratic Governance standard, this Court may follow the Indiana Supreme Court's decision in *Snyder*, and identify the specific felony crimes that are infamous

under that standard, such as "treason, perjury, malicious prosecution, and election fraud." *Snyder*, 958 N.E.2d at 782. Any crimes not sharing the elements of those crimes are not infamous. Voter registration forms may simply list those crimes as disqualifying where currently the class of all felony offenses is listed.

Even if the Court adopts one of the other two standards, they can also enable this Court to determine precisely which specific elements of a felony offense must be present for it to be "infamous" according to a bright line. It is not wholly uncommon for states to disenfranchise citizens for an enumerated list of offenses that is narrower than the category of "all felonies," as eight states temporarily or permanently deprive a person of her voting rights depending on the type of crime committed or the frequency of the individual's criminal history: Alabama, Kentucky, Virginia, Tennessee, Mississippi, Wyoming, Arizona, and Nevada. American Civil Liberties Union, *State Criminal Re-enfranchisement Laws (Map)*, http://tinyurl.com/nw45zc7. In addition to a ruling from this Court specifying which kinds of offenses are infamous, there are also simple administrative solutions that would allow for the preservation of fundamental constitutional rights as well as efficient elections administration, such as written guidance from the Attorney General's office to state elections officials, careful adoption of registration forms, and training for county auditors.

In fact, it is the State's current erroneous interpretation of the Infamous Crimes Clause that sows the seeds for confusion: the legislature need only reclassify an offense from a misdemeanor to a felony (or vice versa) to change whether it is disenfranchising. By contrast, a carefully construed and precise definition by this Court will conclusively resolve which crimes are disqualifying, while restoring the voting rights of tens of thousands of Iowans who, like Mrs. Griffin, have been wrongly deprived of their most fundamental right of citizenship.

## CONCLUSION

For the foregoing reasons, Mrs. Griffin respectfully asks this Court to reverse the district court's grant of summary judgment in favor of the Respondents-Appellees below.

## REQUEST FOR ORAL ARGUMENT

The Petitioner-Appellant respectfully requests the opportunity to present oral arguments to the Court in this matter.

Dated: December 8, 2015

Respectfully submitted,

/s/ Rita Bettis

Rita Bettis, AT0011558
ACLU of Iowa
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
Phone: (515) 207-0567

Fax: (515) 243-8506
Email: rita.bettis@aclu-ia.org

Dale E. Ho*
Julie A. Ebenstein*
ACLU Foundation, Inc.
Voting Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2686
Fax: (212) 549-2649
Email: jebenstein@aclu.org
Email: dale.ho@aclu.org

* *Pending Admission Pro Hac Vice*

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I hereby certify that the cost of printing this application was $0.00 and that that amount has been paid in full by the undersigned.

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/s/ Rita Bettis

Rita Bettis, AT0011558
ACLU of Iowa
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
Phone: (515) 207-0567
Fax: (515) 243-8506
Email: rita.bettis@aclu-ia.org