SUPREME COURT NO. _____
POLK COUNTY CASE NO. CVCV047317

IN THE
SUPREME COURT OF IOWA

IN THE MATTER OF OBJECTION TO
ANTHONY BISIGNANO'S CANDIDACY
FOR
IOWA SENATE DISTRICT 17

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE DAVID L. CHRISTENSEN

BRIEF OF *AMICUS CURIAE:* AMERICAN CIVIL LIBERTIES UNION OF IOWA

IN SUPPORT OF STATE ELECTIONS PANEL IN THE OUTCOME, THOUGH NOT THE REASONING, OF ITS DECISION

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CERTIFICATE OF FILING

I, Rita Bettis, hereby certify that I will file eighteen (18) copies of the attached brief with the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, on 4/3/2014.

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I, Rita Bettis, hereby certify that on 4/3/2014, I served a copy of the attached brief on all other parties to this appeal by mailing one (1) copy thereof to the respective counsel for said parties at the following addresses and by E-mail at the following E-mail addresses:

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization made up of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Iowa, founded in 1935, is its statewide affiliate. Together, the two organizations work in the courts and legislature to safeguard the rights of all citizens. The ACLU of Iowa has given priority to cases and advocacy seeking to protect and promote the right to vote. The ACLU of Iowa has been actively involved in advocacy relating to combatting the disenfranchisement of persons convicted of felonies and aggravated misdemeanors, including supporting the power of the Governor in 2005 to issue an executive order automatically restoring the right to vote to persons disqualified from voting by virtue of a criminal conviction and establishing an automatic process for the restoration of the right to vote thereafter; as well as advocacy related to the current Governor's recent decision to require only that criminal debts be current before a person is eligible to apply for restoration of the right to vote, rather than paid in full and striking the requirement that applicants submit a credit report; finally, regarding this immediate issue, the ACLU of Iowa has created and keeps updated a guide to assist Iowans with criminal convictions in applying to restore their right to vote from the Governor.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

This case involves the appeal of the Polk County District Court's decision April 2, 2014 affirming the appellee State Elections Panel ("Panel") in finding that Mr. Bisignano was not disqualified from running for State Senate District 17 on March 21, 2014. *Chiodo v. Section 43.22 Panel Consisting of: Secretary of State Matthew Schultz, Auditor of State Mary Mosiman, and Attorney General Thomas Miller*, No. CVCV 047317 (Polk Co. D. Ct. Apr. 2, 2014), at 1-2.

Mr. Bisignano pled guilty to OWI second offense in violation of 321J.2 on December 9, 2013, an aggravated misdemeanor. *Chiodo v. Panel* at 2. On March 11, 2014, Mr. Bisignano filed an Affidavit of Candidacy for State Senate in District 17 with the Secretary of State, and soon after, on March 13, 2014, Mr. Chiodo filed an objection to Mr. Bisignano's candidacy pursuant to Iowa Code section 43.24. *Id.* Mr. Chiodo argued that Mr. Bisignano was a disqualified elector on account of conviction of an infamous crime under Article II, section 5 of the Iowa Constitution. *Id.* On March 19, 2014, the Panel held a hearing on the matter, and on March 21, 2014, issued a decision denying Mr. Chiodo's challenge. *Id.*

Mr. Chiodo appealed to the district court, which held a hearing on March 27, 2014, and on April 2, 2014, issued its decision affirming the determination of the Panel. *Id.* The same day, Mr. Chiodo filed an appeal with this Court.

ARGUMENT

I. INTRODUCTION AND BACKGROUND ON EXISTING CASE LAW

The Iowa Constitution provides that persons convicted of infamous crimes are disqualified electors. Iowa Const. Art. II § 5 ("A person ... convicted of any infamous crime shall not be entitled to the privilege of an elector"). On appeal, this Court is asked to uphold or overturn its 1916 and 1957 decisions interpreting the Infamous Crimes Clause of the Iowa Constitution. An independent state constitutional historical review reveals that this Court's prior decisions were in error. Specifically, it is likely that our framers understood infamous crimes to be a category of offenses that is much narrower than all crimes for which punishment in a penitentiary is authorized. Infamous crimes likely denoted only those offenses that revealed the offender to be of such a deceitful, untrustworthy, and unreliable character that he was not suitable to serve as a juror, be a witness in trial, vote, or hold office. Accordingly, this Court should overturn those prior decisions as pertaining to the definition of infamous crime.

In *Flannagan v. Jepson*, 177 Iowa 393, 158 N.W. 641 (Iowa 1916), the Court first defined "infamous crime" outside of the context of Iowa Const. Art. II § 5. In *Flannagan*, the Court found that the district court's imposition of a punishment of imprisonment at hard labor for not more than one year for contempt of a court was unconstitutional under the Fifth Amendment to the U.S. Constitution. *Flannagan*, 158 N.W. at 643-44; U.S. Const. amend. V. Looking only at the federal constitutional

history, the Court cited *Ex Parte Wilson*, 114 U.S. 417 (1885) for the proposition that "a crime, punishable by imprisonment by a term of years at hard labor, is an infamous crime," and "For more than a century, imprisonment at hard labor in the penitentiary has been considered an infamous punishment in England and America." *Flannagan*, 158 N.W. at 643 (quoting from *Ex Parte Wilson)* In *Flannagan,* the Iowa Supreme Court did not decide what "infamous crime" might have meant to the framers of the Iowa constitution.

A few months later, the Iowa Supreme Court decided *Blodgett v. Clarke*, 159 N.W. 243, 177 Iowa 575 (Iowa 1916). In that very short opinion, the Iowa Supreme Court applied the definition adopted in *Flannagan*, again without independent state constitutional inquiry, to the Infamous Crimes clause of the Iowa Constitution:

> To be eligible to an elective office created by the Constitution a person must be a qualified elector. *State v. Van Beek*, 87 Iowa, 54 N.W. 525, 19 L.R.A. 622, 43 Am. St. Rep. 397. Section 5 of article 2 of the Constitution of Iowa declares "that no ... person convicted of any infamous crime shall be entitled to the privilege of an elector." Any crime punishable by imprisonment in the penitentiary is an infamous crime. *Flannagan v. Jepson*, 158 N.W. 641. As the punishment prescribed by statute for forgery is confinement in the penitentiary not more than ten years, the offense is infamous. Section 483, Code.

Blockett v. Clark, 159 N.W. 243, 244 (Iowa 1916).

The next and last time that the Supreme Court considered the Infamous Crimes Clause was in 1957. In *State v. Haubrich*, 83 N.W.2d 451 (Iowa 1957), the Court's analysis focused not on the definition of infamous crime, but on the relationship between the state and federal executives' power to grant reprieves,

commutations, and pardons. *Haubrich*, 83 N.W. at 452-54. Haubrich had been convicted for income tax evasion in violation of federal law and his rights were restored by the Iowa Governor. *Id.* In reciting the facts of the case, the Court reiterated the definition of infamous crime in *Flannagan* and *Blodgett*:

> He was not eligible to vote nor to hold office. Article II, Section 5, Constitution of Iowa, I.C.A. provides: 'No ... person convicted of any infamous crime, shall be entitled to the privileges of an elector.' Any crime punishable by imprisonment in the penitentiary is an infamous crime. *Flannagan v. Jepson*, 177 Iowa 393, 158 N.W. 641, L.R.A. 1918E, 548; *Blockett v. Clarke*, 177 Iowa 575, 159 N.W. 243; 22 C.J.S. Criminal Law § 3; 14 Am. Jur. I.A. § 4.

Haubrich, 83 N.W.2d at 452. Again, the Court did not consider the term on light of its independent state constitutional history.

II. STANDARD OF REVIEW

Here, all parties and *amicus curiae* ask this Court to interpret the Infamous Crimes Clause of the Iowa Constitution. "When a party raises constitutional issues in an agency proceeding, our review is de novo." *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 605 (Iowa 2004).

III. A HISTORICAL ANALYIS SUPPORTS A MUCH NARROWER UNDERSTANDING OF "INFAMOUS CRIMES" THAN THIS COURT HELD IN *FLANNAGAN, BLOCKETT, AND HAUBRICH*

A. Defining Infamous Crime in the Constitutional Debates 1839-1857

When Iowa lawmakers first defined "infamous crime," they did so by reference to the deceitful, untrustworthy nature of the crime, not the length of punishment

attached to the crime. Section 109 of the Iowa Statute Laws of 1839, defining "Persons When Deemed Infamous" states:

> Each and every person in this Territory who may hereafter be convicted of the crime of rape, kidnapping, wilful 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.

Iowa Territory Statute Laws, Tenth Division, Section 109 (1839).

Significantly, this list does not include a number of crimes that were felonies in 1839—including murder. While murder was punishable by death, it was not considered an infamous crime because the nature of the crime did not necessarily render the felon inherently untrustworthy to give testimony. The thread that binds all the crimes in Section 109 together is that lawmakers felt that the very nature of those crimes revealed the person to be so dishonest and debased that they could never again be trusted to give testimony, vote, or hold public office.[1]

While only fragments of the debates at the 1844 and 1846 Conventions remain, they support the proposition that an infamous crime is defined by its nature, not its sentence. While debating banking regulations, a rule was proposed stating that any

[1] This list itself also illustrates the need consider anew what crimes we consider "infamous" so as to warrant civil death. Actions that were once thought legally equivalent to rape and kidnapping are now no longer considered within the realm of activity that can or should be criminalized at all, such as sodomy or "the crime against nature."

stock holder, commission, or officer of a bank that violates any of the rules governing banks "shall be punished by fine and imprisonment in the Penitentiary, *and shall subject the offender to the same disqualifications as conviction for infamous crimes.*" Statement of Mr. Peck, Fragments and Debates of the Iowa Constitutional Conventions of 1844 and 1846, p. 96 (1900) (emphasis added). Were an infamous crime defined by the potential sentence, the words after "Penitentiary" would be superfluous. Further, the fact that the above amendment was adopted reveals that the majority of the delegates concurred with this understanding of the term.[2]

The intent to define infamous crime by its nature is further supported by the eventual text of the 1844 Constitution, which stated "No idiot, or insane person, or persons declared infamous by act of the legislature, shall be entitled to the privileges of an elector." Art. III, § 5 of the Constitution of the State of Iowa as Adopted in Convention, Nov. 1, 1844. This understanding of the term was the basis for the 1846 Constitution, which contained nearly identical language: "No idiot, or insane person, or persons convicted of any infamous crime, shall be entitled to the privileges of an elector." Art II, § 5 of the Iowa Constitution (1846).

When a Constitutional Convention was reformed in 1857 to adopt a new constitution, this language was adopted verbatim. *See* The Debates of the

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[2] Fragments and Debates of the Iowa Constitutional Conventions of 1844 and 1846, p. 96. Of course, it is probable that many if not all of the delegates who voted against the amendment did so for substantive reasons, not because they disagreed with the need to add the words regarding infamous crime. The only objection to the amendment voiced was that this was a question better left to the state legislature. *Id.*

Constitutional Convention of the State of Iowa. Full transcripts of the 1857 Constitutional Convention Debates show that every time Art. II, § 5 was brought before the floor, it was adopted without discussion. The 1857 delegates thus implicitly adopted the definition of infamous crime codified in 1839 and used in drafting the 1844 and 1846 Constitutions.

Digging deeper, the 1851 Code of Iowa was the first law the state adopted after ratifying the 1846 Constitution, and was still the law of the land when the 1857 Constitution was passed. An examination of the 1851 Code reveals that its drafters also believed a crime was not made infamous by the length of its sentence. In at least three places the legislature went out of its way to state that crimes already punishable by a year or more of imprisonment in the penitentiary *further* disqualified the individual from holding public office in the future. Chapter 140, § 2618 states that officers convicted of embezzling pubic money "shall be imprisoned in the penitentiary not exceeding five years and fined in a sum equal to the amount of money embezzled, *and moreover he is forever afterward disqualified from holding any office* under the laws or constitution of this state." Iowa Code Ch. 140 § 2618 (1851) (emphasis added). Likewise, Chapter 142 "Offenses Against Public Justice" creates 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 are punishable by terms of imprisonment of 5 and 10 years, respectively. If infamous crimes were defined by their potential sentence, these crimes would obviously be included. Still,

the legislature went out of its way to state that both crimes carry an additional penalty: "Every person convicted under either of the two proceeding sections of this chapter *shall forever afterward be disqualified from holding any office under the laws of constitution of this state.*" Iowa Code Ch. 142 §2649 (1851) (emphasis added). Like those crimes enumerated in 1839, the 1851 legislatures sought to make it clear that these crimes which revealed a dishonest nature would disqualify a person from voting, testifying, or holding office.

Appellant-Petitioner cites language of J.C. Hall from Des Moines County on February 21, 1857 of the Constitutional Convention to support his argument that "infamous crime" is "linked to imprisonment." Petitioner's Memorandum of Authorities in Support of the Petition for Judicial Review, at 13. Amicus interprets the cited language differently. The language in question is as follows:

> I look upon the amendment as broad enough to cover all the classes I named. Idiots and insane persons are a class of people, and as I understand the gentleman's amendment, it will cover them, as it will persons who have been convicted of infamous crimes, and who may have served their time in the penitentiary.

Id. A plain reading of these words only says that, of the class of persons convicted of infamous crimes, some members of that class may have served their time in the penitentiary. This statement is entirely consistent with the understanding of an infamous crime being defined by its dishonest nature, and thus (as is being discussed here) disqualifying the individual from testifying.

B. Defining Infamous Crimes in the Iowa and Wisconsin Territories Prior to Statehood

A review of which crimes were classified as infamous in the days prior to Iowa's statehood support an interpretation of our Infamous Crimes Clause that excludes all crimes but those that undermine the reliability and trustworthiness of the offender to fulfill the duties of citizenship. The Organic Act for the Territory of Iowa (1838) extended all the same laws, rights, privileges, and immunities as granted to Wisconsin and its inhabitants to Iowa. Act of June 12, 1835, 5 Stats., 235. Chap. XCVI (Sec. 12), at 71. The Organic Act for the Territory of Wisconsin (1836), does not exclude persons convicted of certain crimes from right to vote or run for office, but vests the legislature of the Territory of Wisconsin with the power to define the qualifications of voters for all elections after the first election. Territory of Wisconsin. Acts of April 20, 1836 and June 12, 1838; 5 Stats., 10, 235. Chap. LIV. – An Act establishing the Territorial Government of Wisconsin, at 57. ("the qualifications of voters at all subsequent elections shall be such as shall be determined by the Legislative Assembly"). Resulting legislation passed at the first assembly of the Territory of Wisconsin (1836) include reference to the phrase "infamous crime" three times (republished pursuant to Act of the Legislature of 1967). In all instances, infamous crime is used to indicate untrustworthiness--to practice law and hold office as justice of the peace, serve as a juror, or witness. The words "infamous crime" are also used as distinct from either "felony" or "misdemeanor."

First, the Acts provide for the striking of attorneys admitted to practice law in the Territory on account of "any misdemeanor or infamous crime." Acts No. 24, Sect. 1. page 81-82. Second, the Acts provide for the removal of justices of the peace for conviction of "bribery, perjury or any other infamous crime, or convicted of any willful misdemeanor in office." No. 58 Sec. 17. Pages 311-12. Third, the Acts provide that persons convicted of infamous crimes be disqualified from serving on a jury, along with other persons whose presence on a jury would constitute a conflict, whose presence would necessarily be required elsewhere, who possessed mental or physical infirmity, or whose reliability might reasonably be questioned. No. 73 Sec. 1 pages 432-33. Additionally, the ability to serve on a jury is tied directly to the status of being a qualified elector. *Id.* ("[A]ll person who are qualified electors in this territory, shall be liable to serve as jurors in their respective counties as hereinafter provided . . . [Exceptions] . . . and all person shall be disqualified from serving as jurors who have been convicted of any infamous crime."). No. 73 Sec. 1 pages 432-33.

IV. A TEXTUAL AND STRUCTURAL ANALYSIS SUPPORTS OVERTURNING *FLANNAGAN, BLOCKETT, AND HAUBRICH*

This Court's prior decisions interpreting "infamous crime" to mean any crime punishable by a term of years in a penitentiary functions to equate "infamous crime" with "felony." However, the text of the Iowa Constitution itself makes evident that "infamous crime" is something distinct from "felony." Article II governs the right of

suffrage in our state. While § 5 provides that " A person . . . convicted of any infamous crime shall not be entitled to the privilege of an elector," § 2 provides that "Electors shall, in all cases except treason, *felony*, or breach of the peace, be privileged from arrest on the days of election, during their attendance at such election, going to and returning therefrom." Iowa Const. Art. II. Similarly, Art. III, § 11 makes members of the General Assembly privileged from arrest during the legislative session except for "treason, *felony*, or breach of the peace." Finally, Art. I, § 11 ensures the right of grand jury indictment to that all *felony* offenses. Iowa Const. Art. I §11. Because the framers must be presumed to have used two different terms to mean two different things, it must be true that the definition of infamous crime is not simply that of a felony.

V. OTHER STATE SUPREME COURTS FACED WITH SIMILAR STATE CONSTITUTIONAL PROVISIONS HAVE DEFINED INFAMOUS CRIME ACCORDING TO THE NATURE OF THE CRIME ITSELF, RATHER THAN BY THE CRIME'S PUNISHMENT.

Legal scholarship has established that there is more than one historical 'test' for defining "infamous crime." On the one hand, the federal courts have interpreted "infamous crime" in the manner adopted by the Iowa Supreme Court in *Flannagan* and extended in *Blockett* and *Haubrich*, to wit: as a function of the potential punishment imposed for that crime. On the other hand, state courts have for some time been moving back to the historical test, defining infamous crime by the nature of the crime itself. *See A Double Test for Infamous Crimes,* 24 Wash. & Lee. L. Rev. 145, 145

(1967). In fact, while the U.S. Supreme Court has interpreted infamous crime according to its potential punishment, the scholarship clearly indicates that at common law, the alternative test for infamous crime, that determined by the nature of the offense, that pertained to the retention or deprivation of civil rights. *Id.* at 148 (citing *County of Schuylkill v. Copely*, 67 Pa. 386, 390-91 (Pa. 1871) and *Butler v. Wentworth*, 84 Me. 25, 24 Atl. 456 (Me. 1891)). These cases and their analysis are discussed below.

In *Otsuka v. Hite*, 414 P.2d 412 (Cal. 1966), the California Supreme Court interpreted "infamous crime," which appeared in its state constitution in language very similar to Iowa's, to necessarily "be limited to conviction of crimes involving moral corruption and dishonesty, thereby branding their perpetrator as a threat to the integrity of the elective process." *Id.* at 145. The California language formerly found in art. II, §1 was "no person convicted of any infamous crime...shall ever exercise the privileges of an elector in this State . . . ." *Id.*[3]

The Alabama Supreme Court in 1881 cited the common law test to disqualify a person of a civil right: "The test seems to be, whether the crime shows such depravity in the perpetrator, or such a disposition to pervert public justice in the courts, as

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

creates a violent presumption against his truthfulness under oath." *A Double Test for Infamous Crimes* at 149 n. 25, *citing Sylvester v. State*, 71 Ala. 17, 25 (Al. 1881).

Similarly, the South Carolina Supreme Court "declared that for disqualification of a witness on the basis of conviction of an infamous crime, the crime not only had to encompass falsehood or fraud, but had to be of such character as to reasonably imply that the person convicted was 'devoid of truth and insensible to the obligations of an oath. . . .clearly . . . neither a change in the nature of the punishment, nor the designation of an offense as a felony, alters the moral qualities which must be taken into consideration in determining whether the offense is infamous.'" *A Double Test for Infamous Crimes* at 149, *citing State v. Laboon*, 107 S.C.275, 92 S.E.622 (S.C. 1917).

Three much more recent state Supreme Court decisions interpreting state constitutional infamous crimes provisions are particularly illuminating. In 2000, the Pennsylvania Supreme Court found that convictions of unlawful restraint, terroristic threats, firearms not to be carried without a license, possession of instrument of a crime, and recklessly endangering another person were not infamous crimes within the meaning of the Pennsylvania Constitution. The Court quoted the 1842 Webster's Dictionary defining "infamy" as "that loss of character, or public disgrace, which a convict incurs, and by which he is rendered incapable of being a witness or juror." *Baldwin v. Rirchard*, 751 A.2d 647 (Penn. 2000). In 1842, the Pennsylvania Supreme Court had explained what types of offenses rendered one incompetent to be a witness as infamous as "treason, felony, and every species of the *crimin falsi*--such as forgery,

subordination 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." *Id.*, citing *Commonwealth v. Shaver*, 3 Watts & Serg. 338 (Penn. 1842).

Notably, the dissent points out the problem of automatically including all felony convictions within the ambit of infamous crime:

> Despite the Majority's stated rationale that the definition of "infamous crime" should not be subject to varying interpretations, the Majority nonetheless continues to approve of a rule that includes felonies within the ambit of infamous crimes. However, the legislature can, and frequently does, alter the complement of crimes that constitute felonies. The legislature may change felonies to misdemeanors and vice versa, or indeed, criminalize acts as felonies that were not previously criminal at all. Thus, even under the Majority's reasoning, the crimes that qualify as infamous will continue to change. I think it far better to focus on the nature of the conduct than the legislatively-determined grading of the crime.

Baldwin v. Richard, 751 A.2d 647, 654 n.3 (2000)(J. Castille, concurring and dissenting.)

The Arkansas Supreme Court has recently interpreted its infamous crimes provision to mean any crime involving deceitfulness, untruthfulness, or falsification. *State v. Oldner*, 206 S.W.3d 818, 822. The Arkansas Constitution reads "No person hereafter convicted of embezzlement of public money, forgery, or other infamous crime, shall be eligible to the General Assembly or capable of holding any office or trust or profit in this State." Ark. Const. Art. 5, § 9. The Arkansas Supreme Court specifically rejected the definition of infamous crime that uses duration of punishment

as a test, and specifically rejected the contention that "infamous crimes" includes all felonies or only felonies. *State v. Oldner*, 206 S.W.3d at 822-24 (disqualifying public official from eligibility to hold office in perpetuity for his convictions of abuse of office and witness tampering).

Most recently, the Indiana Supreme Court, in a meticulous opinion tracing the definition of infamous crime back its ancient Greek and Roman origins[4] through the Indiana penal code in 1816, overturned its prior opinions. *Snyder v. King*, 958 N.E.2d 764, 772-73 (Ind. 2011). The prior Indiana decisions, like the 1916 and in 1957 Iowa cases, improperly adopted the U.S. Supreme Court's definition of infamous crime in lieu of an independent state constitutional analysis. *Id.*

The Indiana Constitution reads in relevant part "The General Assembly shall have power to deprive of the right of suffrage, and to render ineligible, any person convicted of an infamous crime." Ind. Const. Art. II, § 8; *Synder v. King*, 958 N.W.2d at 774-75. Much like the Iowa Supreme Court's decisions in *Flannagan, Blockett,* and *Haubrich,* the Indiana opinions that *Synder* overturned with respect to the definition of

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[4] The very idea of imposing various forms of civil death for commission of certain crimes has its roots in Ancient Athenian and Roman Law. In ancient Greece, *atimia* ("without honor or value") conferred complete political death; in classical Rome, similarly, *infamia* ("loss of legal or social standing") was imposed for certain serious crimes. *See* Travis D. Spears, *Civil Death in the Modern World: Criminal Disenfranchisement and the First Amendment*, 7 Crit. Stud. J. 91, 93 (2014). Thereafter in primitive penal systems of the Germanic tribes of Europe and England, "infamy" and "outlawry" resulted in "civil death," barring "appearing in court, voting, making speeches, attending assemblies, and serving in the army. . . . and eventually became part of 'attainder,' the consequences of which were forfeiture of property, corruption of blood, and loss of all civil privileges" *Snyder v. King*, 958 N.E.2d. at 773.

infamous crime were "perfunctory at best and seemingly adopted federal jurisprudence as a matter of course." *Synder* at 777 (Noting, "But, of course, federal constitutional jurisprudence has no binding effect when interpreting the Indiana Constitution. This is particularly so in the present context, given that the [U.S.] Supreme Court's interpretation of the Grand Jury Clause did not occur until 1885, more than 30 years after the Indiana Constitution was adopted."). When the court examined the history and the *purpose* of the Indiana Infamous Crimes Clause, they found that it was a regulatory measure seeking to regulate suffrage and elections so as to preserve the integrity of elections and the democratic system. *Id.* at 781-82 ("In other words, criminal disenfranchisement protects 'the purity of the ballot box.'"). The Indiana Supreme Court found that definition consistent with the Alabama and California Supreme Court decisions cited *supra.*

> 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. These types of crimes are "most vile" in that they undermine the system of government established by our Constitution. Persons committing such crimes may be presumed to pose a bona fide risk to the integrity of elections. An infamous crime may include some felonies and some misdemeanors, but crimes marked by gross moral turpitude *alone* are not sufficient to render a crime infamous for purposes of the Infamous Crimes Clause. . . . Prototypical examples of infamous crimes are treason, perjury, malicious prosecution, and election fraud. . .

Synder v. King, 958 N.E.2d at 782.[5]

[5] Significantly, at various points in the record, each party cites to the Indiana Supreme Court as an acceptable or instructive approach. *See* Brief on Behalf of Intervenor

VI. AN EVOLVING UNDERSTANDING OF THE TERM "INFAMOUS CRIME" SIMILARLY SUPPORTS A NARROWER DEFINITION THAN THIS COURT HAS PREVIOUSLY HELD.

The panel's contention that the legislature possesses the ability to unilaterally redefine constitutional terms and provisions is clearly erroneous. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803); Iowa Const. art. III, § 1; *Iowa-Nebraska Light & Power Co. v. City of Villisca*, 261 N.W. 423, (Iowa 1935) ("One Legislature may not bind a succeeding Legislature, since the power of each is derived from the Constitution, but Legislature may empower one city council to make contract binding on succeeding councils."); *Carlton v. Grimes*, 23 N.W.2d 883 (Iowa 1946); *Varnum v. Brien*, 763 N.W.2d 862, 875 (Iowa 2009) ("A statute inconsistent with the Iowa Constitution must be declared void, even though it may be supported by strong and deep-seated traditional beliefs and popular opinion.") However, the legislature's desire to do so, as well as the panel's action in this case, signify that crimes for which prison is a potential sentence have become, unfortunately, somewhat commonplace, and are not infamous. While the legislature has no power to supersede the Constitution as interpreted by this Court absent the constitutional amendment process as ratified by the People of Iowa, this Court clearly possesses the ability to re-interpret the Infamous Crimes clause in light of contemporary standards so as to best

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Anthony Bisignano, Iowa Dist. Ct. Mar. 31, 2014 at 5 n.1; Panel Decision, Mar. 21, 2014 at 12-13; Brief on Behalf of Petitioner: Memo. of Authorities in Support of the Pet. for Judicial Review, Mar. 26, 2014, at 22-23.

effectuate and give life to the purposes of the constitutional text. *Varnum*, 763 N.W.2d at 876. ("In fulfilling this mandate under the Iowa Constitution, we look to the past and to precedent. We look backwards, not because citizens' rights are constrained to those previously recognized, but because historical constitutional principles provide the framework to define our future as we confront the challenges of today.")

In the last 40 years during the so-called War on Drugs, tremendous resources have been expended to arrest, convict, and incarcerate people for substance abuse and related behaviors. A system of mass incarceration has resulted, which has had an undisputed disparate impact on African Americans and other people of color in Iowa. *See* Heather Schoenfeld, *The Politics of Crime, and Mass Incarceration in the United States,* 15 J. Gender Race & Just. 315 (2012); Dorothy E. Roberts, The Social and Moral Cost of Mass Incarceration in African American Communities, 56 Stan. L. Rev. 1271 (2004); *see also* Mark W. Bennett and Mark Osler, *America's Mass Incarceration: The Hidden Costs,* Minneapolis Star Tribune, June 27, 2013. African Americans comprise 17.3 percent of Iowa's incarcerated population, but less than 3 percent of Iowa's overall population.[6] In fact, the experience of facing serious criminal penalties for crimes pertaining to substance abuse has become so regularized that prior to the July 4, 2005 Executive Order signed by then Governor Vilsack, 1 in 4 (24.87 percent) voting-age African

[6] Iowa Department of Corrections, Annual Report 8 (2013), *available at* http://www.doc.state.ia.us/Documents/2013AnnualReport.pdf; U.S. Census, State & County QuickFacts: Iowa (2012 data), *available at* http://quickfacts.census.gov/qfd/states/19000.html.

American men in Iowa were disenfranchised as a result of this court's broad interpretation of "infamous crime" under Art. V, Sect. II so as to include any crime punishable in a penitentiary.[7] Lynn Eisenberg, *Note: States as Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U. J. Legis. & Pub. Pol'y 539, 563 (2012); Iowa and Felony Disenfranchisement, The Sentencing Project 1 (2005).

In fact, even under the federal standard adopted by the Iowa Supreme Court from *Ex Parte Wilson*, there seems to be some support for an understanding of "infamous crime" that evolves over time. A year after *Ex Parte Wilson*, in *Mackin v. United States,* 117 U.S. 348, 351 (1886) the Court indicated that the definition of infamous crime would change over time. ("What punishment shall be considered as infamous may be affected by the changes of public opinion from one age to another...") Similarly, in 1920 the Connecticut Supreme Court found that "Infamous crimes, known to our common law of the period of 1800, are not all of the infamous

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[7] The Bureau of Justice Statistics (BJS) estimates that at year end 2001, more than 5.6 million adults, or 1 in 37 people nationwide, had served time in state or federal prison. *FAQ Detail*, Bureau of Justice Statistics, available at *http://www.bjs.gov/index.cfm?ty=qa&iid=404*. One in three African American men will go to prison at some point in his life; one in six Latino men; and one in seventeen white men. Report of the Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System, The Sentencing Project (August 2013) 1, *available at* http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf. Data analysis by the Sentencing Project about 2005 disenfranchisement rates in Iowa is still available online at http://www.sentencingproject.org/doc/publications/fd_iowa.pdf.

crimes of to–day; and those in existence to–day will not necessarily be all in existence at a later day. Society progresses, and law develops to meet its needs, and new crimes are created to protect it against new offenses." *Drazen v. New Haven Taxicab Co.*, 95 Conn. 500, 111 A. 861, 863 (1920).

This case presents the first opportunity since 1957 for the Court to reinterpret the Infamous Crimes clause of the Iowa constitution. Its reinterpretation has the potential to correct a profound textual and historical error; of equal import, it can correct the current widespread disenfranchisement of Iowans, especially African Americans and other minorities who are so disproportionately burdened.[8]

VII. ANY DEFINITION OF IOWA'S INFAMOUS CRIMES CLAUSE SHOULD EXCLUDE ALL MISDEMEANORS.

In interpreting the Infamous Crimes Clause of the Iowa Constitution anew, this Court must decide if misdemeanors may be included. This Court should decide that no misdemeanors (simple, serious, or aggravated) are sufficiently infamous to justify permanent disenfranchisement under the Constitution. While it is true that definition of infamous crime cannot accurately be understood to include all felonies, it does

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[8] *See generally* Marc Meredity and Michael Morse, *The Politics of the Restoration of Ex-Felon Voting Rights: The Case of Iowa*, Princeton State Politics and Policy Conference (Mar. 24, 2013), *available at* http://www.sas.upenn.edu/~marcmere/workingpapers/IowaFelons.pdf, *and* John Ghaelian, *Restoring the Vote: Former Felons, International Law, and the Eighth Amendment*, 40 Hastings Const. L.Q. 757 (2013).

denote a seriousness of offense such that the classification of the crime as a felony should be understood to be a necessary although not sufficient element of defining which crimes are infamous.

Applying the historical understanding of infamous crime, which characterizes the offender as so unreliable, so deceitful, and so dishonest that he cannot be relied upon as a witness, juror, or elector, it is clear that our ancient and modern understanding of misdemeanors cannot be included in that category. A misdemeanor is by its nature and definition is a *less serious* crime than a felony, and infamous crimes are those that are *most serious* as well as *most vile.* As a class, a misdemeanor is punished less severely than a felony, and is far less stigmatized. While the collateral consequences of felony convictions are severe and typically set an offender up for a lifetime of struggle and marginalization, misdemeanors do not. Felony convictions, particularly if they are drug related, often make persons ineligible for federally funded food and cash assistance, housing programs, and student loans. Persons with felony convictions also face an uphill battle when it comes to finding employment or passing a background check associated with a rental agreement for housing. Other effects include driving and professional licensure revocation or suspension.[9]

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[9] *See Collateral Consequences,* American Bar Association, *available at* http://www.abacollateralconsequences.org/consequences/?jurisdiction=4&codelist=22&keyword; *After Prison: Roadblocks to Reentry: A Report on State Legal Barriers Facing People With Criminal Records,* Legal Action Center (2004), *available at* http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf.

Inclusion of misdemeanors punishable by less than one year may violate the Fourteenth Amendment to the U.S. Constitution. The Supreme Court has upheld disenfranchisement on account of felony conviction by state law or constitutional operation under the Fourteenth Amendment, § 2 ("...except for participation in rebellion, or other crime..."). *Richardson v. Ramirez*, 418 U.S. 24, 54, 94 S. Ct. 2655, 2671, 41 L. Ed. 2d 551 (1974); U.S. Const. amend. XIV § 2. The Court examined the legislative history and debates of the framers of the Fourteenth Amendment, and determined that the framers had in mind the disenfranchisement by the states on account of felony or infamous crime. *Richardson v. Ramirez*, 418 U.S. at 48 ("States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes.")[10]. As we know from as early as *Ex Parte Wilson*, the federal courts interpret infamous crime to mean crimes punishable in a penitentiary. 114 U.S. 417, 418 (1885).

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[10] The Court referenced the following state constitutional provisions in effect at the time of the debates: Ala.Const., Art. 6, s 5 (1819); Calif.Const., Art. 2, s 5 (1849); Conn.Const., Art. 6, s 3 (1818); Del.Const., Art. 4, s 1 (1831); Fla.Const., Art. 6, s 4 (1838); Ga.Const., Art. 2, s 6 (1868); Ill.Const., Art. 2, s 30 (1818); Ind.Const., Art. 6, s 4 (1816); Iowa Const., Art. 2, s 5 (1846); Kan.Const., Art. 5, s 2 (1859); Ky.Const., Art. 6, s 4 (1799); La.Const., Art. 6, s 4 (1812); Md.Const., Art. 1, s 5 (1851); Minn.Const., Art. 7, s 2 (1857); Miss.Const., Art. 6, s 5 (1817); Mo.,Const., Art. 3, s 14 (1820); Nev.Const., Art. 2, s 1 (1864); N.J.Const., Art. 2, s 1 (1844); N.Y.Const., Art. 2, s 2 (1821); N.C.Const., Art. 6, s 5 (1868); Ohio Const., Art. 4, s 4 (1802); Ore.Const., Art. 2, s 3 (1857); R.I.Const., Art. 2, s 4 (1842); S.C.Const., Art. 4 (1865); Tenn.Const., Art. 4, s 2 (1834); Tex.Const., Art. 7, s 4 (1845); Va.Const., Art. 3, s 14 (1830); W.Va.Const., Art. 3, s 1 (1863); Wis.Const., Art. 3, s 2 (1848). *Richardson v. Ramirez*, 418 U.S. 24, 48 n. 14 (1974).

In *McLaughlin v. City of Canton, Miss.*, a federal district court held that the Fourteenth Amendment made no such exception for mere misdemeanors. 947 F. Supp. 954, 975 (S.D. Miss. 1995):

> Thus, this legislative history provides this court with a principled basis for distinguishing between the standards of review to be applied to those statutes which disenfranchise persons convicted of felonies and those statutes which disenfranchise persons convicted of misdemeanors. This court finds that in order to disenfranchise a class of otherwise qualified electors on the basis of a misdemeanor, the state must show that this classification is precisely tailored to serve some compelling governmental interest.

Id. (distinguished on other grounds by *Tobin for Governor v. Illinois State Bd. of Elections*, 268 F.3d 517, 527 (7th Cir. 2001)). The plaintiffs had challenged application of the Mississippi constitutional provision which disqualifies persons "convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy" from voting. Miss. Const. art. XII, § 241.

Similarly, reading Iowa's Infamous Crimes Clause together with sections 1,6,9, and 21, of our state's Bill of Rights, the Infamous Crimes Clause should not be read to disenfranchise tens of thousands of Iowans convicted of crimes classified as any degree of misdemeanor under Iowa law. Iowa Const. Art. I, § 1 (providing for freedom and equality and recognizing inalienable rights); § 6 (providing that all laws shall apply uniformly and equally belong to all citizens); § 9 (providing that no person shall be deprived of life, liberty, or property without due process of law); § 21 (prohibiting ex post facto application of laws). It is a longstanding principal of

constitutional and statutory construction that the provisions of the constitution should be read together and in such a way as to pose no internal conflict. *See, e.g., Hutchins v. Hanna*, 162 N.W. 225, 227 (1817) (finding that provisions of Art. I section 18, Articles III and VII must be read together, rather than to result in different outcomes in case challenging constitutionality of statute)("[C]onstruing Constitutions is done under the rules for construing statutes, and that in interpreting the Constitution the court should consider all matter *in pari materia*; and all provisions on the same subject-matter shall, if possible, be given effect."). When these provisions of the Iowa Bill of Rights are read together so as not to conflict with one another, they would tend to prohibit the stripping of the franchise of Iowa misdemeanants who were never provided notice of this significant collateral consequence of their conviction, after the fact, and with the severe consequence of civil death.

VIII. COMPLETE CLARITY IS REQUIRED.

Justice and equity truly call upon this Court to consider anew the meaning of Infamous Crime contained in the Iowa Constitution. Justice and equity also require total clarity in so doing, given the tremendous harms that the widespread confusion surrounding the definition of infamous crimes has wrought on our state. The Court's opinion should make clear that all persons convicted of non-infamous crimes are restored their voting rights upon completion of their sentences. Moving forward, the

Court should require that each person convicted of an infamous crime be specifically informed of the loss of their voting rights pursuant to Art. II, § 5.

CONCLUSION

Amicus Curiae ACLU of Iowa respectfully request this Court to affirm the decision of the district court and Panel, and overturn its prior decisions in the *Flannagan, Blockett, and Haubrich* decisions as pertaining to the definition of the Infamous Crimes Clause of the Iowa Constitution.

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