

IN THE SUPREME COURT OF IOWA  
NO. 15-1661

---

KELLI JO GRIFFIN,  
*Plaintiff-Appellant,*

v.

PAUL PATE, in his official capacities as the Secretary of State of Iowa, and  
DENISE FRAISE, in her official capacities as the County Auditor of Lee  
County, Iowa,  
*Defendants-Appellees.*

---

On Appeal from the District Court for Polk County  
The Honorable Arthur Gamble

---

**Brief of the Iowa State Association of Counties, as *Amicus Curiae*  
in support of the Appellees**

---

Kristi L. Harshbarger, AT0008936  
Iowa State Association of Counties  
5500 Westown Parkway, Suite 190  
West Des Moines, Iowa 50266  
Telephone: (515) 369-7014  
Facsimile: (515) 244-6397  
E-mail: kharshbarger@iowacounties.org

*Attorney for Amicus Curiae*

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES .....	iii
IDENTITY AND INTEREST OF AMICI CURIAE .....	1
SUMMARY OF THE ARGUMENT .....	1
I. A bright-line definition of infamous crime is necessary for county commissioners of elections to effectively administer the elections in Iowa..	2
II. A bright-line definition of infamous crime is necessary to avoid a chilling effect on the election process. ....	4
III. A bright-line definition of infamous crime is necessary to avoid litigation on every crime to determine if it is infamous. ....	8
CONCLUSION.....	9
CERTIFICATE OF COMPLIANCE.....	11
PROOF OF SERVICE AND CERTIFICATE OF FILING.....	12

## TABLE OF AUTHORITIES

### Cases

<i>Chiodo v. Section 43.24 Panel</i> , 846 N.W.2d 845 (Iowa 2014) .....	passim
<i>Commonwealth ex rel. Att'y Gen. Corbett v. Griffin</i> , 946 A.2d 668, 675 (Pa. 2008) .....	9
<i>Devine v. Wonderlich</i> , 268 N.W.2d 620, 623 (Iowa 1978) .....	2

### Statutes

Iowa Code section 39.3 (2015) .....	9
Iowa Code Section 48A.14 (2015) .....	4, 5
Iowa Code Section 48A.15(2015) .....	5
Iowa Code § 48A.16 (2015) .....	5
Iowa Code § 48A.17 (2015) .....	5
Iowa Code § 49.79 (2015) .....	5, 6
Iowa Code § 49.81 (2015) .....	6
Iowa Code § 50.21 (2015) .....	6
Iowa Code Section 124.401(2015) .....	8

### Constitutional Provisions

Iowa Const. art. II, § 5 .....	9
--------------------------------	---

## **IDENTITY AND INTEREST OF AMICI CURIAE**

The Iowa State Association of Counties (ISAC) is a private, nonprofit corporation. ISAC members are elected and appointed county officials from all 99 counties. ISAC's mission is to promote effective and responsible county government for the people of Iowa. ISAC's vision is to be the principal, authoritative source of representation, information and services for and about county government in Iowa.

County auditors serve as the county commissioners of elections and conduct all elections within the county. County auditors will be on the frontlines of implementing any definition of infamous crimes that comes from this case. County auditors are members of ISAC and thus the organization has an interest in this case.

## **SUMMARY OF THE ARGUMENT**

The election process demands a definition of infamous crime that can be easily discerned and quickly applied. County auditors, as the county commissioners of elections, need a bright-line test in order to be able to provide the public with effective and efficient elections. A test that cannot be swiftly applied in the exact same way in every precinct in our state will have a chilling effect on the entire process – from registration, to voting, to recruiting persons to serve

on precinct election boards. Additionally, if the plurality test in *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845 (Iowa 2014), or any test that does not clearly set the categories of crimes that constitute infamous crimes, is adopted by the Court, a tremendous amount of litigation will occur to determine what crimes will be categorized as infamous. County auditors will be left in limbo in their attempts to determine who can vote and who cannot vote during the years of ensuing litigation.

## **I. A BRIGHT-LINE DEFINITION OF INFAMOUS CRIME IS NECESSARY FOR COUNTY COMMISSIONERS OF ELECTIONS TO EFFECTIVELY ADMINISTER THE ELECTIONS IN IOWA.**

The district court identified the interests at stake in any court opinion addressing the parameters of a person's ability to vote:

Voting is a fundamental right in Iowa. *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 848 (Iowa 2014). The State of Iowa has a compelling governmental interest in regulating voting. *Id.* at 856. However, “any alleged infringement of the right to vote must be carefully and meticulously scrutinized. 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. 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.” *Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa 1978) (citations omitted).

(Dist. Ct. Order at 15, September 25, 2015 (emphasis added)).

The Court must drop the nascent prong of the *Chiodo* plurality test to insure the orderly conduct of elections. Such action will not only insure the continued provision of orderly elections, but will provide security and clarity for persons wanting to vote who have been convicted of crimes.

County auditors cannot be expected to determine at polling places if a crime is one that is “particularly serious” and a crime “that reveals that voters who commit the crime would tend to undermine the process of democratic governance through elections.” *Chiodo*, 846 N.W.2d at 856. The Court needs to consider the practical realities of conducting elections and institute a bright-line test that auditors and precinct election officials can use when fulfilling their statutory duties. The plurality in *Chiodo* recognized this was a difficult task. “Any definition of the phrase ‘infamous crime’ has vast implications and is not easy to articulate.” *Id.* Regardless of the difficulty of the task, the Court must address the issue in a way that goes beyond legal theory and results in a test that can be used by the people administering and participating in our election system.

“The concurring justices [in *Chiodo*] rejected the second element of the plurality’s nascent standard as unnecessary, inconsistent with precedent, and

unworkable in the administration of elections.” (Dist. Ct. Order at 10, September 25, 2015 (citing *Chiodo*, 846 N.W.2d at 861) (emphasis added)). ISAC encourages the Court to adopt this opinion and provide county auditors and election officials with a workable and practical definition of infamous crime.

**II. A BRIGHT-LINE DEFINITION OF INFAMOUS CRIME IS  
NECESSARY TO AVOID A CHILLING EFFECT ON THE  
ELECTION PROCESS**

When considering any voting restrictions the *Chiodo* plurality recognized the importance of not “subvert[ing] the voting process and diminish[ing] the voices of those casting legitimate ballots.” *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 856 (Iowa 2014). We encourage the Court to consider that creating a test that is unworkable in the practical realities of election administration will do a disservice to voters and our election process.

There are various points in the voting process that, if a clear definition of infamous crime does not exist, problems would arise for potential voters with criminal records. The problems would begin with registration. Iowa Code Section 48A.14 provides that “[t]he registration of a registered voter may be challenged by another registered voter of the same county.” Iowa Code § 48A.14 (2015). A challenge to a voter’s registration sets into motion an

extensive process that involves consideration by the county auditor, a hearing conducted by the county auditor on the challenge, and possible appeal of the challenge to the district court by either the registrant or the person challenging the registration. *See Iowa Code § 48A.15 (2015); Iowa Code § 48A.16 (2015); Iowa Code § 48A.17 (2015).* Without a bright-line definition of infamous crime, there may be an increase in challenges to voter registrations of persons convicted of crimes that have not been clearly determined by a court as to whether or not they are infamous. This will mean additional administrative burdens on the county and may ultimately discourage people from registering to vote in the first place.

When a person votes, the ways in which that person can be challenged increases. “Any person offering to vote may be challenged as unqualified by any precinct election official or registered voter. It is the duty of each official to challenge any person offering to vote whom the official knows or suspects is not duly qualified.” Iowa Code § 49.79(1) (2015) (emphasis added). Currently, the Iowa Secretary of State maintains a list of persons convicted of felonies and provides that list to county auditors. If the precinct is using electronic poll book laptops, the poll book will tell a precinct election official that the prospective voter is a possible felon. In precincts that are not using electronic poll book tools, the precinct election official has to call the auditor’s

office to find out if a new registrant is on the felon list, unless the county provides the felon list from the Secretary of State to each precinct so situated. If those crimes that are infamous are not clearly categorized, it will become extremely difficult, if not impossible, for county auditors to monitor and determine what persons with criminal records are eligible to vote.

If a person's qualification to vote is challenged, the person is required to cast a provisional ballot. *See* Iowa Code § 49.79 (2015); Iowa Code § 49.81 (2015). Then the precinct election official must explain to the person the qualifications to vote and give the person a printed statement explaining the provisional ballot process and the allegations of the challenge. *See* Iowa Code § 49.81 (2015). The qualifications of all persons filing provisional ballots must be reviewed by the special precinct board after the election, and the board must determine whether to count or reject each provisional ballot. Iowa Code § 50.21 (2015). If the ballot is rejected, the person must be notified within 10 days by the county auditor. *Id.* Without a bright-line definition of infamous crime, some persons who have been convicted of crimes that have not been clearly included or excluded from the definition, may opt not to attempt to vote for fear of being challenged. When forced to cast a provisional ballot, some will learn only after the official canvass of the election that their

provisional ballots were rejected, and then it is too late to have the decision reversed by a court and have the ballot counted.

Additionally, there would likely be an increased number of provisional ballots filed and the administration of those ballots would take already scant county resources to process. In 2014, 3,415 provisional ballots were filed in Iowa.

U.S. Election Assistance Commission, *The 2014 EAC Election Administration and Voting Survey Comprehensive Report*, [http://www.eac.gov/assets/1/Page/2014\\_EAC\\_EAVS\\_Comprehensive\\_Report\\_508\\_Compliant.pdf](http://www.eac.gov/assets/1/Page/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf) at 226, Table 34 (last accessed December 17, 2015).

Between 2012 and 2014, 4,069 persons were removed from the voter rolls in Iowa due to felony convictions. *Id.* at 107, Table 4b (last accessed December 17, 2015). Thus, the number of provisional ballots could easily double if it is not clear what felonies are infamous crimes. Each provisional ballot of a person convicted of a crime that is not clearly infamous will need to be reviewed by the special precinct board, the auditor and the county attorney, which will take significant time and delay the election process. The special precinct election board would have more ballots to consider and if faced with an unclear standard to apply, it would likely be harder to recruit persons to serve on these boards. In sum, the entire process would face unnecessary

burdens if the Court does not institute a bright-line definition of infamous crime.

### **III. A BRIGHT-LINE DEFINITION OF INFAMOUS CRIME IS NECESSARY TO AVOID LITIGATION ON EVERY CRIME TO DETERMINE IF IT IS INFAMOUS.**

The plurality in *Chiodo* recognized that their decision would not create a test that could apply to other crimes to determine infamy.

Considering the crime at the center of this case, we need not conclusively articulate a precise definition of “infamous crime” at this time. We only conclude that the crime must be classified as particularly serious, and it must be a crime that reveals that voters who commit the crime would tend to undermine the process of democratic governance through elections.

*Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 856 (Iowa 2014).

The crime at hand in *Chiodo* was a second offense operating while intoxicated (OWI), an aggravated misdemeanor. In this case, the Court has the opportunity to consider a felony crime, a Class C felony, specifically Delivery of 100 Grams or Less of Cocaine in violation of Iowa Code Section 124.401(1)(c)(2)(b). For the sake of the county officials that are charged with administering our elections, we would implore the Court to adopt a definition that will apply to all crimes. To do otherwise, will involve litigation on every individual crime to determine whether or not it is an infamous crime.

The *Chiodo* plurality was also not unaware of the additional litigation their proposed test could create. “Our decision today is limited. It does not render the legislative definition of an ‘infamous crime’ under Iowa Code section 39.3(8) unconstitutional. We only hold OWI, second offense, is not an ‘infamous crime’ under article II, section 5, and leave it for future cases to decide which felonies might fall within the meaning of ‘infamous crime’ that disqualify Iowans from voting.” *Chiodo*, 846 N.W.2d at 857. If the Court chooses to rely on the Chiodo plurality test, county auditors, potential voters, and the entire voting process will be in limbo during years of costly litigation.

## **CONCLUSION**

“Secretary Pate and Auditor Fraise contend the nascent standard of the *Chiodo* plurality is unworkable for election officials as well as potential voters and will lead to a flood of litigation to adjudicate the voting rights of individual convicted felons on a case-by case basis. They believe the legislature is in the best position to draw the appropriate line of infamy for purposes of voting rights. *Commonwealth ex rel. Att’y Gen. Corbett v. Griffin*, 946 A.2d 668, 675 (Pa. 2008).” (Dist. Ct. Order at 12, September 25, 2015). The Iowa State Association of Counties would concur with this assertion. We respectfully request that the Court consider the practical implications alongside the legal theory when adopting a definition of “infamous crimes,” so that the county

auditors administering our elections can continue to serve the public by providing efficient and accurate elections.

Respectfully submitted,

IOWA STATE ASSOCIATION OF COUNTIES

*By:* /s/ Kristi L. Harshbarger  
Kristi L. Harshbarger, AT0008936  
General Counsel  
5500 Westown Parkway, Suite #190  
West Des Moines, IA 50266  
Telephone: (515)369-7014  
Facsimile: (515) 244-6397  
Email: [kharshbarger@iowacounties.org](mailto:kharshbarger@iowacounties.org)

## **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 2,075 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14 point font.

/s/ Kristi L. Harshbarger AT0008936

## **PROOF OF SERVICE AND CERTIFICATE OF FILING**

I hereby certify that on December 21, 2015, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

Michael P. Short  
Lee County Attorney  
25 North 7th St.  
PO Box 824  
Keokuk, IA 52632  
*Attorney for Appellee Denise Fraise*

Jeffrey Thompson  
Meghan Gavin  
Iowa Attorney General's Office  
1305 Walnut St. Des Moines, IA 50319  
*Attorneys for Appellee Paul Pate*

Rita Bettis  
American Civil Liberties Union of Iowa Foundation  
505 Fifth Avenue, Ste. 901 Des Moines, IA 50309-2316

Dale E. Ho  
Julie A. Ebenstein  
American Civil Liberties Union Voting Rights Project  
725 Broad Street  
New York, NY 10004  
*Attorneys for Appellant*

/s/ Kristi L. Harshbarger AT0008936