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IN THE SUPREME COURT OF IOWA

No. 15-1661

KELLI JO GRIFFIN,

Petitioner-Appellant,

v.

PAUL PATE, in his official capacity as the Iowa Secretary of State, and DENISE FRAISE, in her official capacity as the Lee County Auditor,

Respondents-Appellees.

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

APPELLEE'S FINAL BRIEF

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II. Whether Griffin has Met Her Heavy Burden to Overcome the Presumption of Constitutionality that Cloaks Iowa Code section 39.3(8)?

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ROUTING STATEMENT

The Iowa Supreme Court should retain jurisdiction of this appeal. The sole issue presented in this appeal is the meaning of the Infamous Crime Clause in the Iowa Constitution. As a result, this case concerns fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(d).

STATEMENT OF THE CASE

The Petitioner, Kelli Jo Griffin, a convicted felon, filed a Petition for Declaratory Judgment, Supplemental Injunctive Relief, and Mandamus Relief, seeking to clarify her right to vote in Iowa. (First Amended Petition; App. 4). Article II, section 5 of the Iowa Constitution states, "A person adjudicated mentally incompetent to vote or a person convicted of any infamous crime shall not be entitled to the privilege of an elector." The privileges of an elector include the right to hold public office and the right to vote. Iowa Code section 39.3(8) defines "infamous crime" as any felony under Iowa or federal law. Griffin challenges the constitutionality of section 39.3(8) as applied to her conviction for Delivery of 100 Grams or Less of Cocaine, a Class C felony. Thus, the sole issue before the Court is whether Griffin's felony conviction is an "infamous crime" for purposes of Article II, section 5 of the Iowa Constitution.[1]

[1] While significant time and attention in this litigation has focused on the constitutionality of the governor's restoration process—as established by Executive Order 70—this case is not about restoration. As noted below, the district court determined that the Petition did not challenge Executive Order 70 and thus dismissed Governor Branstad from suit. Petitioner has not challenged the dismissal nor the limited characterization of her constitutional challenge on appeal.

FACTUAL AND PROCEDURAL HISTORY

The Petitioner, Kelli Jo Griffin, is an Iowa resident. (Facts ¶ 1; App. 66). On January 7, 2008, Griffin was convicted of Delivery of 100 Grams or Less of Cocaine, in violation of Iowa Code section 124.401(1)(*c*)(2)(b) (2007), a Class C felony. (Facts ¶ 12; App. 68). Petitioner was sentenced to a term of imprisonment not to exceed ten years. (App. 68). She successfully discharged her sentence on January 7, 2013. (Facts ¶ 13; App. 68). But for her 2008 felony conviction, the Petitioner satisfies the requirements to register to vote under Iowa's existing statutes and regulations. (Facts ¶ 24; App. 69). Griffin now wishes to register to vote and vote in elections that impact her, her family, and her community without fear of subsequent criminal prosecution. (Facts ¶ 26; App. 69).

Petitioner filed a Petition for Declaratory Judgment, Supplemental Injunctive Relief, and Mandamus Relief in the Iowa District Court for Polk County naming Governor Terry Branstad, Secretary of State Matt Schultz, and Lee County Auditor Denise Fraise as Defendants. (Petition; App. 3–21). The sole issue raised in the Petition was the constitutionality of Iowa's statutory voting scheme.

Governor Branstad moved to dismiss himself from the suit as Petitioner solely challenged the legality of her loss of citizenship rights.

(Governor Branstad's Motion to Dismiss; App. 22–24). The Governor asserted that he was not a necessary party to the action because the process of citizenship restoration established in Executive Order 70 was not at issue in the case. *Id.* The Honorable Arthur E. Gamble agreed and dismissed Governor Branstad from the suit having found the "Petitioner is not challenging the constitutionality of Executive Order 70." (Ruling and Order on Motion to Dismiss or In the Alternative Motion to Recast; App. 37).

Secretary Schultz also filed a Motion to Dismiss or in the Alternative Recast noting that it was unclear under the Petition whether Griffin was attempting to assert direct causes of action under the Iowa Constitution, whether she was attempting to contest Iowa's statutory voting scheme solely as applied to her, or whether she was attempting to vindicate the rights of others. (Motion to Dismiss or In the Alternative Motion to Recast; App. 25–28). While acknowledging Iowa's liberal notice pleading requirements, Chief Judge Gamble agreed that the Petition was ambiguous as to whether Petitioner was solely challenging the loss of her citizenship rights or the loss of citizenship rights for *all* felons. (Ruling and Order on Motion to Dismiss or In the Alternative Motion to Recast at 3; App. 36). As a result, Petitioner was ordered to recast her Petition.

In her First Amended Petition,[2] Griffin made clear that she was challenging Iowa's statutory election scheme *solely* as applied to her. (First Amended Petition at 19; App. 59) (praying the court declare "Iowa's statutes, regulations, forms, and processes that prohibit from voting and holding public office Iowans who have completed sentences for crimes classified as felonies—are invalid and unconstitutional ***as applied*** to Mrs. Griffin. . . . ") (emphasis added).

Following the filing of the First Amended Petition, the parties agreed to the submission of a Joint Statement of Undisputed Facts and a Joint Appendix. (Joint/Stipulated Statements of Undisputed Facts; App. 66–71; Stipulated/Joint Appendix; App. 72–147). The parties filed cross motions for summary judgment. Following oral argument, the district court granted Secretary Pate's and Auditor Fraise's Motions for Summary Judgment in their entirety, overruled Petitioner's Motion for Summary Judgment, and dismissed the case. (Ruling on Motions for Summary Judgment at 17–18; App. 291–92). The district court concluded "that convicted felons, including Kelli Jo Griffin, remain disenfranchised under section 39.3(8) and the 'infamous crimes' clause of article II, section 5 of the Iowa Constitution until a majority of our highest court holds otherwise." (*Id.* at 14; App. 288).

[2] Newly-elected Secretary of State Paul Pate was substituted for former Secretary Schultz in the First Amended Petition.

Griffin filed a timely notice of appeal. (Notice of Appeal; App. 294–95).

ARGUMENT

I. The District Court Properly Concluded that Griffin Had Been Convicted of an Infamous Crime.

A. Error Preservation. Secretary Pate agrees that Griffin has preserved error on her argument that her felony conviction is not an "infamous crime" under Article II, section 5 of the Iowa Constitution.[3]

B. Standard of Review. Although this Court is reviewing a ruling on cross motions for summary judgment, the sole issue raised in this appeal is constitutional. As a result, this Court's review is de novo. *Simmons v. State Pub. Defender*, 791 N.W.2d 69, 73 (Iowa 2010). However, statutes are "cloaked with a presumption of constitutionality." *State v. Thompson*, 836 N.W.2d 470, 483 (Iowa 2013); Iowa Code § 4.4(1) (2013) ("In enacting a statute, it is presumed that . . . '[c]ompliance with the Constitution of the state and of the United States is intended.' "). In challenging a statute, or as

[3] Appellant also raises two additional arguments at Sections II and III of her brief which appear to attack alternative grounds upon which this Court might sustain the loss of her citizenship rights. These arguments are not properly before the Court. As Appellant correctly notes at page 49 of her brief, notwithstanding the district court's discussion at pages 14 through 17 of its Ruling, the State has not made such an alternative argument in this case. This is contrary to the decision in *Snyder v. King*, 958 N.E.2d 764, 784 (Ind. 2011), wherein the Indiana Supreme Court held that the state could disenfranchise prisoners under the state's general police powers.

in this case a statutory scheme, the challenger bears a hefty burden. The challenger must (1) prove unconstitutionality beyond a reasonable doubt, and (2) refute every reasonable basis upon which the statute could be found constitutional. *Thompson*, 836 N.W.2d at 483. " '[I]f the statute is capable of being construed in more than one manner, one of which is constitutional, [the court] must adopt that construction.' " *Id.* (quoting *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005)).

C. Felonies are "Infamous Crimes" for Purposes of Article II, Section 5 of the Iowa Constitution. The right of suffrage is established in Article II, section 1 of the Iowa Constitution. That section provides:

> Every citizen of the United States of the age of twenty-one years, who shall have been a resident of this state for such period of time as shall be provided by law and of the county in which he claims his vote for such period of time as shall be provided by law, shall be entitled to vote at all elections which are now or hereafter may be authorized by law.

Iowa Const. art. II, § 1. While Article II, section 1 establishes the right of suffrage, the Iowa Constitution also limits that right. Article II, section 5 provides "[a] person adjudged mentally incompetent to vote or a person convicted of any infamous crime shall not be entitled to the privilege of an elector." *Id.* at art. II, § 5. The district court correctly determined that all felonies are infamous crimes because (1) the 2008 Amendment to Article II, section 5 ratified the statutory definition of infamous crime, and (2) for over

one hundred and fifty years this Court has found that all felonies are infamous crimes.

1. *The 2008 Amendment to Article II, Section 5 Ratified the Statutory Definition of Infamous Crime.* Throughout this litigation, Petitioner has focused on the meaning of the Infamous Crime Clause as ratified in 1857. As pointed out by the special concurrence in *Chiodo*, the constitutional provision at issue in this case was actually enacted in 2008 not 1857. *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 861–62 (Iowa 2014) (Mansfield, J., specially concurring). In 2006 and 2007, the General Assembly voted to amend Article II, section 5 of the Iowa Constitution. *See* 2006 Iowa Acts ch. 1188, § 1, 2007 Iowa Acts ch. 223, § 1. That amendment was ratified in 2008 by popular vote.

Admittedly, that amendment was intended to remove the offensive and outdated "idiot" language from the Iowa Constitution and did not alter the Infamous Crime Clause. Nevertheless, both the General Assembly and voters had the opportunity to amend or clarify the infamous crime language and chose not to do so. Instead both the General Assembly and the people of Iowa readopted the Infamous Crime Clause in its entirety. *See State v. Sanford*, 814 N.W.2d 611, 619 (Iowa 2012) ("When the legislature amends some parts of a statute following a recent interpretation, but leaves others

intact, this 'may indicate approval of interpretations pertaining to the unchanged and unaffected parts of the law.' ") (quoting 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 49.10, at 144 (7th ed. 2008)).

The historical and legal context of the 2008 ratification are instructive. In 1994, the Iowa General Assembly enacted a statutory definition of infamous crime. 1994 Iowa Acts, ch. 1169, § 7, ch. 1180, § 1. Iowa Code section 39.3(8) defines "infamous crime" as any felony under Iowa or federal law. Thus, in, 2007, and 2008 when the Infamous Crimes Clause was ratified infamous crimes were defined as felonies.

The statutory definition of infamous crime was reiterated by the Legislature when it revamped election crimes in the early 2000s. In a rare expression of legislative intent, the General Assembly noted:

> It is the intent of the general assembly that offenses with the greatest potential to affect the election process be vigorously prosecuted and strong punishment meted out through the imposition of felony sanctions which, as a consequence, remove the voting rights of the offenders. Other offenses are still considered serious, but based on the factual context in which they arise, they may not rise to the level of offenses to which felony penalties attach.

Iowa Code § 39A.1(2), 2002 Acts, ch 1071, § 1.

Both the Legislature and the public are presumed to know the law. By failing to alter the Infamous Crime Clause when other portions of Article II,

section 5 were amended, the Legislature and the public ratified the definition of infamous crime as all felonies under state and federal law. Not only is this answer supported by this Court's longstanding rules of statutory interpretation, but it also most accurately reflects the evolving nature of constitutional jurisprudence.

As this Court has repeatedly made clear, the Iowa Constitution is not a relic frozen in time. Instead, the interpretation of the Iowa Constitution is intended to evolve over time. *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), *Clark v. Bd. of Dir.*, 24 Iowa 266 (1868); *see also* Honorable Mark S. Cady, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our pioneering Tradition in Recognizing Civil Rights & Civil Liberties*, 60 Drake L. Rev. 1133 (2012). What was deemed infamous at the time the Iowa Constitution was ratified in 1857 has only marginal application to contemporary society—even though the language of the clause has not changed. For example, sodomy and bigamy were explicitly thought to be infamous crimes in 1839.[4] Society has evolved and

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[4] In 1839, the territorial code provided:

> Each and every person in this Territory who may hereafter be convicted of the crime of rape, kidnapping, willful [*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

sodomy is no longer criminal, let alone infamous. *See Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003).

The earliest cases defining infamous crime have recognized an evolving definition. As the United States Supreme Court noted in *Wilson*, "What punishments shall be considered infamous may be affected by the changes of the public opinion from one age to another." *Ex Parte Wilson*, 114 U.S. 417, 427 (1885). The measure of public opinion on the severity or infamy of any offense is best reflected by the legislature. As the Supreme Court of Pennsylvania noted,

> [O]ur General Assembly, as a representative, political branch of government, sets public policy, which this Court enforces, subject to constitutional limitations. . . . Thus, the Legislature's determination as to whether a particular offense is serious enough *at a given time* to warrant the status of felony [for purposes of voting rights] reflects the public will as expressed through the ballot box, and this determination properly controls whether the offense in question was constitutionally infamous at the time of the officeholder's conviction.

Commonwealth ex rel. Pennsylvania Att'y Gen. Corbett v. Griffin, 946 A.2d 668, 675 (Pa. 2008) (internal citation omitted) (emphasis added).

> be rendered incapable of holding any office of honor, trust, or profit, of voting at any election, of serving as a juror, and giving testimony in this Territory.

The Statute Laws of the Territory of Iowa, Code of Criminal Jurisprudence, First Div., § 2, at 150. Murder and treason were excluded from this definition, presumably due to the imposition of the death penalty.

Here, not only has society's contemporary understanding of infamous crime changed from 1857, but the actual constitutional clause has changed as well. When the Infamous Crime Clause was ratified in 2008, it was ratified in a markedly different environment than the original clause in 1857. This Court's interpretation of the 2008 Infamous Crime Clause should reflect the 2008 understanding and not be frozen in 1857. Not only is this the cleanest resolution of this case, it is the one best supported by this Court's longstanding rules of construction.

2. *For Over One Hundred and Fifty Years this Court has Interpreted Infamous Crime to Include all Felonies.* Even if this Court were inclined to search for a textual and historical interpretation for the Infamous Crime Clause, the result would nevertheless be the same. For over one hundred and fifty years, this Court has interpreted infamous crimes to include all felonies.

In 1848, this Court rendered an opinion *Carter et al. v. Cavenaugh*, 1 Greene 171 (Iowa 1848). The issue in *Carter* was what convictions could be used to inquire into the "general moral character" of a witness or declare a witness incompetent. *Id.* at 173. The common law rule, as discussed by the territorial court, was that persons "adjudged guilty of an infamous crime" were incompetent. *Id.* at 176.

In defining infamous crime, this Court determined that the *nature* of the crime and not its *punishment* determined infamy. *Id*. The issue discussed in *Chiodo*, therefore, was actually decided by this Court one hundred and seventy years earlier. The Court held infamous crimes were "heinous crimes classed as treason, felony, ***and*** the *crimen falsi*" offenses. *Id.* (emphasis added). Under this definition, felonies are but one type of infamous crimes. At the time the Iowa Constitution was ratified in 1857, the prevailing common law definition of infamous crime was actually broader—not narrower—than felonies.[5] This Court reaffirmed this broad definition of infamous crimes at common law in *Palmer v. Cedar Rapids & M.C. Ry. Co.*, 113 Iowa 442, 85 N.W. 756 (1901). Once again in determining witness incompetency this Court held that infamous crimes included treason, felonies, and *crimen falsi* offenses. *Id.* at 757.

While *Carter* and *Palmer* dealt with the common law definition of infamous crime, this Court has examined the concept of elector rights and "infamous crime" on four separate occasions. The first opportunity was in *Flannagan v. Jepsen*, 177 Iowa 393, 158 N.W. 641 (1916). Flannagan had been convicted of contempt for violating a decree enjoining him from

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[5] The modern statutory definition of infamous crime, which includes *only* state and federal felonies, is actually more conservative than this common law approach.

maintaining a liquor nuisance and sentenced to one year of hard labor at Fort Madison. *Id.* at 641. The issue in *Flannagan* was whether a crime was so "infamous" as to afford an individual all the rights of a criminal defendant. In resolving the case, the Court adopted the federal definition of infamous crime which linked the concept of infamous crime with infamous punishment. At the time *Flannagan* was written, infamous punishment included any sentence to the penitentiary for hard labor. *Id.* at 644 (relying upon *Ex Parte Wilson*, 114 U.S. at 429.[6]

The Court's next opportunity to opine on the meaning of "infamous crime" occurred just months later in *Blodgett v. Clarke*, 177 Iowa 575, 159 N.W. 243 (1916). Blodgett had been convicted of forgery, sentenced to a term of imprisonment, and sought higher office after his release. *Id.* at 244. Unlike *Flannagan*, therefore, the meaning of Iowa's Infamous Crime Clause was at issue in *Blodgett*. In resolving the case, however, the Court adopted the *Flannagan* link between infamous crime and infamous punishment without analysis.

The Court repeated the same language, again without analysis, in *State ex rel. Dean v. Haubrich*, 248 Iowa 978, 83 N.W.2d 451 (1957). Dean

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[6] The constitutional provision at issue in *Flannagan*, however, was the Fifth Amendment of the U.S. Constitution and not the Infamous Crime Clause of the Iowa Constitution.

had been convicted in the United States District Court of income tax evasion and sentenced to one year imprisonment. *Id.* at 452. Dean was later elected mayor of Mapleton. The issue in *Dean* was not, however, the meaning of Iowa's Infamous Crime Clause, but rather whether the Governor of Iowa had the power to restore citizenship or elector rights when an individual has been convicted of a federal felony. *Id.*

This link between infamous crime and infamous punishment continued unabated until the ballot challenge in *Chiodo*. Chief Justice Cady, writing for a plurality of the Court, concluded that misdemeanors were not infamous crimes regardless of whether an infamous punishment (i.e., imprisonment) was possible. *Chiodo*, 846 N.W.2d at 857. In so holding, the plurality decoupled the explicit link between infamous crime and infamous punishment.

While *Flannagan*, *Blodgett*, and *Haubrich* purported to link infamous crime with the infamous punishment of imprisonment, at the time all three cases were rendered the *only* crimes subject to infamous punishments were felonies. At the time *Flannagan*, *Blodgett*, and *Haubrich* were decided, Iowa criminal law was binary. There were only two classifications—felony or misdemeanor. Upon conviction, individuals were sent to only two places—prison or jail. *See State v. Di Paglia*, 247 Iowa 79, 71 N.W.2d 601

(1955) (noting that Iowa crimes were divided into two categories felonies and misdemeanors, and the classification was based solely on where the convicted were sent—felons to prison, misdemeanants to jail). In this binary system, *all* felonies were infamous crimes because *all* felonies were subject to the infamous punishment of imprisonment. Conversely, all misdemeanors were not infamous because they were subject only to a jail sentence.

While the verbiage in these initial cases was focused on the severity of punishment, the result of these cases was the same—all felonies were infamous crimes. Looked at in the proper context, therefore, this Court has determined that all felonies were infamous crimes since before the Civil War—in fact, since before statehood. More importantly, *Flannagan*, *Blodgett*, and *Haubrich*, can be properly understood as a narrowing of the common law definition of infamous crimes to include *only* felonies. This Court should decide this case by simply following its precedent and rejecting the *Chiodo* plurality's invitation to overrule these cases.[7]

[7] The plurality opinion in *Chiodo* purports to overturn *Blodgett* and disapprove of language in *Flannagan* and *Dean*. Such a declaration, however, is impossible. While there were three votes in the plurality to overturn this trilogy of cases, there were three votes—two in the special concurrence and one in dissent to affirm the prior case law—at least on that point. *Id.* at 861 (Mansfield, J., specially concurring); at 865 (Wiggins, J., dissenting). The Court in *Chiodo* was at equipoise on this issue, thus there were an insufficient number of votes to overturn *Blodgett* or disapprove *Flannagan* and *Dean*.

II. Griffin Has Not Met Her Heavy Burden to Overcome the Presumption of Constitutionality that Cloaks Iowa Code section 39.3(8).

Griffin bears the heavy burden to reverse a century and a half of precedent and constitutionally invalidate Iowa's statutory voting scheme. *See* Iowa Code §§ 39.3(8); 48A.6(1); 48A.14(1)(*e*); 48A.30(1)(*d*); 49.79(2)(*f*). She has not met that burden because (1) her textual and historical analysis is fundamentally flawed, and (2) her reliance on *Snyder* is misplaced.

A. Griffin's Textual and Historical Argument is Flawed. The crux of Petitioner's textual and historical argument centers on a single premise—the Iowa Constitution uses both the terms felonies and infamous crime, thus the two terms must have different meanings. While there is simplicity in this syllogism, the conclusion ignores the historical underpinnings of the Infamous Crime Clause, the complete absence of evidence supporting an alternate definition, and the practical realities of overturning one hundred and fifty years of precedent.

Use of the phrase "infamous crime" as opposed to felonies is further understood when the historical underpinnings of the clause are examined. As Justice Mansfield pointed out in his special concurrence in *Chiodo*, most of Iowa's constitutional provisions on suffrage were adopted from the

Federal Constitution without amendment or analysis. *Chiodo*, 846 N.W.2d at 861 (Masfield, J., specially concurring). The U.S. Constitution, like the Iowa Constitution, uses infamous crime and felony in different contexts even though the words are often synonymous—or at least not mutually exclusive. When Iowa's law is derived from another source, this Court will often look to the original source when interpreting Iowa's laws. Here, the United States Supreme Court has held that denying felons who have fully discharged their sentences the right to vote does not violate the Fourteenth Amendment. *Richardson v. Ramirez*, 418 U.S. 24, 94 S. Ct. 2655 (1974).

Petitioner's textual argument and the *Chiodo* plurality's approach, moreover, are based upon an erroneous assumption. Both presumed that if infamous crime and felony are not synonymous, that infamous crime *must* encapsulate a narrower spectrum of crimes than felonies. As discussed above, however, previous opinions of this Court, demonstrate that in the nineteenth century infamous crimes were thought to include a *broader* spectrum of offenses than simply felonies. *Carter*, 1 Greene at 171; *Palmer,* 113 Iowa at 442, 85 N.W. at 757.

Nor are the differences between the non-ratified 1844 Constitution and the ratified 1857 Constitution dispositive. In 1844, the proposed Iowa Constitution denied the privileges of an elector to "persons declared

infamous by act of the legislature." Iowa Const. art. III, § 5 (1844).[8] The 1857 language denying the rights of an elector to those convicted of an infamous crime was not a rejection of the legislature's ability to define infamous crimes. Instead, the 1857 language was a reflection of the territorial statute. All the 1857 language did was shift the focus from a *person* being declared infamous to a *crime* being infamous. The legislature in 1857 still had the exclusive authority to codify crimes.[9]

Petitioner's argument that the difference between the 1844 and 1857 Constitutions reflect an intention to narrow the scope of infamous crimes that result in the loss of the right to vote is also misplaced. It is just as reasonable to conclude that the 1857 drafters looked at the list of offenses in the 1839 territorial law and concluded it was too narrow and instead adopted

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[8] The territorial law of Iowa wholly derived from the Wisconsin territorial law. *See* Act of June 12, 1835, 5 Stats.,235 Chap. XCVI, § 12, at 71.

[9] As reflected in the 1839 territorial code, for more than one hundred and fifty years, both the legislature and the judiciary have defined infamous crimes as felonies. This tandem approach is important in this unique constitutional provision. No one disputes that the judiciary has exclusive and final jurisdiction over the interpretation of a constitutional provision. Nevertheless, it is the legislature's exclusive province to define crimes. *State v. Robbins*, 257 N.W.2d 63, 67 (Iowa 1977) ("All crimes in this State are statutory."). Thus, these two branches will always work in tandem in defining "infamous crime."

the more expansive common law definition. Petitioner's definition of infamous crimes, therefore, is reduced to a selective originalist approach. *See* Brief of Amicus Curiae Iowa County Attorneys Association.

B. Griffin's Reliance Upon *Snyder* is Misplaced. Even if the Petitioner casts doubt on drawing the constitutional line of infamy at felonious conduct—that is only half the question. Petitioner then bears the heavy burden of proving an alternate definition. Or as articulated by Justice Wiggins, if this Court abandons "a seaworthy vessel of precedent" what is it leaving in its place? In formulating an alternate test, the fallacy of Petitioner's argument is most apparent. Petitioner offers three alternative tests of definitions for infamous crimes—(1) crimes that are an affront to democratic governance, (2) *crimen falsi* crimes, or (3) crimes of moral turpitude. There simply is no textual basis for adoption of any of these tests, nor are the tests logically consistent with Iowa law.

Based upon her faulty assumption that "infamous crime" and felony are mutually exclusive, Petitioner leaps to a conclusion that infamous crimes should be limited to felonies "that reveal[] that voters who commit the crime would tend to undermine the process of democratic governance through elections." *Chiodo*, 846 N.W.2d at 856. There simply is no textual or historical basis for such a test.

The "affront to democratic process test" is rooted in the Indiana Supreme Court's decision in *Snyder v. King*, 958 N.E.2d 764 (Ind. 2011). Petitioner's reliance on Snyder as persuasive authority in Iowa, however, is wholly misplaced as: (1) *Snyder* is based on the unique clauses of the Indiana Constitution, (2) *Snyder's* entire discussion of infamous crimes is dicta, and (3) the "test" articulated in *Snyder* is based on a misreading of the common law.

There are important distinctions between Iowa's Constitution and Indiana's. First, the language of the respective texts is different. Indiana's Constitution declares, "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. Unlike Iowa's Infamous Crime Clause, Indiana's clause does not mandate disenfranchisement instead it empowers the legislature with the ability to disenfranchise. Second, Indiana unlike Iowa has a constitutional provision which requires criminal punishment to be "founded on the principles of reformation." *Id.* at art. 1, sec. 18. Criminal punishment in Iowa, including the constitutional requirement of disenfranchisement, can be punitive and not simply regulatory.

Snyder's "affront to democratic governance" test, moreover, is contrary to Iowa law. The unambiguous holding of *Chiodo* is that *only* felonies can be infamous under Iowa law. *Snyder* is not so limited and disenfranchises individuals for even misdemeanor conduct which is an "affront to democratic governance." As such, *Snyder* is contrary to every decision of this Court defining infamous crimes and every legislative definition promulgated in Iowa. While Petitioner asks this Court to follow *Snyder*, she actually seeks this Court to adopt only half of *Snyder's* intellectual underpinnings—a truly peculiar result.

Second, the issue presented to the court in *Snyder* was actually quite narrow—whether Indiana violated Snyder's constitutional rights by removing him from the voting registration rolls *while he was incarcerated* for misdemeanor battery. *Snyder*, 958 N.E.2d at 768–69. The Indiana Supreme Court ultimately determined that the state had the power to remove Snyder from the voter registration rolls while imprisoned. *Id.* at 783–84. Thus, the court's entire discussion of infamous crimes is wholly dicta.

Third, the "affront to democratic governance test" is based on a misreading of the common law. At the same time Iowa adopted a common law definition of infamous crime to include treason, felonies, and *crimen falsi* crimes in *Carter* and *Palmer*, Pennsylvania adopted its own common

law definition. In 1842, The Pennsylvania Supreme Court defined infamous crimes as:

> The offences which disqualify a person to give evidence, when convicted of the same, are treason, felony, and every specieis fo the crime falsi—such as forgery, subornation of perjury, attaint of false verdict, ***and other offences*** of the like description, which involve the charge of falsehood, and affect the public administration of justice.

Commonwealth v. Shaver, 3 Watts & Serg. 338, 342 (Pa. 1842) (emphasis added); *see also Commonwealth ex rel. Baldwin v. Richard*, 751 A.2d 647 (Pa. 2000). The *Snyder* court and the Petitioner incorrectly read this test to limit infamous crimes to only crimes which "affect the public administration of justice." Under the correct reading and the expansive common law understanding, offenses which "affect the public administration of justice" were a *type* of infamous crime—as were felonies.

In any event, adopting the *Snyder* standard is both unworkable and short-sided. As articulated by Justice Mansfield, the *Snyder* "standard is essentially no standard at all and will lead to more voting and ballot cases as [the Court] sort[s] out the implications." *Chiodo*, 846 N.W.2d at 860 (Mansfield, J., specially concurring).

Snyder offers little to no guidance to future courts on how to determine if an offense is an affront to democratic governance. For example, does the standard include only election crimes or also all crimes of

dishonesty? If this were the standard, it would lead to absurd results. If the Court were to adopt this standard, the staffer for Bernie Sanders who opened an email inadvertently sent by the Democratic National Committee would lose his elector rights, but Roger Bentley who was convicted of first-degree kidnapping and first-degree murder would be able to vote and hold public office. *See State v. Bentley*, 757 N.W.2d 257 (Iowa 2008); *see also* Amicus Brief of the Iowa State Association of Counties (articulating the need for a bright-line rule).

While Petitioner notes two other possible tests for infamy—*crimen falsi* crimes and crimes against moral turpitude, she argues that neither of these tests should be adopted.[10] We agree. However, as previously pointed

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[10] It is undisputed that Petitioner was convicted of a Class C Felony—Delivery of 100 Grams or Less of Cocaine. Although Petitioner asserts that her crime fails all three tests, many jurisdictions have found drug offenses—beyond mere possession—to amount to crimes of moral turpitude. *See e.g.*, *In re Robbins*, 678 A.2d 37 (D.C. Cir. 1996); *In re Berk*, 602 A.2d 946 (Vt. 1991).

The felonious distribution of narcotics is a serious offense despite Petitioner's attempts to mitigate her behavior. The felonious distribution of narcotics is also not a victimless crime. Petitioner was not convicted of narcotics possession. She was not convicted due to her personal use of illicit drugs. Petitioner's conviction was based on her distribution of narcotics to *others*.

In any event, because the Petitioner expressly disavows adoption of a "moral turpitude" test the State will not further address this "amorphous" standard. *See Da Silve Neto v. Holder*, 680 F.3d 25, 28–29 (1st Cir. 2012) (detailing the history and various approaches to defining moral turpitude in the immigration context).

out, the common law *crimen falsi* test referenced in the *Chiodo* plurality opinion includes treason, felonies, ***and*** *crimen falsi* offenses. While Petitioner consistently asserts that this test is narrower than felonies, in actually the *crimen falsi* test is significantly broader—and includes all felony offenses. *See Carter*, 1 Greene at 171; *Baldwin*, 751 A.2d at 653.

All three of the tests proposed by the Petitioner have common law roots. At common law, these tests were far more expansive than the standard Petitioner advocates for. And, most importantly, all three tests included felonies.

The issue in this case ultimately comes down to a question of line drawing. Where should the line be drawn and who is in the best position to draw that line? This Court and the Legislature have drawn that line to include felonies for more than a hundred and fifty years. Petitioner has not met her heavy burden to redraw that line with an amorphous and ambiguous test.

CONCLUSION

For the reasons expressed above, the Defendant respectfully prays that the district court judgment be affirmed in its entirety.

Assuming arguendo, however, that this Court disagrees and reverses the district court judgment neither a writ of mandamus or injunctive relief is

necessary to effectuate this Court's decision. In her prayer for relief, Griffin sought a declaratory order, injunctive relief, and a writ of mandamus. Griffin does not request injunctive or mandamus relief in order to establish rights, but instead to confirm the rights potentially established by declaratory order. *See Hewitt v. Ryan*, 356 N.W.2d 230, 233 (Iowa 1984) (noting that mandamus "is not to be used to establish right but to enforce rights that have already been established"). Essentially, Griffin seeks an injunction prohibiting the Respondents from violating the declaratory order and a writ of mandamus requiring Respondents to comply with the declaratory order. For example, Griffin seeks an injunction prohibiting the Respondents from "Criminally prosecuting for election misconduct, registration fraud, voter fraud, perjury, or otherwise imposing civil or criminal sanctions on Mrs. Griffin on account of voting with a felony conviction. . . ." (Amended Petition at 19; App. 59). Neither injunctive or mandamus relief is appropriate under these circumstances.

Courts have long assumed that government officials will give full credence to a court's order finding a statute or statutes unconstitutional. *See Phelps v. Powers*, No. 1:13-CV-00011, ___ F. Supp. 3d ____ (S.D. Iowa Dec. 3, 2014) (declining to enjoin Iowa prosecutors from enforcing flag discretion and misuse statutes); *see also Roe v. Wade*, 410 U.S. 113, 93 S.

Ct. 705 (1973) (declining to address injunctive relief, assuming that state officials would abide by the court's decision). There is no reason to suggest that Secretary Pate would not fully and expeditiously comply with the Court's declaratory order, necessitating further court intervention.

REQUEST FOR ORAL ARGUMENT

Defendants respectfully requests to be heard in oral argument.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief complies with the type-volume limitation, typeface, and type-style requirements of Iowa R. App. P. 6.903. This Final Brief was prepared in Microsoft Word 2007 using Times New Roman 14. The number of words is 5,140, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Meghan Gavin

Date: January 21, 2016

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