IN THE SUPREME COURT OF IOWA

NO. 15-1661
Polk County No. EQCE077368

KELLI JO GRIFFIN,

Petitioner/Appellant,

v.

PAUL PATE, in his official capacities as IOWA SECRETARY OF STATE and DENISE FRAISE, in her official capacities as LEE COUNTY AUDITOR,

Respondents/Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY

HON. ARTHUR E. GAMBLE
Chief District Judge, Fifth Judicial District of Iowa

BRIEF OF AMICUS CURIAE IOWA COUNTY ATTORNEYS ASSOCIATION

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Identity of amicus curiae and interest in the case

The Iowa County Attorneys Association (ICAA) is a nonpartisan association of Iowa's county attorneys and their assistants. The county attorney is the chief law enforcement officer for his or her county. The primary purposes of the association are to encourage and maintain close coordination among county attorneys and to promote the uniform and efficient administration of the criminal and juvenile justice systems of Iowa.

Iowa's county attorneys have two interests in this litigation. It is our duty to enforce criminal violations of Iowa's election laws. These laws include prohibitions against ineligible persons casting a ballot and being a candidate for office. In addition, we must be able to give advice to our county auditors in their capacity as the local commissioner of elections. In both of these roles we need to know who is and who is not a valid elector.

ICAA takes no position on the broader question of whether disenfranchisement is a policy which should be

changed through the political process. As a question of law, however, we submit that the current state of the law is quite clear. Griffin is disenfranchised under the Iowa Constitution. If, or when, the people of Iowa change their most prized legal possession we will gladly enforce such a new law.

Summary of the Argument

This case is about the meaning of two words in the Iowa Constitution. The meaning of "infamous crime" divided this Court in *Chiodo v. Section 42.34 Panel*, 846 N.W.2d 845 (Iowa 2014). Three justices concluded that the words include only some felony offenses. Two justices concluded that the words include all felony offenses. One justice concluded that the words include all felony and aggravated misdemeanor offenses. This case is the natural result of *Chiodo*. A felon sued the secretary of state and her county auditor seeking a declaratory judgment that she was eligible to vote. The district court held that *Chiodo* did not produce a majority opinion and therefore did not overrule prior cases holding that all felonies

were infamous crimes. The district court concluded that the felon was therefore disenfranchised. The felon now appeals.

As will be shown below, the term "infamous crime" is *not* synonymous with the term "felony." "Infamous crime" is a broader concept than "felony." All felonies are infamous crimes but not all infamous crimes are felonies. The other infamous crimes which disqualify an elector include, at a minimum, misdemeanor offenses involving dishonesty, corruption, or other behavior which would undermine the democratic process. In 1994 the Iowa legislature statutorily defined "infamous crimes" to mean only felonies. The effect of this definition must be resolved in another case.

The Iowa Constitution disenfranchises persons convicted of an infamous crime. "Infamous crimes" include all felony offenses.

Preservation of error.

ICAA agrees that Griffin has preserved error on her claim.

Standard of review.

Griffin's claim arises under the Iowa Constitution. This Court reviews constitutional claims de novo. *Hensler v. City of Davenport*, 790 N.W.2d 569, 578 (Iowa 2010).

Meaning of the term "infamous crime" in the Iowa Constitution.

The Iowa Constitution broadly grants the right to vote except to "[a] person adjudged mentally incompetent to vote or a person convicted of any infamous crime." Art. II, § 5. Appellant Kelli Jo Griffin was convicted of the class "C" felony offense of delivery of a controlled substance in violation of Iowa Code § 124.401(1)(c)(2)(b). Griffin now wishes to vote. She cannot if her felony is an infamous crime.

"In construing the Iowa Constitution, we generally apply the same rules of construction that we apply to statutes."

Rants v. Vilsack, 684 N.W.2d 193, 199 (Iowa 2004). The Court seeks the intent of the framers and to do so "we must look first at the words employed, giving them meaning in their natural sense and as commonly understood." *Id.* If necessary, the Court will "examine the constitutional history" or "note the object to be attained or the evil to be remedied as disclosed by circumstances as the time of adoption." *Id.* Terms which are not defined in a constitution or statute may be understood by using a dictionary definition. *Branstad v. State of Iowa ex rel Natural Resources Commission*, ____ N.W.2d ____ at p. 12 (Iowa 2015) (citing to dictionary definition of "adjudicate").

It should be expected that a few words in a constitution may carry great meaning and cover a wide scope. This brevity reflects the nature of the document and is not license to make these words mean whatever one may wish. *McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of

a legal code, and could scarcely be embraced by the human mind.")

Our modern understandings are simply insufficient to properly interpret the language of the Iowa Constitution. "A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 54 (1868). "A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion." *Id.* Our understanding must be guided by an examination of the meaning of the words and phrases as they would have been understood by those who wrote and ratified them.

What, therefore, would they have understood the term "infamous crime" to mean? An early edition of Black's Law Dictionary defined it as:

> A crime which entails infamy upon one who has committed it. The term "infamous" – i.e. without fame or good report – was applied at common law to certain crimes, upon the conviction of which a person became incompetent to testify as a witness, upon the theory that a person would not commit so heinous a crime unless he was so depraved as to be unworthy of credit. These crimes are treason, felony, and the *crimen falsi*.

Black's Law Dictionary 299 (2nd Ed. 1910) (internal case citations omitted). Or consider this definition:

> A crime which works infamy in one who has committed it.
>
> - In the United States. It has been held that only those crimes are infamous that were so at common law, but the general rule is that any offense is infamous that may be punished by death, or by imprisonment in the penitentiary, with or without hard labor.
>
> A crime which subjects the party to a disqualification to hold office, in case he is convicted of such crime.
>
> The test is the possible punishment, and not that awarded in a particular case.
>
> - At Common Law. Treason and all felonies, and certain misdemeanors affecting the public interest most closely, were infamous crimes, the nature of the crime being the test.

Cyclopedic Law Dictionary 527 (2nd Ed. 1922) (internal case citations omitted).

Infamy (and therefore infamous crimes) had under the common law two characteristics: the first was the procedural protections necessary when an infamous crime was charged,

the second was the extent to which the conviction of an infamous crime imposed infamy upon the criminal. Lord Auckland, *Principles of Penal Law* 54 (1771) (Auckland).

A prosecution for an infamous crime – in England and in the United States – could only be commenced upon the presentment and indictment of the grand jury. Fifth Amendment, U.S. Constitution. *Ex parte Wilson*, 114 U.S. 417, 423 (1885) But this is a case about the consequences of a criminal conviction, not the procedure by which the conviction must be obtained. In other words, did Griffin sustain a conviction for an offense which imposed infamy upon her?

"Infamy" means a "total loss of reputation; public disgrace…that loss of character or public disgrace which a convict incurs, and by which a person in rendered incapable of being a witness or juror." American Dictionary of the English Language Vol I 966 (Webster 1828). "Infamy" is directly tied to the person's status in society after conviction. "[P]ersons who…are for ever incapacitated from voting at the elections of members of parliament. They are therefore infamous; they labour under infamy: and have lost part of their political

rights." Political Dictionary Vol II 105 (Charles Knight & Co. 1846). *See also*, Black's Law Dictionary 621 (2nd Ed. 1910) ("A qualification of a man's legal status produced by his conviction of an infamous crime and the consequent loss of honor and credit, which, at common law, rendered him incompetent as a witness, and by statute in some jurisdictions entails other disabilities.")

This Court considered the meaning of the term "infamous crime" in a case involving an accident between a bicycle and a streetcar in Cedar Rapids. *Palmer v. Cedar Rapids and Marion Railway Co.*, 113 Iowa 442, 85 N.W. 757 (1901). The bicyclist had been convicted in federal court of "carrying on the business of a liquor dealer without having first paid the special tax therefore required by the revenue laws of the United States." *Id.* at 443. The question presented was whether this was an "infamous crime" which would have justified the impeachment of the plaintiff as a witness. *Id.* at 445.

"By the common law, a witness who has been convicted of an infamous crime is not allowed to testify; the reason assigned being that such a person is insensible to the

obligations of an oath." *Id.* at 445-46. "But it is not the conviction of any crime which has this effect, and there has been great difficulty among judges and text writers in stating any satisfactory rule for determining definitely what are the crimes conviction of which disqualifies a witness from testifying." *Id.* at 446.

That is not to say all parts of the definition were unclear. "Without controversy, conviction for treason or **felony** will disqualify, but as to other crimes it has been said that they must be in their nature infamous; and this has been interpreted to include only those crimes involving the element of falsifying, such as perjury or forgery, or other crimes which tend to the perversion of justice in the courts." *Id.* at 446 (emphasis added).

After acknowledging that infamous crimes carry certain procedural protections, the *Palmer* Court held, "[i]t is well settled that in determining whether the crime of which the witness has been convicted is an infamous crime, which will disqualify him from testifying, the nature of the crime, and not the punishment which may be inflicted therefor, is the test."

Id. at 447. Thus, *Palmer* teaches that the following are "infamous crimes" for purposes of Art. II, § 5:

1. Treasons
2. Felonies
3. Misdemeanors that have an element of falsifying; and
4. Misdemeanors that tend to the perversion of the courts.

Palmer controls the outcome of this case. The syllogism is simple:

> *Major premise*: all persons convicted of an infamous crime are disenfranchised by the Iowa Constitution and all felonies are infamous crimes.
>
> *Minor premise*: Kelli Jo Griffin was convicted of a felony.
>
> *Conclusion*: Kelli Jo Griffin is disenfranchised.

Yet, regrettably, *Chiodo* does not discuss *Palmer* nor does it consult any dictionary definitions of the term "infamous crime." Griffin's brief addresses *Palmer* by simply claiming it is not "relevant." (Appellant's brief 33). She simply asks this Court to adopt the *Chiodo* plurality decision. Because of this a discussion of the plurality's legal analysis is in order.

Treason, felony, or breach of the peace.

Both the plurality and concurrence in *Chiodo* discuss the difference between "treason" and "felony" by referring to constitutional protections given to electors and legislators. The Iowa Constitution states that electors, "shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest on the days of election." Iowa Const. Art. II, § 2. Likewise, both our state and federal constitutions state that legislators, "in all cases, except treason, felony, or breach of the peace, shall be privileged from arrest" during the session of the legislature. Iowa Const. Art. III, § 11. U.S. Const. Art. I, § 6.

The plurality interprets this language to mean that felonies are not the same as infamous crimes. *Chiodo*, 846 N.W.2d at 853. ("If the drafters intended the two concepts to be coextensive, different words would not have been used…Our framers knew the meaning of felony and knew how to use the term.") The concurrence brushes off this text as merely a copy from the U.S. Constitution. *Id.* at 861 ("Given the specific source of these two provisions, I do not think we

can use them as a lexicon for interpreting the rest of the Iowa Constitution. And by the way, does this mean that treason is not a felony?")

Both the plurality and concurrence miss the mark. To our modern ear the word "treason" has the connotations of espionage, the stuff of a spy thriller. There is good cause for this. The U.S. Constitution defines "treason against the United States" as "levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. Const. Art. III, § 3. One might wonder why the Framers felt the need to constitutionally define treason at all. Would this not normally be the stuff of a statute? And, were the Framers really worried about treason arrests on election day? Did they think treason was a frequently committed crime?

In the common law treason had several forms. High treason was an act (or even disloyal thought) against the king. To say the common law treated high treason seriously is an understatement. "It is then, and it ever hath been, the law of England, to punish a mere intention to kill the king, more severely than the actual and most wilful murder of a private

subject." Auckland 109. The traitor would have his genitals and entrails removed and burned before him. He would then be decapitated, drawn, and quartered. His body parts would be hung in conspicuous places so that they could be eaten by wild birds. *Id.* at 134.

The law also recognized petit treason. This was the killing of one's husband or employer or a high-ranking church official by a low-ranking one. Black's Law Dictionary 1730 (10th Ed. 2014). "Treason" can therefore be understood as an act against the social order. Although the common law considered this to be an infamous crime, treason itself no longer exists in its traditional forms. The underlying crimes are prosecuted, not treason itself. William Clark, *Handbook of Criminal Law* 41 (3rd Ed. 1915).

Treason is defined in the U.S. Constitution as a deliberate rejection of the abuses which attended treason prosecutions in England:

> As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually

> wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger.

James Madison, *The Federalist No. 43* (1788) The Framers rightly believed that a species of crime focused solely on fealty to the government or to one's superiors in the social order was incompatible with American ideals. The framers of the Iowa Constitution copied this clause in Iowa Const. Art. I, § 16 – presumably for the same reasons.

And treasons were not felonies. In the common law the punishment for a felony offense included forfeiture of lands and property to the feudal lord. The feudal lord was directly responsible for keeping the king's peace and administering the king's justice. The punishment for treason, in addition to extreme physical cruelty, was forfeiture of lands and property to the king:

> This last distinction influenced the development of the law. Kings wished to extend treason at the expense of felony; the magnates resisted. A lord whose tenant had, for example, slain a king's messenger was much concerned that this offence should be a felony, not treason. In the one case he would get an escheat; in the other case, far from getting an escheat, he would lose seigniorial dues, unless the king took pity on him, for the

> king would hold the traitor's land and no one can be the king's lord.

Sir Frederick Pollock, *The History of English Law before the Time of Edward I, Vol. II.*, 523-24 (1898).

So why do the U.S. and Iowa Constitutions use the phrase, "treason, felony, or breach of the peace?" It is a term of art in the common law. It refers to all criminal matters and would have been understood to forbid arrests in a civil action which would have prevented a legislator from performing his duties or a voter from participating in an election. *Williamson v. United State*s, 207 U.S. 425, 445-46 (1908). By using a specific phrase of the common law the drafters invoked the exact same meaning. *See*, Akhil Reed Amar, *America's Constitution: A Biography 101* (Random House 2006) (Amar). The word "treason" in Iowa Const. Art. II, § 2 and Art. III, § 11 has a fundamentally different meaning than its use in Iowa Const. Art. I, § 16.

Now, why would it be necessary to be concerned about someone getting arrested in a civil case? Don't we start a civil case by logging in to EDMS? Again, our modern

understandings may easily lead us astray. "When the Constitution was adopted, arrests in civil suits were still common in America." *Long v. Ansell*, 293 U.S. 76, 83 (1934). The plaintiff swore out a writ of *capias ad respondendum* which commanded the sheriff to take the civil defendant into custody to make him appear in court. Sir William Blackstone, *Commentaries on the Laws of England in Four Books, Vol. II* 281-82 (Philadelphia: J.B. Lippincott Co. 1893). All court practice in that era was substantially quicker than it is today. The civil plaintiff would have the defendant physically brought before the court for a swift determination of justice. *Id.* at 281

Iowa's territorial laws provided for the sheriff or coroner "to serve all process of summons or capias" and gave the plaintiff the right, if the defendant was not found, to have another summons or capias issued. The Statute Laws of the Territory of Iowa, Code of Practice, Ch. 112, §§ 2 and 4 (Iowa Territory Laws). After statehood, it was a substantial reform to this practice to specify that an action would "be commenced by serving the defendant with [original] notice" and that upon

service "the defendant shall be considered in court." Iowa Code §§ 1714, 1730 (1851).

Even with this reform the law permitted arrests in civil cases under certain other circumstances. *Id.* at § 1959 (judgment debtors), § 2201 (injunction violations), and § 2231 (habeas corpus actions). None of these arrests would have been constitutional, however, if they prevented an Iowan from voting or attending session as a member of the general assembly. The privilege prevented the use of the civil justice system to manipulate which legislators could be present to vote on bills. "When a representative is withdrawn from his seat by summons, the 30,000 people whom he represents lost their voice in debate and vote." Amar 101 (quoting Thomas Jefferson, *A Manual of Parliamentary Practice* § III (2d ed. 1812)). There was a specific purpose for including the "treason, felony, or breach of the peace" language in the Iowa Constitution. And this reason has nothing to do with the definition of "infamous crime."

Both the plurality and concurrence in *Chiodo* draw the wrong textual lesson. The lesson should be that the language

in the constitution can only be understood by reference to how the drafters of the document would have used those words. To us the idea of having a civil defendant arrested is an utterly foreign concept. We therefore look at language written in a context where such a thing was common and assume it must have a meaning consistent with modern life. This is an invitation to disaster. Our state constitution is an awful[1] document. It should be treated as such.

Iowa precedent on "infamous crimes" after Palmer.

This Court next considered infamous crimes in *Flannagan v. Jepson*, 177 Iowa 393, 158 N.W. 641 (1916). Flannagan had been held in summary contempt for violation of an earlier decree enjoining him from maintaining a liquor nuisance. *Id.* at 395. He was sentenced to serve a year in the penitentiary at Fort Madison at hard labor. *Id.* at 401. This Court ruled that this was an infamous punishment which required the procedural protections of a criminal trial.

1 Originally "awful" would have been understood to mean "inducing awe," not the negative connotation we would associate today. Bryan A. Garner, Modern American Usage 81 (3d Ed. 2009). A contemporary judge interpreting an historic document using the word in its proper sense could, if she was not careful, easily assume the text had a meaning opposite to what its author intended. An *amusing* consideration.

Summary contempt proceedings were not sufficient. *Flannigan* is certainly not contrary to *Palmer*, yet it deals with criminal procedure, not the infamy which attaches to the criminal.

This Court's first case dealing directly with eligibility to hold public office was *Blodgett v. Clarke*, 177 Iowa 575, 159 N.W. 243 (1916). Blodgett had been a successful candidate for a judge of this Court in the primary election but was denied a certificate of nomination because he had been convicted of the felony offense of forgery and served a sentence in the penitentiary. 177 Iowa at 575, 159 N.W. at 243. Blodgett claimed that his forgery conviction was invalid due to evidentiary errors by the trial judge. 177 Iowa at 578, 159 N.W. at 244. After rejecting the attempt to collaterally attack his conviction, this Court had little trouble finding him to be ineligible for the office. "Any crime punishable by imprisonment in the penitentiary is an 'infamous crime.'" *Id.*

This statement in *Blodgett* is central to the decision in *Chiodo*. The plurality "overrules"[2] *Blodgett*'s holding, the

2 The plurality opinion uses this language, however it cannot have this effect. A plurality opinion does not create binding precedent, particularly when just as many justices considered Blodgett to be good law. *Book v.*

concurrence and dissent both consider it still valid (although disagreeing on the interpretation of its meaning).

The plurality criticizes *Blodgett* as lacking reasoning and analysis. *Chiodo*, 846 N.W.2d at 850-51. It is certainly true that there is no analysis of the meaning of "infamous crime" in *Blodgett*. Yet, is this a fair criticism of *Blodgett*?

The real issue in *Blodgett* is whether a candidate for public office may litigate the validity of his disqualifying conviction when his eligibility for public office is attacked. Blodgett himself essentially conceded that his felony conviction otherwise made him ineligible. He claimed that his conviction was invalid because he had previously been acquitted of uttering the writing at issue (he was successfully prosecuted for forging it in another county) and for evidentiary errors by the trial judge. *See*, *State v. Blodgett*, 143 Iowa 578, 121 N.W. 685 (1909).

This Court held that his complaints did not go to the jurisdiction of the court where he was convicted and that his

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Voma Tire Corp., 860 N.W.2d 576, 590-91 (Iowa 2015) (recognizing that a plurality opinion does not create binding authority).

felony could not be ignored. "That decision is conclusive on the question of the legality of the plaintiff's conviction of an infamous crime, and, under [Art. II, § 5], we have no option to do otherwise than declare him not entitled to the privilege of an elector, and, therefore, ineligible as a candidate for the office of judge of the Supreme Court of this state." *Blodgett*, 177 Iowa at 578, 159 N.W. at 244.

There was good reason for this Court to not analyze the meaning of "infamous crime" – it was not the disputed question. To be sure, the *Blodgett* court gets it right. At the time the term "felony" was synonymous with "a crime punishable by imprisonment in the penitentiary." Perhaps the lack of analysis reflected the obviousness of the definition to the *Blodgett* court.

It therefore appears that the *Chiodo* plurality's criticism of *Blodgett*'s inadequacy was not fair – especially in light of the failure to acknowledge *Palmer*'s existence. *Blodgett* and *Palmer* both defeat Griffin's claim. The historical meaning of the term "infamous crime" as evidenced by contemporary dictionary definitions and use in treatises defeats Griffin's claim. And, as

we will see, the legislature's latter definition of the term defeats her as well.

Whether the legislature may define "infamous crimes" as all felony offenses.

In 1994 the Iowa Code was amended to define the term "infamous crimes" to mean any felony. 1994 Iowa Acts Ch. 1180, § 1 (codified at Iowa Code § 39.3(8)). This presents the question of whether the legislature has the power to make such a definition. If it does, then Griffin plainly is disqualified. The *Chiodo* plurality rejects the notion that the legislature may define this term. It justifies this rejection, however, with a historical analysis which cannot bear the weight placed upon it.

To decide if the legislature may define "infamous crime" the plurality compares the proposed original state constitution of 1844 (which was not ratified) to the constitution of 1846:

> [I]t appears the drafters at our 1857 constitutional convention intended to deprive the legislature of the power to define infamous crimes. The proposed 1844 Iowa Constitution had contained a provision denying the privileges of an elector to "persons declared infamous *by act of the legislature*." Iowa Const. art. III, § 5 (1844) (emphasis added). This language was removed in the

> 1846 Iowa Constitution. *See*, Iowa Const. art. III, § 5 (1846) ("No idiot, or insane person, or persons convicted of any infamous crime, shall be entitled to the privileges of an elector.").

Chiodo, 846 N.W.2d at 855.

The structure of the highlighted sentence from the proposed 1844 constitution demonstrates why the plurality's analysis is simply wrong. The 1844 language proposed that the legislature could declare *persons* – not types of crimes – to be infamous. There was good reason to abandon such language. A legislative act fixing punishment on an individual is an unconstitutional bill of attainder. U.S. Const. Art. I, § 10 ("No state shall…pass any bill of attainder.") Only a court can impose punishment, infamous or not. *Cummings v. Missouri*, 4 Wall. 277, 288 (1867).

The plurality compounds its error of grammar with an error of history. The plurality describes the framers of the 1846 Iowa Constitution as influenced by "radically egalitarian and inclusive voices" because of the grant of the vote to "resident foreigners who had declared their intention of becoming residents. This suggests its infamous crimes clause

was meant to apply narrowly." *Chiodo*, 846 N.W.2d at 855 (citing Benjamin F. Shambaugh, *History of the Constitutions of Iowa* 301 (1902) (Shambaugh)).

The plurality reads history too generously. The primary reason for failure of the proposed constitution of 1844 and the success of the constitution of 1846 was the size of Iowa. Congress trimmed the proposed boundaries of the 1844 document in an effort to create more free-soil states in the upper Mississippi river valley. Richard, Lord Acton, *To Go Free: A Treasury of Iowa's Legal Heritage* 24, 53 (1995) (Acton). Iowans voted this down twice in 1844. However the constitutional convention of 1846 accepted the smaller boundaries and made few substantive changes to the constitution of 1844. Shambaugh at 299. The principal differences were provisions regulating commerce and banking. *Id.* at 302. This, of course, was the main political fight (other than slavery) which occupied the Whig and Democratic parties at the time. *Id.* at 318-20 (relating Whig reaction to proposed 1846 constitution). *See also*, Joseph Frazier Wall, *Iowa: a Bicentennial History* 40 (Norton 1978) (Wall) ("Banks, to most

of these hard-money Jacksonian delegates, were highly suspect institutions…")

And, to say that "radically egalitarian" voices influenced debate is to ignore other historical evidence. The convention of 1844 debated at length the question of whether the constitution should expressly prohibit migration of blacks into the territory. A committee appointed to study the issue reported back "[h]owever your committee may commiserate with the degraded condition of the negro, and feel for his fate, yet they can never consent to open the doors of our beautiful State and invite him to settle our lands. The policy of the other States would drive the whole black population of the Union upon us." Shambaugh at 216.

Iowa's territorial laws provided that "[a] negro, mulatto, or Indian, shall not be a witness in any court, or in any case against a white person." Iowa Territory Laws, Practice, § 37. This was incorporated in the first state code. Iowa Code § 2388 (1851). This Court interpreted the statute to even prohibit a white defendant from using the testimony of a black witness in an action filed by a black plaintiff. *Motts v. Usher*, 2 Clarke 82,

83-84 (Iowa 1855). The statute was repealed in 1856. Acton at 75. At the 1857 constitutional convention, however, a delegate proposed including a similar provision in the new constitution. The motion failed by a vote of 1 to 33. Journal of the Constitutional Convention of Iowa 107-08 (1857).[3]

The *Chiodo* plurality's citation to history is plainly incorrect. It cannot be reconciled with the sources it cites and other historical evidence. The best evidence of what our 1857 Constitution means is the meaning of the words as they would have been understood by the people who wrote and ratified the document. This meaning, as we have seen, defeats Griffin's claim. History and language are not on her side.

It is not necessary for this Court to decide in Griffin's case whether the legislature's definition in Iowa Code § 39.3(8) is valid. Griffin falls within both the meaning of "infamous

[3] This is not to say that the 1857 Iowa Constitution was intended to disenfranchise blacks by the term "infamous crime." The question of whether blacks should be permitted to vote *at all* was submitted as a separate referendum during the ratification process. It failed decisively. Wall 101. Iowa's whites-only voting rules did not change until 1868 (prior to ratification of the Fifteenth Amendment). *Id.* at 115. This history is nothing to be proud of today, yet it hardly reflects a racial-animus concern in the interpretation of "infamous crime." Our framers were not thinking about (or fearful of) black voters when they wrote those words.

crime" as used in the Iowa Constitution and the statutory definition. Indeed, this legislative definition offers a tantalizing path forward for those who advocate reductions in disenfranchisement. This path will be explored later in this brief.

The Indiana Supreme Court's approach.

Griffin, like the *Chiodo* plurality, relies heavily on *Snyder v. King*, 958 N.E.2d 764 (Ind. 2011). The *Chiodo* plurality cites the case for the proposition that "[i]n the context of the limitation of political and civil rights, infamous described the nature of the crime itself, irrespective of punishment." *Chiodo*, 846 N.W.2d at 852. Griffin draws from this an analytical framework which, naturally, leads to the conclusion that she should not be disenfranchised. An examination of *Snyder* shows that it is paltry authority for Griffin. Indeed, the case contains a landmine of legal logic. Griffin jumps on it with both feet.

The Indiana Constitution states "[t]he General Assembly shall have the power to deprive of the right of suffrage, and to render ineligible, any person convicted of an infamous crime."

Ind. Const. Art. II, § 8. The Indiana General Assembly had enacted statutory provisions which provided that anyone serving a sentence of imprisonment was disenfranchised while incarcerated. *Snyder*, 958 N.W.2d at 768.

Snyder had been incarcerated while serving a sentence for a misdemeanor battery offense. Because of his incarceration he was removed from voting rolls. When he was released he did not reregister to vote (as he could have) but instead sued in federal court under a variety of constitutional and statutory theories. *Id.* at 768-69. The federal court certified the question of whether a misdemeanor battery offense is an infamous crime under the Indiana Constitution. *Id.* at 769. The Indiana Supreme Court elected to also answer the more general question of "whether cancellation of Snyder's voter registration violated the Indiana Constitution." *Id.*

The court engaged in a lengthy discussion of prior case law, dictionary definitions, and the text of the Indiana Constitution. The court, like the *Chiodo* plurality, considered the phrase "treason, felony, and breach of the peace." *Id.* at 771. Much like the *Chiodo* plurality, the *Snyder* court said "if

the framers had intended the Infamous Crimes Clause to apply only to felonies, we presume they would have used the term 'felony' instead of "infamous crimes.'" *Id. Compare*, *Chiodo*, 846 N.W.2d at 853. ("If the drafters intended the two concepts to be coextensive, different words would not have been used…Our framers knew the meaning of felony and knew how to use the term.") We understand now, of course, that this constitutional phrase is a term of art for immunity from arrest in a civil case. The *Snyder* court makes the same error as the *Chiodo* plurality and concurrence. But set that aside for a moment.

This is where *Snyder* explodes under Griffin. Remember, Griffin asks for the views of the *Chiodo* plurality to become law. The *Chiodo* plurality believes that infamous crimes are a subset of felonies. *Yet* Snyder *holds the opposite*! The *Snyder* court concludes that "infamous crime" includes more than just felonies. In fact, Snyder conceded that all felonies were infamous crimes. 958 N.E.2d at 778 ("Snyder argues that misdemeanor battery is not an infamous crime because conviction thereof would not have rendered a witness

incompetent at common law…[under which] a person was rendered infamous and therefore incompetent to serve as a witness if he or she was convicted of treason, felony, or any species of *crimen falsi*.") *Snyder* disenfranchises misdemeanants whose crimes involve a threat to democratic governance. *Id.* at 782. Yet the *Chiodo* plurality rejects out of hand the notion that any misdemeanor crime can be infamous. 846 N.W.2d at 856.

If the logic of Snyder is no help to Griffin, what about its holding? No such luck. The holding is that a misdemeanor battery is not an infamous crime. *Snyder*, 958 N.E.2d at 782-83. Griffin is a felon – no help for her. A secondary holding is that the Snyder was constitutionally disenfranchised during the time of his incarceration due to another provision of the Indiana Constitution. *Id.* at 785 (holding legislature has general police power to disenfranchise prisoners). This, similarly, is not relevant to Griffin's case. She is either disenfranchised based on the infamous nature of her criminal record or she is not at all. Iowa's legislature, unlike Indiana's,

lacks a general disenfranchisement power in criminal sentencing.

The parts of *Snyder* relied upon by Griffin are nothing but dicta. For whatever reason, the *Snyder* court went far beyond what it needed to decide the case. The decision rejects numerous Indiana precedents containing a clear rule of decision (although without necessarily rejecting the ultimate holding of those cases). *Id.* at 777. The court also concludes that Snyder was validly disenfranchised under a separate constitutional provision which gave the power to disenfranchise during the period of incarceration. If this is so, why was it necessary to rule on the meaning of "infamous crime"?

The *Snyder* decision painfully demonstrates the wisdom of appellate courts deciding cases on as narrow a basis as possible. The normal rule is that a court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). The Iowa Supreme Court has followed Justice

Brandeis's wise counsel. *War Eagle Vill. Apts. v. Plummer*, 775 N.W.2d 714, 722 (Iowa 2009) (quoting rule).

The *Snyder* court also substantially undercuts the validity of its own decision by noting the "troubling posture" of the case. *Snyder*, 958 N.E.2d. at 786. "[A]ddressing an issue of state constitutional law in the context of a certified question contravenes at least two fundamental principles of the judicial function." *Id.* The court identified these principles as the doctrine of constitutional avoidance described in *Ashwander* as well as the prohibition against advisory opinions. *Id.*

"These concerns are not merely academic. The posture of this case has rendered review of this important question of state constitutional law difficult." *Id.* at 788. The court identified at least three concerns. "First, the issues were not fully developed. Second the briefs were not very helpful in discussing the history and purpose of the Infamous Crimes Clause, which likely is due to the lack of a clearly refined issue. Third, there is no record." *Id.*

Yet, inexplicably, the *Snyder* court did not heed its own warnings. "Although we have accepted and answered the

certified question in this case, we have not done so without hesitation. While there are benefits to the certified question – namely, ensuring uniform interpretation and application of Indiana law – there are significant pitfalls." *Id.*

Snyder shows little fidelity to the understanding that "the law [is] an evolving process that often makes the resolution of legal questions a composite of several cases, from which appellate courts can gain a better view of the puzzle before arranging all the pieces. The wisdom of this process has been revealed time and again…" *State v. Young*, 863 N.W.2d 249, 282 (Iowa 2015) (Mansfield, Waterman, and Zager, JJ., concurring) (citing *State v. Williams*, 695 N.W.2d 23, 30 (Iowa 2005)).

Griffin's request for this Court to follow *Snyder* is not based on comprehensive or consistent legal analysis. Griffin wants a result, not a sensible rule of law. *Snyder* is a tangled mess of constitutional law mish-mash. By its own terms it calls out the serious questions about the procedural and adversarial nature of the litigation which produced it.

This Court can do better.

The Chiodo dissent and questions left unanswered by this case.

Mindful of the lesson to decide cases on as narrow of a ground as possible, ICAA wishes to make a few observations about the dissent in *Chiodo*. The dissent concludes that a conviction for operating a motor vehicle while intoxicated, second offense is an infamous crime because it is punishable by imprisonment in the penitentiary. The dissent reads *Blodgett* as controlling and is unpersuaded by the fact that aggravated misdemeanors (being punishable by imprisonment in the penitentiary) are a more recent feature of the criminal law. *See*, *Chiodo*, 846 N.W.2d at 863-64 (Wiggins, J., dissenting).

The dissent is of course correct that constitution cannot be amended by legislation. The dissent concludes that the legislature must have considered *Blodgett* when it created the offense level of the aggravated misdemeanor. 1976 Iowa Acts, Ch. 1245, § 108 (codified at Iowa Code § 701.8). The fact that the offense was defined as punishable by imprisonment in the penitentiary meant the legislature intended to disenfranchise

aggravated misdemeanants. The dissent therefore believes that the later statutory change which purported to define "infamous crime" as meaning only a felony was unconstitutional.

Yet, an argument not made in *Chiodo* remains. The legislature can, certainly, set the punishment level of specific offenses. What is a felony today could be made a misdemeanor tomorrow. Indeed, the Iowa Constitution expressly contemplates the existence of capital punishment. Iowa Const. Art. I, §§ 9, 10, and 12. Does this mean that the legislature cannot repeal capital punishment? Hardly.

Similarly, perhaps the legislature has the power to remove infamy from certain offenses. There is a plausible argument to be made that the enactment of Iowa Code § 39.3(8) did not amend the constitution, but it did remove a part of the infamy associated with a conviction for an aggravated misdemeanor (and therefore swept up all misdemeanors which are *crimen falsi*).

This is, of course, not Griffin's case to make. She falls within both the commonly understood meaning of "infamous

crime" and Iowa Code § 39.3(8). This could have been, but was not, made by Anthony Bisignano in the *Chiodo* case. And the flip side of this argument could be made if a candidate for public office had a simple or serious misdemeanor conviction for an offense which involved dishonesty or harm to the democratic process. His candidacy could be challenged on the basis that Iowa Code § 39.3(8) is unconstitutional for failing to disenfranchise misdemeanants who fall under the definition of "infamous crime."

And, perhaps, this argument is wrong. But it should not be foreclosed. After all, suppose the legislature, sympathetic to Griffin's situation, amended the law to say that a crime or a person shall not be deemed infamous after completion of her sentence. Griffin, and the amici who support her, miss this point. And this is a better path for them to pursue. It does not require a tortured and ahistorical view of the Iowa Constitution. It honors the rule of law and the value of the democratic process. If the people, in their wisdom, decide to ameliorate some or all of the harshness of disenfranchisement

their choice can be tested at that time to see if it is constitutional.

Conclusion

Kelli Jo Griffin may well be rehabilitated. Her desire to participate in civic life is laudable. Yet, it is our solemn duty to enforce the Constitution and laws of the State of Iowa. These do not permit her to vote. The judgment of the district court should be affirmed.

Respectfully submitted,

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