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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/s/

_____

Alan R. Ostergren
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IN THE SUPREME COURT OF IOWA

NO. 18-1280

JOSHUA VENCKUS,

Plaintiff/Appellee,

v.

CITY OF IOWA CITY, ANDREW RICH, JOHNSON COUNTY, IOWA, ANNE LAHEY, NAEDA ELLIOTT, and DANA CHRISTIANSEN,

Defendants/Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY

HON. CHAD KEPROS, Judge

FINAL BRIEF OF AMICI CURIAE IOWA COUNTY ATTORNEYS ASSOCIATION and IOWA STATE ASSOCIATION OF COUNTIES

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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.

The Iowa State Association of Counties (ISAC) is a private, nonprofit corporation whose members are county officials from Iowa's 99 counties. ISAC's mission is to promote effective and responsible county government for the people of Iowa.

Iowa's county attorneys and Iowa counties have substantial interest in this litigation. Unless reversed, the idea that prosecutors and counties face liability for prosecutorial activities under the Iowa Constitution would cause crippling damage to the administration of criminal justice in the State of Iowa.

Summary of the argument

In this lawsuit, as in so many others, the plaintiff believes he has been wronged and seeks a judicial remedy. The plaintiff probably chafes at the cost and delay inherent in litigation. And what could stir passions more than a claim of absolute immunity? It seems, well, like a legal technicality. A person can allegedly do something wrong and not be held to account for it by a court. Is this the American Way?

In a word, yes. The doctrine of absolute immunity plays a vital role. This doctrine, whether it is enjoyed by judges, prosecutors, witnesses, or others, allows our system of criminal and civil justice to function. Without absolute immunity no participant in the system could make the hard choices demanded by their station. Most directly this case concerns the parties to it. But fundamentally it concerns every judge, prosecutor, or witness who might be called upon to adjudicate, prosecute, or testify in the future. Those individuals need this Court to recognize the value of absolute immunity.

This case provides an opportunity for this Court to bring needed clarity to this doctrine of absolute immunity. The doctrine is also known as "judicial absolute immunity." This term is mistakenly thought of as being something special to judicial officers. It is not. The doctrine has nothing to do with judges themselves – rather, the doctrine protects the judicial *process*. In so doing it protects everyone – judges, prosecutors, grand jurors, and many others – who perform functions at the core of the judicial process.

This case also presents an opportunity for this Court to clarify its recent decision in *Baldwin v. City of Estherville*. Although *Baldwin* addresses qualified and not absolute immunity, it apparently was interpreted by the district court as implying that the immunity doctrine for the Iowa Constitution is fundamentally different than other areas of liability. This Court should make clear that immunity of any kind is based on the function performed by the individual invoking it, and is not special to the theory of civil liability which is advanced.

The doctrine of absolute immunity for certain participants in the judicial process protects the independence and vigor of those participants from liability for their actions – regardless of the legal theory of the liability. Plaintiff seeks to impose liability on prosecutors for their actions in a judicial process by basing his claim on the Iowa Constitution. Should the Iowa Constitution be recognized as an exception to the absolute immunity doctrine?

Preservation of error.

Error was preserved by the filing of a pre-answer motion to dismiss.

Standard of review.

As this case involves a question of constitutional law this Court reviews the decision of the district court de novo. Iowa R. App. P. 6.907.

Argument

Let's start with grammar before moving to law. In the phrase "judicial absolute immunity" the word "judicial" is an adjective. But where is the noun that goes with it? What person, place, or thing is modified by the word "judicial"? The word is implied from the context, but the problem with implying something is that sometimes the implication can be lost on the audience. A review of the cases in this area shows that this has occurred with too great a frequency.

As we will see below the implied word is most assuredly not "officer." This is a common misconception. The missing noun rather is "process." *Judicial process absolute immunity* protects everyone involved in the judicial process who performs a function integral to it. Judges, to be sure, are the chief beneficiaries of this immunity – not because they are judges but because nearly everything a judge does is integral to the judicial process. Because other participants, prosecutors for example, do many things which are not integral to the process one could fall into the mistaken belief that prosecutors have

lesser immunity than judges. Not so. Prosecutors have the same immunity that a judge has.

The district court originally held that the prosecutors had absolute immunity from the tort law claims against them for their prosecutorial activities. The district court also held that a claim under the Iowa Constitution (as recognized by *Godfrey v. Branstad*, 898 N.W.2d 844 (Iowa 2017)) was preempted by the Iowa Municipal Tort Claims Act. Shortly after the district court's ruling this Court decided *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018)). The plaintiff then asked the district court to reconsider its dismissal order.

The district court surprisingly reversed itself. Focusing on the discussion in *Baldwin* that a claim under the Iowa Constitution is distinct from one under the municipal tort claims act, the district court concluded that its previous preemption analysis was wrong. But the district court never revisited the question of whether the prosecutors were entitled to absolute immunity without regard to the theory of civil liability. Furthermore, the district court reversed itself on the dismissal of the common-law tort claims on absolute

immunity grounds without explaining how or why it arrived at that conclusion.

In other words, this case is procedurally a mess. But it can be saved by a simple application of an old doctrine. Judicial process absolute immunity exists without regard to the specific theory pleaded by the plaintiff. It does not matter if the plaintiff alleges malice or corruption. It does not matter if the plaintiff alleges a violation of a common-law tort or even the Iowa Constitution. It exists because the judicial process cannot exist without it. Because of this doctrine all claims against the defendant prosecutors in this action must be dismissed.

a. Common law doctrine of absolute immunity

The doctrine of judicial absolute immunity "has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country." *Bradley v. Fisher*, 80 U.S. 335, 347 (1871). The purpose of immunity was to preserve the independence and energy of judges to do their work – especially in hard cases. "[I]t is precisely in this class of cases that the losing party feels

most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge." *Id.* at 348.

Immunity exists even if the judge allegedly acted maliciously. "The purity of their motives cannot in this way be the subject of judicial inquiry." *Id.* "If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away." *Id.* "Few persons sufficiently irritated to institute an action…would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action." *Id.*

The immunity that judges enjoy is not strictly because they are judges – it is because they participate in the judicial process. "The common law's protection for judges and prosecutors formed part of a 'cluster of immunities protecting the various participants in judge-supervised trials,' which stemmed 'from the characteristics of the judicial process.'"

Briscoe v. Lahue, 460 U.S. 325, 335 (1983) (citing *Butz v. Economou*, 438 U.S. 478, 512 (1978)). "Neither party, witness, counsel, jury, or judge can be put to answer, civilly or criminally, for words spoken in office." *Id.* (citing *King v. Skinner*, 98 Eng. Rep. 529 (K.B. 1772)).

It is therefore a mistake to think of judges, prosecutors, or others having separate types of immunities which may share some characteristics. This is a false division of the concept. The U.S. Supreme Court "has instead developed a functional approach to immunity law." *Brown v. Griesenauer*, 970 F.2d 431, 436 (8th Cir. 1992) (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). "Absolute immunity flows not from rank or title or location within the Government, but from the nature of the responsibilities of the individual official." *Clevinger v. Saxner*, 474 U.S. 193, 201 (1985). Judges, prosecutors, and others have the *same* immunity derived from their participation in the *same* process.

The lack of such immunity would have two chief results. *First*, the participants in the judicial process would be too hesitant in the discharge of their duties. "If upon such

allegations a judge could be compelled to answer in a civil action for his judicial acts… his office [would] be degraded and his usefulness destroyed…" *Id.* "The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent them from being harassed by vexatious actions." *Id.* at 349.

Second, there could be no end to a dispute in the absence of immunity. A second judge would have to decide the case against the first judge. What, other than an immunity doctrine, would prevent a losing party from suing the second judge? "[T]he second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party." *Id.* Without immunity the judicial process would become a snake eating its own tail. There process would be unending and self-destructive.

This is not to say there are no remedies against bad judges. The most direct remedy is an appeal to a higher court. Systemic errors or inadequacies can also be addressed by removal of the judge from office. "In this country the judges of

the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office." *Id.* at 350. If they act "with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office." *Id.* A judge's "errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption." *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

These remedies exist equally for prosecutors (who are almost universally elected in this country). In addition, prosecutors can be subject to ethical discipline and the opprobrium of their constituents for their errors. These remedies do not threaten the functioning of the judicial process.

b. Immunity continues to exist after the Civil Rights Act of 1871

In the same year as *Bradley*, Congress enacted the Civil Rights Act of 1871 (commonly known as the Third Ku Klux Klan Act). 17 Stat. 13. The Act sought to prevent state and local governmental officials from abusing the Constitutional rights of their residents:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979, 8 U.S.C. § 43. This language, with some amendments, is now found at 42 U.S.C. § 1983.

The Act did not contain any express statement of common law immunity as recognized for judges in *Bradley*. Did this mean that Congress had abrogated the doctrine? The U.S. Supreme Court first addressed this question in a case which raised an immunity doctrine similar to judicial process absolute immunity. The Court considered a civil rights claim

arising from a California state legislative committee's investigation into communist sympathizers. *Tenney v. Brandhove,* 341 U.S. 367 (1951). Brandhove had led an effort to convince the California legislature to defund a committee chaired by Tenney. *Id.* at 370-71. He alleged that Tenney had led an effort to retaliate against him by causing him to be unsuccessfully prosecuted for contempt of the legislature for refusing to testify before the committee. *Id.* at 371. He then sued the chairman of the committee for violating his constitutional rights, claiming that the committee hearing was not conducted for a valid legislative purpose. *Id.*

The claim therefore required the Court to consider the immunity historically granted to legislators for their legislative acts. Such immunity dated to the early 16th century England (where the failure of the monarch to respect the rights of Parliament led to the English Civil War and over 200,000 deaths) and was carried over into colonial legislative practice. *Id.* at 373 (citing U.S. Const. Art. I, § 6 – the "Speech or Debate" clause.) The privilege was necessary for a legislator "to discharge his public trust with firmness and success." *Id.*

The Court rejected the claim that the 1871 statute had abrogated this long-tenured privilege. "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here?" *Id.* at 376. It did not, the Court concluded. "We cannot believe that Congress – itself a staunch advocate of legislative freedom – would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." *Id.*

As with the claim of judicial immunity in *Bradley*, the claim of legislative immunity was valid despite the allegation that the legislative act was done for an improper purpose. "The claim of an unworthy purpose does not destroy the privilege…[it] would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or the hazard of a judgment against them based upon a jury's speculation as to motives." *Id.* 377. The Court simply refused to inquire into the motive of the legislator and ordered the case to be dismissed. *Id.*

The Court reached the same conclusion as to judicial immunity in *Pierson*. "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." 386 U.S. at 553. "We do not believe that this settled principle of law was abolished by § 1983…" *Id.* at 554. "The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 555.

The Court recognized that prosecutors had the same absolute immunity in *Imbler v. Pachtman*, 424 U.S. 409 (1976). Citing an Indiana case from 1896 the Court held that absolute prosecutorial immunity was the "clear majority rule on the issue." *Id.* at 421 (citing *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896)). "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties." *Id.* at 423.

"The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses as fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby." *Id.* at 423-24 (citing *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. App. 1935)).

The *Imbler* Court had little trouble rejecting the view that qualified, rather than absolute, immunity would be sufficient to protect the important societal interests served by the prosecutor. If prosecutors only had qualified immunity they would have to defendant suits which were sufficiently pleaded to allege malice or an improper purpose. These suits "would pose substantial danger of liability even to the honest prosecutor." *Id.* "The presentation of [the underlying criminal case] in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the law jury." *Id.* Qualified immunity in this context would be mostly theoretical. "[T]he honest

prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials…[d]efending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Id.* at 425-26.

It must be emphasized that absolute immunity exists for the benefit of the public, not just the prosecutors who invoke the doctrine when sued. "A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Id.* at 424-25. Prosecutors are particularly at a hazard for inviting litigation. "Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Id.* at 425. These suits would

constitute a significant expense and distraction which would diminish the prosecutor's ability to serve the public. *Id.*

And criminal defendants benefit from this doctrine as well. There are many post-trial avenues to review and attack a criminal conviction. "In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutors being called upon to respond in damages for his error or mistaken judgment." *Id.* at 427.

Absolute immunity serves an interest that is as broad as it is important. "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest." *Id.* at 428. "In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread

of retaliation." *Gregorie v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

c. Scope of prosecutorial absolute immunity

Prosecutors, like judges, have absolute immunity for actions which are an "integral part of the judicial process." *Imbler*, 424 U.S. at 430. *Imbler* provided absolute immunity for the initiation and pursuit of a criminal prosecution, including actions preliminary to the initiation of the prosecution. *Id.* Such immunity also protects participation in a probable cause hearing, *Burns v. Reed*, 500 U.S. 478 (1991). Or the application for a search warrant. *Kalina v. Fletcher*, 522 U.S. 118, 127, 130 (1997). Or the handling of potential impeachment information about prosecution witnesses. *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009).

Prosecutors enjoy absolute immunity for conferring with potential witnesses for the purpose of deciding whether to file criminal charges – even when the allegation is that the prosecutor induced a witness to commit perjury. *Meyers v. Morris*, 810 F.2d 1437, 1450 (8th Cir. 1987). "Some leeway is needed to perform the function of assembling the state's

case…While it is true that some investigative work is necessarily a prerequisite to the preparation of a prosecuting attorney's case, this does not automatically change the nature of his function to resemble that of a police officer." *Id.* "Not all of an advocate's work is done in the courtroom. For a lawyer to properly try a case, he must confer with witnesses, and conduct some of his own factual investigation." *Cook v. Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980).

To be sure there are things that prosecutors can do which are not protected by absolute immunity. As to just one example, public statements about a criminal case are not integral to the judicial process. *Buckley v. Fitzimmons*, 509 U.S. 259 (1993). But these are not exceptions to the absolute immunity. They simply draw the line as to what is and what is not integral to the judicial process. And it is worth mentioning that the district court originally found that "[t]he Plaintiff has not alleged any misconduct by the County or the prosecutors either before the determination of probable cause or outside of the "courtroom" during the judicial process." (Order granting motion to dismiss 6; App. at ___). Although the district court

later drew a different (and incorrect) legal conclusion there is nothing in the district court's order on reconsideration to call into question this factual determination.

d. Absolute immunity in Iowa

This Court has fully recognized that absolute immunity derives not from the "identity of the government actor" but from the "nature of the function performed" as it is associated with the judicial process. *Minor v. State*, 819 N.W.2d 383, 394 (Iowa 2012). "In particular, we must examine whether absolute immunity for the particular official performing this particular function will free the *judicial process* from the harassment and intimidation associated with litigation." *Id.* (emphasis original).

This Court has applied *Imbler* numerous times in actions against prosecutors. *Blanton v. Barrick*, 258 N.W.2d 306 (Iowa 1977) (prosecutor had absolute immunity for initiating prosecution despite claim he had conflict of interest due to private law practice involving defendant and victim); *Burr v. City of Cedar Rapids*, 286 N.W.2d 393, 396 (Iowa 1979) (holding a prosecutor has absolute immunity for signing and filing a complaint or information containing false statements);

Blanton v. Barrick, 258 N.W.2d 306, 310-11 (Iowa 1977) (absolute immunity for prosecutor initiating a criminal prosecution); *Beck v. Phillips*, 685 N.W.2d 637, 644 (Iowa 2004) (decision to not prosecute cases filed by a particular police officer protected by absolute immunity); *Hike v. Hall*, 427 N.W.2d 158, 160-62 (Iowa 1988) (recommendations to dismiss cases at a defendant's cost and the training, supervision, and control of another prosecutor protected by absolute immunity).

This Court recently applied *Imbler* to find that a social worker had absolute immunity for actions in bringing a child dependency action. "[S]ocial workers are entitled to absolute immunity when they act as an advocate before the court, which includes the act of filing an affidavit reflecting the social worker's opinions and recommendations as to what is in the best interests of the child." *Minor*, 819 N.W.2d at 397. Although a social worker would not be protected by absolute immunity if acting as a complaining witness, the worker would when testifying as an ordinary witness in a judicial hearing. *Id.* "[W]hen a DHS social worker refers a case to the county

attorney for possible [dependency proceedings] and the county attorney files the…petition, the social worker is performing a function analogous to that of a prosecutor and should be afforded comparable immunity." *Id.* at 398.

Persons and entities which provide court-ordered evaluations enjoy absolute immunity in Iowa. In *Babbe v. Peterson*, 514 N.W.2d 726 (Iowa 1994) this Court found that a court-appointed guardian ad litem enjoyed absolute immunity. Similarly, in *Muzingo v. St. Luke's Hosp.*, 518 N.W.2d 776, 778 (Iowa 1994) this Court said "when psychiatrists and other mental health providers are appointed by the court and render an advisory opinion regarding an individual's mental condition, they are acting as an arm of the court and should be protected from suit by absolute quasi-judicial immunity." The Court of Appeals came to an identical conclusion in an action against a court-appointed social worker assigned to make a recommendation to the court about child visitation. *Rockas v. Stockdale*, 826 N.W.2d 515 (Iowa Ct. App. 2012).

e. Does the doctrine of absolute immunity apply to a cause of action arising under the Iowa Constitution?

Godfrey ultimately stands for the proposition that where a plaintiff claims a governmental official has violated his rights under the Iowa Constitution and the legislature has not provided a statutory framework which is sufficient that plaintiff may proceed despite the lack of that statutory framework. But there is nothing in *Godfrey* which purports to abrogate other principles of civil law which would provide immunities and defenses to those who are accused. *Godfrey* simply does not carry the burden placed on it by the plaintiff.

Baldwin addressed a question anticipated but not answered by *Godfrey*: whether a defendant who is alleged to have violated the Iowa Constitution may assert an immunity defense. *Baldwin* teaches that a law enforcement officer sued for an allegedly unconstitutional seizure of an individual may raise a qualified immunity defense where he pleads and proves that he acted with due care. *Baldwin*, 915 N.W.2d at 281. Ultimately, the analysis of *Baldwin* is focused on the new type

of civil liability under the Iowa Constitution and not the function of the officer being sued for the violation in the first place. This was a mistake.

Baldwin fundamentally gave the wrong answer because the parties to it asked the wrong question. The question is not "what kind of immunity defenses can be raised now that we have a new theory of liability after *Godfrey*?" The question that should have been asked is "what immunity must this governmental official have for the task he performed – regardless of the theory of civil liability raised by the plaintiff?" Fundamentally, the misstep of *Baldwin* was to treat the law of immunity as an unexplored part of the new territory of *Godfrey*. Immunity for governmental officials exists independently of the theory of liability.

Consider the litigation posture of our case. The defendant prosecutors have sought discretionary review of the district court's denial of their pre-answer motion to dismiss. This is undoubtedly the litigation strategy that would be called for when a claim of immunity has been denied. Since absolute immunity is not merely a defense but an entitlement to not be

sued at all it is appropriate to resolve the question as early as possible in the case.

But what if the defendant prosecutors had employed a two-pronged strategy? What if they had also sued the district court judge for denying them their right to due process under the Iowa Constitution? The petition would naturally allege that the denial was done for malicious and corrupt purposes. Suppose they demanded the judge pay their damages for having to pursue this application for discretionary review? How about some punitive damages since his conduct was directed at them personally? Maybe they would toss in a request for their legal fees too.

What would happen next? Surely the district court judge would think that he was entitled to a dismissal of the action. He had been presented with a legal question and issued an order. Does anyone think for one moment that the question of whether the judge should be absolutely immune for his decision would depend on the prosecutors' citation to the Iowa Constitution rather than a common-law tort theory? Of course not.

If this Court believes that the district court judge would be entitled, on judicial process absolute immunity grounds, to dismissal of such a lawsuit then it must also believe that these defendant prosecutors are entitled to the same dismissal for any claim based on their actions which were integral to the judicial process. If one exists, the other must too.

Judicial process absolute immunity has nothing whatsoever to do with the specific theory of civil liability raised by a plaintiff. It doesn't matter if a judge is sued for abuse or process, a grand juror for defamation, or a prosecutor under 42 U.S.C. § 1983. If there are certain kinds of civil liability for which immunity exists in a lessened form (or not at all) then there is no immunity at all.

This case does not hinge on qualified immunity but it certainly gives this Court an opportunity to clarify and narrow *Baldwin*. This Court should emphasize that the question of immunity looks to the type of government official being sued and the nature of the action giving rise to the claim. Just as police officers need qualified immunity to properly enforce the

law, judges and prosecutors need absolute immunity to do their roles.

The district court's analysis of preemption under the municipal tort claims act was ultimately irrelevant to how it should have approached the case. There is no authority in the decisions of this court that judicial process absolute immunity has ever been abrogated by any statute. Because the district court attempted to answer an irrelevant question it got the wrong result when it tried to apply *Baldwin*. This Court can rectify this error easily. The claims against the defendant prosecutors and the county must be dismissed due to absolute immunity.

Conclusion

The judgment of the district court should be reversed with instruction to dismiss all claims against the prosecutors and the county in this case.

Respectfully submitted,

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This brief complies with the type-volume limitation of Iowa R. App. Pro. 6.903(1)(g)(1) because it contains **4943** words, excluding parts of the brief exempted by that rule.

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No party, their counsel, or other individual has authored this brief in whole or in part. No party, their counsel, or other individual has contributed funds to the preparation of this brief.

/s/
_____
Alan R. Ostergren
Muscatine County Attorney

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

STATE OF IOWA, Plaintiff, vs. RODD MCNEAL, as trustee of Muscatine-Louisa Drainage District #13; ROBERT COOK, as trustee of Muscatine-Louisa Drainage District #13; TERRY MARTIN, as trustee of Muscatine-Louisa Drainage District #13; and MUSCATINE-LOUISA DRAINAGE DISTRICT #13, Defendants.	No. EQCV024133 RESISTANCE TO MOTION TO DISMISS (Oral argument requested)

COMES NOW the State of Iowa by and through Muscatine County Attorney Alan R. Ostergren and in resistance to the motion to dismiss states as follows:

I. Background

The history of our state includes a long battle between humans and water. The settlement of Iowa was greatly hindered by vast areas of swampy land which were unsuitable for agriculture or other productive purposes. To address this obstacle the law provided for the creation of drainage districts. These districts gave a legal and fiscal mechanism for property owners to install drainage features that would make their lands productive.

One of these districts, and its trustees, are the defendants in this action. The Muscatine-Louisa Drainage District #13 is in the area known locally as the Muscatine Island. Covering a large area of sandy river bottom, parts of this

area have been drained since early in the last century. Of particular importance to this litigation is the fact that the district owns a pumping station. This station sends drained waters over the levee which protects the Muscatine Island from the Mississippi River.

In 2016 the district embarked on an effort to annex lands into the district. These lands, principally residential, commercial, and industrial properties, had never been required to contribute to the drainage infrastructure. There is a substantial question as to whether these properties enjoy any benefit whatsoever from the district's infrastructure.

Most drainage districts have passive features such as tile and ditches which allow water to drain away from farmland. Although these improvements need periodic maintenance, they work without any direct human intervention or energy input. The inexorable law that water will seek its own level is all that is necessary for the drainage improvements to operate. Some districts, however, need a pumping station. The defendant district is one of these. Pumping-station districts require ongoing expenditures to operate because gravity alone is not enough. Iowa law treats these districts differently.

The law says that once a district with a pumping station is substantially completed it cannot annex additional land without a petition or consent from at least one-third of the landowners sought to be annexed. But the defendants never got a petition or consent from anyone before moving forward with their annexation effort. If the district is successful it will be able to impose its costs on property owners who have involuntarily been brought into the district. The

assessments sought to be imposed on these landowners are collectively large but for most are individually too small to make it worth contesting the annexation proceedings in an appeal to the district court. The State of Iowa, acting in its sovereign capacity to ensure that the law is obeyed by political subdivisions, has invoked the remedy of quo warranto to prevent this illegal annexation.

II. Standards for grant of a motion to dismiss

A motion to dismiss tests the legal sufficiency of a plaintiff's petition. *Schaffer v. Frank Moyer Constr., Inc.*, 563 N.W.2d 605, 607 (Iowa 1997). The grant of a motion to dismiss is proper only when the petition "on its face shows no right of recovery under any state of facts." *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001). A motion to dismiss cannot rely on facts not alleged in the petition (except those for which judicial notice may be taken). *Id.* An evidentiary hearing is not permitted. *Id.* The motion should not be liberally granted because "[a]t issue is petitioner's right of access to the district court, not the merits of his allegations." *Id.* (citing *Richards v. Iowa Dep't of Revenue & Fin.*, 454 N.W.2d 573, 574 (Iowa 1990)). Ultimately, a motion to dismiss rises or falls on purely legal grounds. *Haupt v. Miller*, 514 N.W.2d 905, 907 (Iowa 1994).

III. The petition states a claim for relief in the nature of quo warranto.

The motion to dismiss is first premised on the failure of the petition to state a claim upon which relief may be granted. This is not borne out by reading the petition. The State of Iowa has invoked its power to file a quo

warranto action to challenge the illegal exercise of power by the drainage district.

Quo warranto – latin for "by what authority" is a common-law writ "to inquire whether authority existed to justify or authorize certain acts of a public character or interest." Charles Herman Kinnane, *A First Book on Anglo-American Law* 662 (2d ed. 1952). The first codification following statehood included provisions for obtaining such a writ. Iowa Code § 2151 et seq. (1851). These provisions are now found in Iowa Rules of Civil Procedure 1.1301-1.1307. "The county attorney of the county where the action lies has discretion to bring the action, but must do so when directed by the governor, general assembly or the supreme or district court, unless the county attorney may be a defendant, in which event the attorney general may, and shall when so directed, bring the action." Iowa R. Civ. P. 1.1302(1). The law also allows for private citizens to petition the court for permission to bring the action if the county attorney fails to do so after being demanded. *Id.* at 1.1302(2).

The essence of an action in quo warranto is to challenge the legality of a claim of right to exercise a power granted by law. So, for example, suppose a person serves on a governmental commission despite being ineligible. Under the common-law de facto officer doctrine the ineligibility cannot be collaterally attacked to defend an action taken by the body. *Iowa Farm Bureau Fed'n v. Envtl. Prot. Comm'n*, 850 N.W.2d 403, 422-31 (Iowa 2014). The law requires a direct attack on eligibility and quo warranto is the means to do so.

The State of Iowa seeks relief in the nature of quo warranto because the defendants are exercising corporate powers which they do not possess under Iowa law. Iowa R. Civ. P. 1.1301(4) (allowing for relief when "a corporation exercise[es] powers not conferred by law." The word "corporation" in this rule should not be read narrowly. The term means "an artificial person or legal entity created by or under the authority of the laws of a state or nation…" Black's Law Dictionary, 273 (2d ed. 1910). Relief in quo warranto may be obtained against public corporations. *Harvey v. Kirton*, 182 Iowa 973, 164 N.W.888 (1918) ("quo warranto is the proper remedy to test the legality of the organization of quasi corporations, such as a school district, and that such a remedy is exclusive, where the legality of the organization is the only question"), *Nelson v. Consolidated Independent School Dist.*, 181 Iowa 424, 164 N.W. 874 (1917), *State ex rel. West v. Des Moines*, 96 Iowa 521, 65 N.W. 818 (1896).

Specifically, the district – which owns a pumping station – seeks to annex land into the district despite having failed to receive a petition or consent from one-third of the landowners to be annexed. This is illegal. Iowa Code § 468.356 ("No additional land shall be taken into any such drainage district after the improvements therein have been substantially completed, unless one-third of the owners of the land proposed to be annexed have petitioned therefor or consented in writing thereto.")

Drainage districts "have only such limited power as the legislature grants them." *Bd. of Water Works Trs. of City of Des Moines v. Sac Cnty. Bd. of*

Supervisors, 890 N.W.2d 50, 55 (Iowa 2017). They cannot be sued for money damages, a principle "not based on the doctrine of sovereign immunity; instead, it flows from the fact that a drainage district is an entity with 'special and limited powers and duties conferred by the Iowa Constitution.'" *Id.* (quoting *Chi. Cent. & Pac. R.R. v. Calhoun Cty. Bd. of Supervisors*, 816 N.W.2d 367, 374 (Iowa 2012)). "Suits against drainage districts 'have been allowed only to compel, complete, or correct the performance of a duty or the exercise of a power by those acting on behalf of a drainage district.'" *Id.* at 59.

"[A] drainage district is a legislative creation which has no rights or powers other than those found in statutes which give and sustain its life." *State ex rel. Iowa Emp't Sec. Comm'n*, 260 Iowa 341, 345, 149 N.W.2d 288, 291 (Iowa 1967). It is a legal entity which is a "political subdivision of the county in which it is located…[i]t is a legally identifiable political instrumentality." *Id.* at 346, 291.

The State of Iowa is aware that the defendants claim that Iowa Code § 468.356 constrains only a board of supervisors operating as trustees of a drainage district and not the trustees who have been independently elected. *See*, Iowa Code § 468.500 et seq. (providing for election of trustees once original construction of a drainage or levee district has been completed). But the Iowa Supreme Court has already rejected an attempt by this same entity to make a very similar claim. In *Reed v. Muscatine-Louisa Drainage District No. 13*, 268 N.W.2d 548 (Iowa 1978) the district was sued after it had sold a piece of real property without conducting a public auction. The trustees claimed that a

statute requiring a public auction when the board of supervisors sold real property did not apply to them, citing a more specific provision authorizing sales of real property by drainage trustees. *Id.* at 550.

This specific statute did not save the sale. "Our reading of [the] statutes leads us to a different conclusion. We are not persuaded that the legislature intended to grant greater authority to the trustees than to the body (the supervisors) in whose place they act." *Id.* "We do not overlook the fact that drainage districts are established for specific limited purposes and have been held to possess particular characteristics of their own. However, they are also political subdivisions of the county. They have only such power as the legislature grants them, and we do not believe they authority of the trustees is greater than that of the supervisors." *Id.* at 551.

An action in quo warranto is designed for exactly this type of situation:

> In the absence of statutory provision to the contrary, quo warranto proceedings are held to be the only proper remedy in cases in which they are available. Thus, **they are held to be the exclusive method of questioning the legality of** the organization or **a change in the territory of a quasi public corporation, such as a** school district, or a **drainage district**, or of determining the right to hold and exercise a judicial or other public office, or to enforce the forfeiture of a corporate franchise, to attack the validity of the organization of a corporation, or to try title to an office therein; and when the remedy by quo warranto is available, it is held that there is no concurrent remedy in equity, unless by virtue of statutory provision.

Harvey, 182 Iowa at 978-79, 164 N.W. at 889 (emphasis added). Individual property owners certainly have the right to contest a drainage district annexation through a specific statutory procedure. But quo warranto is the only available mechanism for the State of Iowa to force this district to obey the

law in its dealings with the public in general. Defendants' motion to dismiss for failure to state a claim is without merit.

IV. Defendants' real-party-in-interest claim is neither correct nor ripe.

Defendants claim that the State of Iowa is not the real party in interest. The defendants cite to other ongoing litigation which challenges the legality – on numerous grounds – of the attempted annexation. The plaintiffs in that litigation are certain property owners who have followed the statutory procedure to appeal an annexation proceeding to district court. Among the plaintiffs is Muscatine County. The county objects to the annexation of property it owns (a county park and the secondary road system). The interest of the State of Iowa in this action is fundamentally different. It is to vindicate the rights of the community in general that the law shall be obeyed and the specific interests of the many parcel holders who, if nothing is done, will illegally be annexed into the district.

The defendants cite a series of cases discussing the concept of claim preclusion. The State of Iowa agrees that in general terms "a party must litigate all matters growing out of his claim at one time and not in separate actions." *Warnecke v. Foley*, 234 Iowa 348, 350, 11 N.W.2d 457, 458 (1943). The defendants gloss over the fact that the party in other action is Muscatine County acting as a property owner and the party in this action is the State of Iowa acting in its sovereign capacity.

The Iowa Rules of Civil Procedure forbid joining a quo warranto action with any other claim. Iowa R. Civ. P 1.1303 ("In such action there shall be no joinder of any other claim, and no counterclaim.") The law therefore specifically forbids doing what defendants apparently claim should have been done – to have included the quo warranto claim in connection with the annexation appeal.

Defendants also read the law of claim preclusion too broadly. "One is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008). There are limited exceptions to this rule against nonparty claim preclusion. None[1] apply here. There is no catchall "virtual representation" exception to the rule against nonparty preclusion. *Id.*

Also, there is no other judgment which can be asserted by defendants against the State of Iowa. The other litigation is ongoing. The best argument that defendants appear to have is that the State of Iowa and Muscatine County share the same lawyer. This is not the basis of a motion to dismiss.

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[1] a. When a party agrees to be bound by the determination of issues in another action;
b. Where there is a substantive legal relationship between the parties such as "preceding and succeeding owners of property, bailee and bailor, and assignee and assignor";
c. Where the party was adequately represented by someone with the same interests who was a party, as in a class action;
d. Where the party has assumed control of the other litigation;
e. Where a party seeks to relitigate a claim by a proxy; and
f. Where there is a special statutory scheme which "expressly forecloses successive litigation by nonlitigants" if the scheme is otherwise consistent with due process.
Taylor v. Sturgell, 553 U.S. at 894-95.

V. Conclusion

The motion to dismiss should be denied. The State of Iowa requests oral argument on the motion.

THE STATE OF IOWA

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