IN THE SUPREME COURT OF FLORIDA

Case No. SC00-1745

HENRY W. COOK, individually,

Appellant,

v.

CITY OF JACKSONVILLE and
JOHN STAFFORD SUPERVISOR OF
ELECTIONS, DUVAL COUNTY, FLORIDA,

Appellees.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF CASE AND FACTS

STATEMENT OF THE CASE

This appeal involves the issue of whether a 1992 amendment to the Charter of the City of Jacksonville, which established a two-term limit for the office of Clerk of the Circuit Court, is unconstitutional ("Term Limits Amendment"). [A6] In 1992, the electors of Duval County adopted this limitation by enacting section 12.11, City Charter of Jacksonville, which provides: "Two Term limit. – No person elected and qualified for two consecutive full terms as Clerk of the Court shall be eligible for election as Clerk of the Court for the next succeeding term." [A6] Mr. Henry J. Cook, who was initially appointed as Clerk of the Court in 1988, was subsequently elected later in 1988 and reelected in 1992 and 1996. If effective, the Term Limits Amendment would disqualify preclude Mr. Cook from qualifying for and seeking reelection during the Fall 2000 elections.

Mr. Cook Sues After His
Candidacy Form Is Rejected

Mr. Cook presented his "Statement of Candidate" form to the Supervisor of Elections for Duval County, who refused to accept the form due to the Term Limits Amendment. Mr. Cook then sued the City and the Supervisor of Elections for a declaration that the provisions of the Term Limits Amendment, section 12.11, were unconstitutional. He also sought an order requiring the Supervisor to accept his "Statement of Candidate."

The Trial Court Proceedings

A factual record was established, in large part, by stipulation. [A2] The testimony of Mr.

Cook was presented at trial as well as the videotaped testimony of Mr. Cook's expert witness, Mr. Alan Sundberg. The trial court addressed two issues of law: (1) "If the Clerk is an article V officer, does that status preclude the City of Jacksonville and its electors from adopting and enforcing Section 12.11 of article 12, Charter of the City of Jacksonville?"; and (2) "If Section 12.11, Charter of the City of Jacksonville, is an additional qualification for election of the Clerk, is it constitutional?" [A1]

The Trial Court's Order

In its written order, the trial court held that the City's Term Limits Amendment was unconstitutional because it prescribed qualifications for a constitutional officer beyond those set forth in the Florida Constitution. [A1] As such, the trial court declared the Term Limits Amendment invalid and instructed the Supervisor of Elections to accept Mr. Cook's application. [A1]

The City filed a notice of appeal from the final judgment below. [R2 191] Mr. Cook sought by-pass jurisdiction based upon important constitutional issues regarding whether a local government may impose term limitations on a constitutional office. The certified questions presented were:

1. WHETHER THE CLERK OF THE COURT IS AN OFFICER UNDER ARTICLE V OF THE FLORIDA CONSTITUTION WHOSE STATUS PRECLUDES THE ADOPTION AND ENFORCEMENT OF THE CITY'S 1992 TERM LIMITS AMENDMENT, SECTION 12.11, CHARTER OF THE CITY OF JACKSONVILLE; and

2. WHETHER THE CITY'S 1992 TERM LIMITS AMENDMENT IS AN ADDITIONAL QUALIFICATION ON THE OFFICE OF CLERK OF THE COURT THAT IS UNCONSTITUTIONAL.

The City had no objection to certification. The First District Court of Appeal, however, denied the motion for by-pass certification.

The First District's Decision

In its August 22, 2000 decision (one judge concurring in result only), the First District reversed the trial court's ruling that the Term Limits Amendment was unconstitutional. [A__] The court held that the "constitution is silent" as to "specific qualifications for clerk of the court." [A__] For this reason, the court concluded that the "City of Jacksonville is not precluded from adopting and enforcing a two-term limit for the clerk of the court. The two-term limit of section 12 of Jacksonville's charter does not establish an unconstitutional qualification for the office of the clerk." [A__] The court also rejected Mr. Cook's argument that clerks of court are judicial officers under article V of the constitution whose (dis)qualifications are not subject to local term limits. Finally, the court held that the trial court's admission of the testimony of Mr. Sundberg was proper.

Mr. Cook filed a timely notice to invoke jurisdiction. He asserted that jurisdiction exists because the decision expressly construes a number of provisions of the Florida Constitution, expressly affects a class of constitutional officers, and conflicts with a decision of this Court. This Court accepted jurisdiction on February 9, 2001.

STATEMENT OF THE FACTS

Brief History of the Jacksonville/Duval County Consolidation and Charter

The issues on appeal require an understanding of the history of the constitutional provisions

that apply to the governance of Duval County. A fundamental issue is whether Duval County, as a unit of local government, has the power to limit the term of an elected constitutional office. This analysis requires a review of the City's powers under the Florida Constitution.

The starting point is the 1885 Florida Constitution, which was amended in 1934 to permit the consolidation of Duval County, its existing municipalities, and the City of Jacksonville. The text of this amendment – which related solely to Duval County – was set forth in article VIII, section 9 of the Florida Constitution.[1] It is commonly referred to as the "Duval County Enabling Amendment" because it empowered Duval County voters to create a charter for purposes of forming a consolidated city-county government.

A key provision of the Duval County Enabling Amendment regarding the office of Clerk of Circuit Court is as follows:

> The offices of Clerk of the Circuit Court and Sheriff shall not be **abolished but the Legislature may prescribe the time when, and the method by which, such offices shall be filled** and the compensation to be paid to such officers and may vest in them additional powers and duties. No county office shall be abolished or consolidated with another office without making provision for the performance of all State duties now or hereafter prescribed by law to be performed by such county officer.

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[1] The text of this article is contained in the Note to article VIII of the Florida Constitution.

Id. (emphasis added). As indicated, this constitutional provision provides that the legislature may prescribe the "method by which" the office of Clerk of the Circuit Court is to be filled.

In 1967, the voters of Duval County adopted a Charter for the City of Jacksonville ("City Charter"), which created a single consolidated government of Duval County and its municipalities. The Charter was adopted pursuant to a House and Senate bill on August 8, 1967. Chapter 67-1320, Laws of Florida.

The Term Limits Amendment

On November 3, 1992, the voters in Duval County approved a two-term limit on the office of Clerk of the Circuit Court as set forth in the following City Charter ordinance:

> Section 12.11. Two Term Limit – No person elected and qualified for two consecutive full terms as Clerk of the Court shall be eligible for election as Clerk of the Court for the next succeeding term. The two-term limitation shall apply to any full term which began in 1992 or thereafter.

[A6] If valid, the Term Limits Amendment would disqualify Mr. Cook from seeking reelection to the office of clerk of the circuit court because he was elected to and qualified for that office for the past two consecutive terms.

Clerks of the Circuit Court

Are Within The Judicial Branch

The office of Clerk of the Circuit Court is a judicial office created on a statewide basis under article V of the Florida Constitution, which relates solely to the Judiciary. Specifically, clerks of the circuit court are established under section 16 of article V as follows:

> Section 16. Clerks of the Circuit Court. **There shall be in each county a clerk of the circuit court who shall be selected pursuant to the provisions of Article VIII section 1**. Notwithstanding any other provision of the constitution, the duties of the clerk of the circuit court may be divided by special or general law between two officers, one serving as clerk of court and one serving as ex officio clerk of the board of county commissioners, auditor, recorder, and custodian of all county funds. There may be a clerk of the county court if authorized by general or special law.

Art. V, § 16, Fla. Const. (1999) (emphasis added). The highlighted language indicates that clerks of the circuit courts are article V offices.

The language also indicates that clerks of the circuit court, although article V offices, are selected in accordance with the provisions of article VIII, section 1(d) of the Florida Constitution, which states:

> (d) County officers. **There shall be elected by the electors of each county, for terms of four years**, a sheriff, a tax collector, a property appraiser, a supervisor of elections, and **a clerk of the circuit court …**

Art. VIII, § 1(d), Fla. Const. (1999) (emphasis added). As indicated, the Florida Constitution establishes a limited class of statewide constitutional officers – sheriffs, tax collectors, property appraisers, supervisors of elections, and clerks of the circuit courts – as "County officers" who are charged with administering and enforcing state laws and programs on a local level.[2]

Notably, the City Charter places the Clerk of the Circuit Court in the **judicial**

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[2] These constitutional officers contrast with local officials, such as county commissioners, whose offices may be established and governed by county charter. Article VIII, section 1 requires that the governing body of a county be composed either by county charter or by standards set forth as follows:

> (e) Commissioners. Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five or seven members serving staggered terms of four years. After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected as provided by law.

Art, VIII, § 1(e), Fla. Const. (1999). As indicated, the Constitution permits a county to establish the composition and terms of its governing body and its county commissioners.

The Florida Constitution makes a distinction between section 1(d) state officers and section 1(e) county officers. The section 1(e) county officers (county commissioners) handle the day-to-day administration of local government, such as budgeting, construction, zoning, road and sewer maintenance, etc. County commissioners adopt strictly local ordinances. While some overlap in the duties performed by section 1(d) and section 1(e) officers may exist, section 1(d) state officers are charged by the Florida Constitution with the uniform administration of state laws and programs, while section 1(e) county officers are members of local legislatures that operate under whatever home rule enactments are in place in their respective counties.

branch of the consolidated government. Art. 12, City Charter. [A4] The Clerk of the Circuit Court is purely a judicial office. Section 12.06 (formerly 13.108) of the City Charter makes this clear by limiting the Clerk's function to solely judicial activities. [A4] As the parties stipulated, the Clerk does not serve as the ex officio clerk for the board of county commissioners or the ex officio auditor of the county. Instead, section 12.06 relieves the Clerk of the Circuit Court of "any duty or right to act as clerk of the board of county commissioners or the ex officio auditor of the county." [A4] Without such administrative and auditing functions, the office of Clerk of Circuit Court has solely judicial functions. In essence, the City retains the relationship with the circuit and county courts that the county commission had maintained under the pre-Charter government.

Term Limits/Disqualifications On State Offices

Article VI of the Florida Constitution relates to "Suffrage and Elections" and states in section 4 the sole grounds for disqualification of state offices (including clerks of court) as follows:

> **Section 4. Disqualifications.**--
> (a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

> (b) No person may appear on the ballot for re-election to any of the following offices:
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> (1) Florida representative,
> (2) Florida senator,
> (3) Florida Lieutenant governor,
> (4) any office of the Florida cabinet,
> (5) U.S. Representative from Florida, or
> (6) U.S. Senator from Florida
>
> if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.

Art. VI, § 4 (1999). Subsection (b) was added by constitutional amendment via initiative petition adopted and filed with the Secretary of State on July 23, 1992. As indicated, persons are disqualified from seeking office if they have been convicted of felonies, been adjudged mentally incompetent, or are seeking re-election for specific constitutional offices having already served eight years. Clerks of court are not within the defined class of offices to which a term limit disqualification applies.

SUMMARY OF THE ARGUMENT

The trial court was correct in ruling that section 12.11 of the City Charter (the "Term Limits Amendment") is invalid because it imposes a (dis)qualification on candidates for the office of clerk of the circuit court beyond those set forth in or reserved to the Florida Constitution. The term of office, qualifications, and disqualifications for clerks of circuit courts set forth in the Constitution operate as direct or implied restrictions on the power of the legislature, or a local government, to impose additional or different qualifications or disqualifications.

By its structure and language, the Constitution makes evident that the terms, qualifications, and disqualifications for the office of clerk of the circuit court are within its exclusive province. A county's broad home rule powers do not permit fundamental modifications to these constitutional offices whose (dis)qualifications are set forth or reserved to the Constitution. Instead, a term limits disqualification must be set forth in the Florida Constitution itself, and not imposed via a local government initiative.

Of note, the Florida Constitution was amended in 1992 to add eight-year term

limits as a disqualification from office for only for certain state and federal offices. Article VI, § 4, Fla. Const. This amendment, which was upheld as to state offices, demonstrates that the manner of imposing such a disqualification is via amendment to the Constitution itself. As such, the Term Limits Amendment is impermissible because it usurps the power to add disqualifications from office reserved to article VI, section 4 of the Constitution.

Moreover, the judicial nature of the clerk of circuit court's office highlights the overreaching nature of the Term Limits Amendment. Article V sets forth and thereby reserves to itself the authority to set qualifications for article V offices including justices, judges, state attorneys, public defenders and the clerk of circuit court, the latter exercising solely judicial powers in Duval County. The City's attempt to intrude upon this exclusively judicial domain by imposing a disqualification from office is impermissible.

In conclusion, the First District's decision is contrary to this Court's holding in Thomas v. State ex rel. Cobb and inconsistent with the principle that neither local governments nor the legislature may add disqualifications from office without amending article VI, section 4 of the Florida Constitution, which sets forth the sole

grounds for disqualification (including term limits).

Standard of Review

The standard of review is de novo on the legal issue of the constitutionality of the Term Limits Amendment and an abuse of discretion as to any factual disputes. The Term Limits Amendment, although presumed to be constitutional, is rendered invalid if it adds a qualification or disqualification that is reserved to the Constitution itself.

In addition, this Court is not limited to the face of the trial court's order. Instead, this Court may affirm the trial court's decision based on any legal theory or principle of law, whether or not the trial court's actual written decision is correct. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979) ("The written final judgment by the trial court could well be wrong in its reasoning, but the decision of the trial court is primarily what matters, not the reasoning used. Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it.").

ARGUMENT

THE CITY'S TERM LIMITS AMENDMENT IS UNCONSTITUTIONAL BECAUSE IT IMPOSES AN ADDITIONAL (DIS)QUALIFICATION ON A CONSTITUTIONAL OFFICER, CLERK OF THE CIRCUIT COURT, WHO IS AN OFFICER UNDER THE JUDICIAL BRANCH

PURSUANT TO ARTICLE V, FLORIDA CONSTITUTION.

The Term Limits Amendment imposes a disqualifying restriction on candidates for the office of Clerk of the Circuit Court in Duval County that the Florida Constitution does not permit. The parameters of the office of clerk of circuit court are set forth in the Florida Constitution, which:

establishes the office of the clerk of the circuit court as a judicial office;[3]

sets the term of the office;[4] and

specifies the grounds for disqualification of persons who seek office generally.[5]

In doing so, the Constitution makes clear that the terms, qualifications, and disqualifications for the office of clerk of the circuit court – an article V office – are within its exclusive domain. Neither the legislature nor a unit of local government may impinge upon these areas of authority by adding qualifications or

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[3] Art. V, § 16, Fla. Const. (1999).

[4] Id. Art. VIII, § 1(d).

[5] Id. Art. VI, § 4.

disqualifications for the office other than by constitutional amendment.

[6]

As discussed below, any purported term limits on candidates for the office of clerk of the circuit court must be set forth in the Florida Constitution itself, and not via an initiative adopted by a local government. Although counties have broad home rule powers, such powers do not permit fundamental modifications to constitutional offices whose terms, qualifications, and disqualifications are set forth in or reserved to the Constitution.

Notably, the Florida Constitution – via a 1992 amendment – specifies term limits (like those at issue) only for certain state (and federal) offices.[7] The power to impose such term limits via disqualifications on constitutional officers is reserved to

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[6] The Second District's decision in Pinellas County v. Eight Is Enough In Pinellas, 25 Fla. L. Weekly D1201 (Fla. May 19, 2000) is deficient because it fails to discuss any of this Court's relevant cases on the constitutional issues presented (e.g., Askew, Grassi, Cobb, George). For that reason, it is not helpful in analyzing the constitutionality of the Term Limits Amendment.

[7] The imposition of term limits on federal offices via a state constitutional amendment is impermissible. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); Ray v. Mortham, 742 So. 2d 1276 (Fla. 1999).

the Constitution itself. For this reason, the Term Limits Amendment is invalid because it imposes this additional disqualification, which is within the sole province of the Constitution itself.

Finally, the judicial nature of the clerk of circuit court's office makes the Term Limits Amendment particularly overreaching by intruding into the operation of the justice system, a separate branch of government. Article V sets forth the qualifications for article V offices (e.g., judges, state attorneys, public defenders), such that the City's attempt to intrude upon that domain is improper.

The Term Limits Amendment Is Unconstitutional Because It Imposes An Additional Qualification On The Office of Clerk Of The Circuit Court.

This Court has held repeatedly that any statute[8] that imposes an additional qualification for office is unconstitutional where the Florida Constitution has already addressed the topic. State ex rel. Askew v. Thomas, 293 So. 2d 40, 42 (Fla. 1974); Wilson v. Newell, 223 So. 2d 734, 735 (Fla. 1969); Thomas v. State ex rel. Cobb, 58 So. 2d 173, 177-78 (Fla. 1952); State v. George, 23 Fla. 585, 3 So. 81 (1887). This basic legal principle makes evident that a local government may not, via local initiative, impose a term limit on a constitutional officer whose term and disqualifications are already addressed in the Constitution itself. In this regard, the Term Limits Amendment is invalid because it attempts to limit a term of office that is already specified in the Constitution itself.

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[8] Throughout this litigation, the City has cited no case in which a *local enactment* that imposed additional qualifications or disqualifications on a constitutional office has been upheld. In this regard, research fails to identify any Florida case that supports the City's position that its Term Limits Amendment is a permissible disqualification or limitation on an otherwise qualified candidate's ability to run for such a constitutional office.

First, the Florida Constitution directly and unequivocally speaks to the term of

office for the office of clerk of the circuit court, a judicial branch office created under article V of the Constitution. The Florida Constitution states that the office of clerk of circuit court shall be for a four-year term – without qualification. Specifically, article VIII, section 1(d), provides as follows:

> (d) COUNTY OFFICERS. There ***shall be elected by the electors of each county, for terms of four years***, a sheriff, a tax collector, a property appraiser, a supervisor of elections, and ***a clerk of the circuit court***; except, when provided by county charter or special law approved by vote of the electors of the county, any county officer may be chosen in another manner therein specified, or any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office. When not otherwise provided by county charter or special law approved by vote of the electors, the clerk of the circuit court shall be ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds.

Art. VIII, § 1(d), Fla. Const. (1999) (emphasis added). As the emphasized language indicates, the Constitution provides for a four-year term without further limitations or qualifications. The Constitution does not limit these state officers to one term of four years, two terms of four years, or some other variation. Unlike other constitutional officers whose terms are limited under the Constitution, the Constitution has set – but not limited — the term of office for the office of clerk of the circuit court. Because the Constitution has already spoken on the term of office, neither the legislature nor a unit

of local government can enact restrictions that qualify, restrict, or impinge upon such term.

Nonetheless, the City – through charter amendment – purports to limit the term of the office of Clerk of the Circuit Court. By establishing an unqualified term of office, the Constitution has spoken and laid sole claim to the office. Neither the legislature nor a unit of local government can tinker with the tenure of this constitutional office. The City's Term Limit Amendment, however, usurps this constitutional authority by imposing a substantial disqualifying restriction. Stated another way, the Constitution has a specific provision regarding the term of office for clerks of the circuit court. In doing so, it has directly (or impliedly) prohibited the exercise of power by the legislature or a unit of local government as to this aspect of this constitutional office. Cobb, infra.

The case law makes this point. For over fifty years, this Court has stated the important principle that any legislative enactment that purports to prescribe qualifications for a constitutional office in addition to those set forth in or reserved to the Florida Constitution is unconstitutional and invalid. Wilson v. Newell, 223 So. 2d 734 (Fla. 1969); Thomas v. State ex rel. Cobb, 58 So. 2d 173 (Fla. 1952); State v.

George, 23 Fla. 585, 3 So. 81 (Fla. 1887). See State ex rel. Askew v. Thomas, 293 So. 2d 40, 42 (Fla. 1974) ("We have consistently held that statutes imposing additional qualifications for office are unconstitutional where the basic document of the constitution itself has already undertaken to set forth those requirements."); Nichols v. State ex rel. Bolton, 177 So. 2d 467, 469 (Fla. 1965) ("The legislature may not prescribe qualifications for a constitutional office unless specifically authorized by the constitution.").

The decision in Thomas v. State ex rel. Cobb is instructive and closely akin to the instant situation. In Cobb, a candidate for Duval County superintendent sought a writ of mandamus to compel the acceptance of his filing fee. At issue was a Florida statute that required candidates for superintendent to hold a valid Florida Graduate Teacher's Certificate. The trial court ruled that the statute was "invalid and ineffective" and the respondent appealed. 58 So. 2d at 174.

This Court affirmed. The "one important question" presented was whether the legislature had the power under the Constitution to "prescribe the qualifications for the constitutional office of County Superintendent of Public Instruction?" Id. at 175. At the outset, the Court noted the importance that the office of superintendent is a

county office created under the Florida Constitution. As such, the qualifications for candidates for superintendent are – first and foremost – to be gleaned from the Constitution itself, which was to be construed "as it is and not as we might like it to be." Id. at 174.

In this regard, the Court noted that it "may be desirable to have certain educational, physical, mental, and moral qualifications definitely prescribed for those persons who desire to hold the office of County Superintendent of Public Instruction." Id. at 175. The Court, however, made clear that such qualifications were not permissible simply because they might increase the efficiency of the school system or be politically popular. The Court stated:

> We must bear in mind, however, that County Superintendent of Public Instruction is not merely an employee. ***He is an officer, holding a constitutional office*** *and* ***if the qualifications for this office*** prescribed by the Legislature, or by some Board, as attempted to be authorized by the Legislature, ***conflict with the State Constitution, the statutes, rules or regulations prescribing such qualifications must be declared to be invalid and ineffective as to such constitutional office***.

Id. (emphasis added). The Court continued making this point by stating as follows:

> Under our system and form of Government the Constitution makes ample provision for free elections and the qualifications of electors. ***Section 1 of Article VI, as limited by Section 4 of Article VI, prescribes the qualifications of electors***, and this court, in State ex rel. Landis v.

> County Board of Public Instruction of Hillsborough County, 137 Fla. 244, 188 So. 88, and Riley v. Holmer, 100 Fla. 938, 131 So. 330, has held that ***the Legislature cannot place restrictions on the qualifications of electors that will prohibit those qualified under constitutional provisions to vote in elections authorized under the Constitution***.

Id. (emphasis added). As the highlighted language makes evident, the Court emphasized the principle that legislative restrictions or limitations are impermissible where they intrude upon constitutional provisions that define the parameters of qualifications or disqualifications.

Moreover, the Court surveyed the content of the Florida Constitution and determined that the terms and qualifications for constitutional officers were set forth therein. It noted that article VI, section 5 (now section 4) "relates to the qualifications of all officers and is the only section of the organic law that does so relate to all officers." Id. at 177. This section sets forth the general grounds for disqualification (e.g., criminal acts). It noted that various prohibitions and qualifications in the Constitution applied to the Governor, members of the legislature, and to judges – but that none applied to superintendents. The Court's point was that qualifications for constitutional office (or in the case of article VI, section 5, the disqualifications from office) were set forth in the body of the Constitution itself.

> Our State Constitution, as we have pointed out, prescribes in no uncertain terms that certain persons are disqualified to hold certain constitutional offices, such as Governor, Members of the Legislature, Justices of the Supreme Court, Judges of the Circuit and Criminal Courts. ***As to all other officers the Constitution further excludes from office all persons "convicted of bribery, perjury, larceny or of infamous crime, . . ." This solemn declaration in our Constitution about qualifications or disqualifications to hold public office are conclusive of the whole matter whether in the affirmative or in the negative form.***

Id. at 183 (emphasis added). In other words, where the Constitution speaks directly as to qualifications or disqualifications, they are conclusive and permit no intrusion into their areas of operation by the legislature or other governmental body.

Based upon these principles, this Court concluded that the legislation imposing additional educational requirements on superintendents was "invalid and ineffective because it prescribes qualifications for the office of Superintendent of Public Instruction in addition to those prescribed by the Constitution." Id. at 183. The Court made clear that its rationale was based on the fact that the superintendent was one of the "constitutional offices" recognized in the Florida Constitution. Finally, the Court concluded that:

> ***It matters not how worthy the aim or noble the purpose, the Legislature cannot enact laws to accomplish such aims and purposes when such laws conflict with the plain expression, meaning, purpose and intent of the Constitution***. As was said by General George Washington, 1st

> President of the U.S., in his farewell address to the Nation when he declined to be a third term candidacy: "If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, ***let it be corrected by an amendment in the way which the constitution designates***. But let there be no change by usurpation; for, though this, in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly over-balance in permanent evil any partial or transient benefit which the use may at any time yield."

Id. at 183-84 (emphasis added). The gist of President Washington's statement is directly applicable in this case.

Both the City and the First District place heavy reliance on the decision in State ex rel. Askew v. Thomas, 293 So. 2d 40 (Fla. 1974). To the extent Askew is relevant, however, it supports Mr. Cook's position. In Askew, this Court addressed the "ever-evolving elective process" that presented the "interesting constitutional question of residence requirements to hold office." 293 So. 2d at 41. Specifically, the issue was whether "actual *residence* in the area to be represented is required" for a school board member. Id. at 41 (italics in original).

A quo warranto proceeding was held to determine whether the school board member, Barbara Thomas, could retain her office. Thomas was elected to the Martin County School Board in 1971 for a four-year term. At the time of election, she resided

in "Residence Area No. 1." She was married in 1973 and moved to "Residence Area No. 4" where she continued to live. The question presented was whether Thomas's new residence created a vacancy such that she could no longer hold the office to which she was elected.

The State relied on section 230.19, Florida Statutes, which provided that a vacancy is created when a school board member "removes his residence from the school board member residence area from which he was elected." Id. at 42 (citing statute). In addition, the State cited to section 230.04, which provided that school board members must be "a resident of the school board member residence area from which he is elected" as prescribed in the statute. Id. (citing statute). Thomas claimed that these statutes imposed an additional "qualification" that was impermissible under the Constitution.

This Court's task was made easy because the Florida Constitution itself contained specific provisions that permitted the enactment of laws related to residency. First, article IX, section 4(a), of the 1968 Constitution stated:

> In each school district there shall be a school board composed of five or more members chosen by vote of the electors for appropriately staggered terms of four years, ***as provided by law***.

Id. at 42 (emphasis supplied). Throughout its opinion, this Court relied on the highlighted language to emphasize the explicit constitutional basis for the enactment of the challenged statutes. In addition, article X, section 3, provided as follows:

> Vacancy in office – Vacancy in office shall occur upon the creation of an office, upon the death of the incumbent or his removal from office, resignation, succession to another office, unexplained absence for sixty consecutive days, ***or failure to Maintain the residence required when elected or appointed***, and upon failure of one elected or appointed to office to qualify within thirty days from the commencement of the term.

Id. at 43 (emphasis added) (capitalization in original). This Court noted that this portion of the Constitution was "an express constitutional recognition of the type of statutory requirements which we have been discussing." Id.

In a point ignored by the First District, this Court held that both of these portions of the Constitution – particularly the clause "as provided by law" – are an express recognition that residency laws were permissible. This Court did not have to undertake any complex analysis. Because the Constitution itself authorized the legislature to act in the area of residency requirements for school board members, the fact that statutes were enacted was to be expected. As such, Thomas's constitutional challenge was without effect.

Moreover, the clause "as provided by law" made evident that the legislature

could enact laws that dealt with the manner in which school board members were chosen. As such, this Court found it unnecessary to apply the principle that additional qualifications are unconstitutional "where the basic document of the constitution itself has already undertaken to set forth those requirements." Id. at 42.

Finally, the Court found that the clause "as provided by law" was a recognition that the drafters of the Constitution simply deferred to the legislative branch on the subject of residency requirements.

> [T]he [constitutional drafting] committee simply did not choose to address itself to the subject of residency requirements or to set forth ANY qualifications for school board members in the constitution, leaving it to be "as provided by law." By its rejection of specific requirements that were offered and refused, it left the matter of qualifications to these statutes [sections 230.04 & 230.19].

Id. at 43 (capitalization in original). In other words, the fact that the Constitution ***explicitly*** left the matter to the legislature resolved the constitutional claim that the statutes were impermissible. That fact, more than any other, explains the result in Askew.

Moreover, that fact clearly distinguishes the situation in Askew from the instant case and makes its relevance dubious. Unlike Askew, no constitutional provision authorizes the legislature or a local government to enact the type of term limits at

issue. No provision of the Constitution states that term limits are permissible "as provided by law" or that such limitations are grounds for disqualifications. To the contrary, only a constitutional amendment – such as that made to article VI, section 4 for certain state offices – can accomplish what the Term Limits Amendment purports to accomplish. The fact that article VI, section 4 was amended to include such limitations on a class of state offices is the best evidence that this power is reserved solely to constitutional amendment.

As such, the situation in Askew is so factually and constitutionally unlike the instant case that it is inapposite. Most strikingly, Askew did not involve a legislative enactment that added a "front-end" (dis)qualification for candidates seeking a constitutional office (like the Term Limits Amendment). Instead, it involved the very different issue of whether a duly elected candidate – who later moves her residence outside the area she represents – can **continue** to hold office. The First District's heavy reliance on Askew demonstrates the frailty of its analysis.[9]

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[9] For all these reasons, Askew did not implicitly overrule the Cobb case, upon which Mr. Cook relied below. Instead, in State v. Grassi, 532 So. 2d 1055 (Fla. 1988), a case decided after Askew, this Court reaffirmed the principle that the legislature may not add qualifications for office beyond those in the Constitution.

Despite the City's arguments, its Charter cannot impinge upon the Florida Constitution, which created the office of clerk of the circuit court in article V, section 16.[10] The City Charter specifically limited its power only to prescribe the time when, and the method by which, the office of Clerk of the Circuit Court may be filled. As such, the City may not prescribe the qualifications or disqualifications for the office of the Clerk of the Circuit Court unless specifically authorized by the Constitution. State v. George, 23 Fla. 585, 3 So. 81 (Fla. 1887); Thomas v. State ex rel. Cobb, 58 So. 2d 173, 183 (Fla. 1952); see Nichols v. State ex rel. Bolon, 177 So. 2d 467, 469 (Fla. 1965) ("legislature may not prescribe qualifications for a constitutional office unless specifically authorized in the Constitution").

Contrary to the City's arguments below, nothing in article VIII, section 1(d) affords authority to the City to impose additional qualifications or disqualifications for the office of Clerk of the Circuit Court in addition to those just described. At best, section 1(d) only provides the "manner" by which the clerk of circuit court is elected.

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[10] The law is clear that where no definite qualifications are specified, the provision of the Constitution for duly qualified electors furnishes sufficient safeguard against the choice of unsuitable persons. Cobb, 58 So. 2d at 181–82. Such a limitation operates as an implied restriction on the power of the government to impose additional or different qualifications or disqualifications. Id.

This provision is consistent with article VIII, section 9, which permits the legislature to "prescribe the time when, and the method by which" the clerk of the circuit court is selected. These clauses are intended only to grant to government the authority to protect the integrity and regularity of the election process by regulating election procedures. See Thornton, 514 U.S. at 827-836 (term limits not a regulation of the "manner" of election; term limits an "indirect attempt to accomplish what the Constitution prohibits[a state] from accomplishing directly.").

Moreover, the fact that article VIII restricts the City to the manner and method of selection of the Clerk of the Court is by its very nature a limitation that precludes the City from adding the disqualification at issue. To allow the imposition of additional qualifications or disqualifications on the Clerk of the Circuit Court through a later Charter Amendment would amount to the type of "bait and switch" that this Court has prohibited. Board of County Com'rs of Dade County v. Wilson, 386 So. 2d 556 (Fla. 1980).

Finally, the City has argued below that the trial court's ruling would prohibit the City from establishing qualifications for any of its county officers and school board members. The City's claim misses the mark for two reasons. First, the trial court

addressed only one type of restriction, i.e., a disqualification based on having served two terms. The judge's order need not be read as broadly as the City asserts to apply to every conceivable qualification for or disqualification from office. Second, the order must be read solely in the context of the limited restriction at issue: term limits. Whether other locally-adopted qualifications for office are permissible under the Constitution is simply not an issue that the trial court or First District addressed, nor does this Court's resolution of the issues presented necessarily impact all county officers. In fact, as section I(C) explains, this Court's holding could be narrowly limited to the unique fact that clerks of the circuit court are article V offices thereby avoiding any broad application to other constitutional offices.

The Term Limits Amendment Imposes An Additional Disqualification Not Permitted Under Article VI, Section 4 Of The Florida Constitution.

The Term Limits Amendment also violates article VI, section 4 of the Florida Constitution (entitled "Disqualifications") by imposing an impermissible disqualification on candidates for the office of Clerk of the Circuit Court in Duval County. This section has historically been the sole "organic" section in the Constitution where all disqualifications, such as criminal history or mental incompetence, are set forth. As the Court in Cobb stated:

> ***Section 5 [now section 4] of Article VI relates to the qualifications of all officers and is the only section of organic law that does so relate to all officers.*** This section reads as follows:
>
> The Legislature shall have power to, and shall, enact the necessary laws to exclude from every office of honor, power, trust or profit, civil or military, with in the State, and from the right of suffrage, all persons convicted of bribery, perjury, larceny or of infamous crime, or who shall make, or become directly or indirectly interested in, and bet or wager, the result of which shall depend upon any election; or that shall hereafter fight a duel or send or accept a challenge to fight, or that shall be second to either party, or that shall be the bearer of such challenge or acceptance; but the legal disability shall not accrue until after trial and conviction by due form of law.

Thomas v. State ex rel. Cobb, 58 So. 2d 173, 177 (Fla. 1952) (emphasis added). As

the highlighted language makes clear, article VI, section 5 was the "only section" that "relates to the qualifications of all officers" in Florida. This Court noted that this "***solemn declaration in our Constitution about qualifications or disqualifications to hold public office are conclusive of the whole matter whether in the affirmative or in the negative form.***" Id. at 183 (emphasis added).

The emphasized language establishes that any disqualifications to hold a constitutional office must arise from article VI, section 5 (now 4), such that all others are impermissible – whether imposed by the legislature or by a local government. The Court made this point clear in stating that "***[t]hese plain and unambiguous specifications of disabilities exclude all others unless the Constitution provides otherwise. The effect of this declaration in the Constitution that certain officers are not qualified carries with it the necessary implication that all others are qualified***." Id. at 183. In essence, because the Constitution reserved to itself the disqualifications for constitutional office, it was impermissible for the legislature to impose additional qualifications (no matter how well intentioned).

The current version of article VI, section 4 includes analogous language regarding the disqualifiers of criminal background and mental incompetence

mentioned in Cobb. Section 4(a) states that: "No person may convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability." Art. VI, § 4(a), Fla. Const. Any additional disqualifications from holding a statewide office must be included in this section via a constitutional amendment.

Candidates for clerk of the circuit court who satisfy the basic test of article VI of the Florida Constitution are qualified to run for that office. Because the disqualifications from office are specifically set forth in article VI of the Florida Constitution, any amendments to county charters that purport to impose additional qualifications – such as the types of term limits set forth in section 4 – are in direct violation of article VI, section 4 of the Florida Constitution.

Notably, section 4 contains term limits on certain state officers, which this Court has held are "disqualification on holding office."[11] For instance, section 4 imposes eight year term limits on state and federal officeholders (upheld as to state

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[11] Advisory Opinion to the Attorney General – Limited Political Terms in Certain Offices, 592 So. 2d 225, 227-28 (Fla. 1991) ("The initiative proposal is intended to amend article VI, section 4 of the state constitution ... ***The amendment, if passed, would add term limits as a further disqualification on holding office."***) (emphasis added).

officeholders in Ray v. Mortham). It does not contain, however, any term limit qualifications for the office of Clerk of the Circuit Court thereby making clear that none are permitted absent constitutional amendment. The limits imposed on state officers were upheld because only the voters of Florida could add, by statewide initiative, a disqualification to a constitutional officer established on a statewide basis in the Constitution.

For instance, a candidate seeking the office of lieutenant-governor, or an office in the Florida Senate, Florida House or the Florida cabinet, is subject to the term limits provision in section 4(b). It took a statewide constitutional amendment to add this requirement to the Florida Constitution. Likewise, only a statewide amendment can impose similar term limits on state officers under article VIII, section 1(d). Local governments, no matter what home rule powers they may possess, cannot impose a term limitation on constitutional officers, particularly in the form of a disqualification from office. Instead, additional qualifications and disqualifications from office must be adopted via constitutional amendment. See Ray v. Mortham, 742 So. 2d 1276 (Fla. 1999).

Further, the inclusion of specific grounds for disqualification (felony

conviction/mental incompetence) thereby precludes the imposition of all others absent constitutional amendment. As this Court has stated, the "plain and unambiguous specifications of disabilities exclude all others unless the Constitution provides otherwise." Cobb, 58 So. 2d at 183. The Court made this point clear in stating that the "effect of this declaration in the Constitution that certain officers are not qualified carries with it the necessary implication that others are qualified." Id. In other words, candidates for clerk of the circuit court are qualified for office unless they either have a felony conviction or are mentally incompetent. The imposition of any other disqualifier is unconstitutional.[12]

In summary, the decision in Cobb is decisive in this appeal. A candidate for clerk of the circuit court may be unable to run for office because he is a convicted felon. He may be unable to run because he is mentally incompetent. Article VI, section 4, of the Constitution disqualifies him from holding office on these grounds. However, a candidate is not subject to disqualification simply because he has served

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[12] See Sullivan v. Askew, 348 So. 2d 312 (Fla. 1977) ("The principle is well established that, where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it.")

two prior terms in that constitutional office. The Constitution has been amended to place such a disqualification on certain other constitutional offices. But, the Constitution has not been amended to place such a disqualification on clerks of the circuit courts, nor has it been amended to permit either the legislature or a local government to do so. Instead, efforts to impose such disqualifications – such as the Term Limits Amendment – run directly afoul of the principles discussed above such that the trial court's order should be upheld.

The Term Limits Amendment Is Unconstitutional Because It Imposes A Limitation On The Office Of Clerk Of The Circuit Court, Who Is An Officer Under Article V.

As an alternative and narrower grounds for affirmance, the Term Limits Amendment is unconstitutional because it imposes an impermissible qualification/disqualification on a judicial office. The office of clerk of the circuit court is a judicial office specifically created by article V, section 16 of the Florida Constitution. Article V sets forth the judicial powers of the State and mandates that there "shall" be a clerk of the circuit court. In other words, the office of clerk of the circuit court cannot be abolished or otherwise altered to render it without effect.

The clerk of circuit court is distinguished from other section 1(d) offices such

as the tax appraiser. It is the judicial nature of clerk of the circuit court that sets it apart from these other state officers, as emphatically stated by this Court in a very recent case:

> **We conclude that the clerks of the circuit courts**, when acting under the authority of their Article V powers concerning judicial records and other matters relating to the administrative operation of the courts, **are an arm of the judicial branch and are subject to the oversight and control of the Supreme Court of Florida, rather than the legislative branch**. We should emphasize that this Court has exercised its authority and directly addressed its responsibility in this area.

Times Pub. Co. v. Ake, 660 So. 2d 255, 257 (Fla. 1995) (emphasis added). The Court left little doubt that the clerks of the circuit court exercise judicial function and are arms of the state's judicial branch.

Here, the Clerk of the Circuit Court in Duval County is relieved of **all** county auditor functions by virtue of section 12.06 of the Charter. As such, **the Clerk of the Circuit Court in Duval County functions solely as a judicial officer**. The office no longer serves a county finance function. A review of the circuit court clerk's functions, as defined by statute, makes this point clear.

Because the Clerk of the Circuit Court is a judicial office, it has a unique position within the governance of the legal system. The Constitution makes clear that

the qualifications of judicial offices may only be set forth in article V, where the qualifications for judges, state attorneys, public defenders and clerks of court are located. Notably, article V does not impose term limits on any of its offices such as county or circuit judges, district judges, or supreme court justices. Nor are term limits imposed on the state attorney of public defender, both article V offices. Instead, these judicial offices are a part of the judicial branch, which is protected from such limitations except by constitutional amendment.

Public policy supports the point that local governments do not have the constitutional power to tinker with the terms of judicial offices. The judicial branch has a significant degree of constitutional independence that requires that it be free from the political will. This point is particularly true as to judges, but is also true as to clerks who administer the justice system such that the adjudicative powers can be wielded effectively. The danger to judicial independence of locally imposed term limits is apparent and needs little discussion.

Likewise, the danger of such broad powers in the hands of local government is that it can be used to undermine court operations. The City argued below that it could "amend it's [sic] charter to require t[he] [sic] clerk to be a lawyer, to be 35 years old,

to have judicial experience, to have some type of experience." [R3 86]. In its view, the purported absence of constitutional qualifications entitles it to impose **any** type of qualifications it desires. [R3 86-87]. As article V officers, however, clerks of the circuit court function as the administrators of their court systems. They are accountable to the people through popular election, but they are also in a branch of government that historically and constitutionally is insulated from substantial intrusions by local governance. This point is particularly true as to the terms of judicial office. Further, clerks are perceived as apolitical administrators who serve the judicial branch. Although they do not exercise the adjudicative powers of judges, they share the unique role of ensuring the non-partisan administration of justice. As such, the protections afforded to other judicial branch offices from locally imposed term limits should be applied to them.

CONCLUSION

Based upon the foregoing, Appellee, Henry J. Cook, requests that this Court reverse the First District and affirm the trial court's decision below.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND TYPEFACE COMPLIANCE

I hereby certify that a true and correct copy of the foregoing has been furnished to: Richard A. Mullaney, Loree L. French & Steven E. Rohan, Esqs., City Hall at St. James, 117 W. Duval Street, Suite 480, Jacksonville, FL 32202, by U.S. Mail this __ day of March, 2001; and, that this Initial Brief uses the Times New Roman 14-point

font.

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Attorney