OA 8-29-01

IN THE SUPREME COURT OF FLORIDA

Case No. SC00-1745

HENRY W. COOK, individually,

Petitioner,

v.

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

Respondents.

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

I. THE TERM LIMITS AMENDMENT IS AN UNCONSTITUTIONAL DISQUALIFICATION ON A CONSTITUTIONAL OFFICE.

A. Neither Askew Nor Any Other Florida Case Has Upheld A Disqualification/Qualification Placed On Candidates For A Constitutional Office By A Local Government.

At the outset, it bears emphasis that the neither the City (nor the Solicitor General as amicus) has cited a single precedent in which a Florida court has upheld restrictions placed on candidates for a constitutional office by a local government. The reason is that none exists. Nonetheless, the City claims that State ex rel. Askew v. Thomas 293 So. 2d 40 (Fla. 1974) "controls" the disposition of this case.

The decision in Askew does not control and, as previously stated in his Initial Brief [IB 33-37], actually supports Mr. Cook. As to constitutional analysis, Askew was a straightforward case because explicit constitutional authority existed for the legislature to have enacted the challenged residency statute.[1] In contrast, no similar constitutional authority exists for term limits on constitutional offices. Instead, the constitution reflects precisely the opposite: that term limits are

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[1] This Court noted that article IX, section 4(a), of the 1968 Constitution left it to the legislature to enact qualifications of school board members "*as provided by law.*" 293 So. 2d at 43 (italics in original). In addition, this Court noted that article X, section 3 (vacancy in office occurs upon the "failure to *maintain* the residency required when elected or appointed") is "an express constitutional recognition of the type of statutory requirements which we have been discussing." Id. at 43 (italics in original). The highlighted portions make clear that constitutional authority existed for the residency statute upheld in Askew.

disqualifications from office to be set forth in article VI, section 4 (entitled "Disqualifications"). This Court's decision in Thomas v. State ex rel. Cobb, 58 So. 2d 173 (Fla. 1952) is a virtual "red cow"[2] because of its holding that the "solemn declaration" of "disqualifications to hold public office" in the [predecessor to article VI, section 4] are "conclusive of the whole matter" and "exclude all others unless the Constitution provides otherwise." 58 So. 2d at 183.

Moreover, that article VI, section 4(b) was amended explicitly in 1992 to include term limits as disqualification on a class of state offices is powerful, if not dispositive, support for the conclusion that disqualification of otherwise qualified candidates via term limits is reserved solely to the constitution. On this point, it would be anomalous that neither the legislature nor the people of Florida had constitutional authority to impose term limits as disqualifications on state offices absent constitutional authority, yet each and every home rule jurisdiction could do so as to constitutional offices. Neither Askew nor any other Florida precedent supports such a sweeping proposition of law.[3]

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[2] Zerwal v. Caribbean Modes, Inc., 145 So. 2d 878, 879 (Fla. 1962) (cited case "comes as near to being a 'red cow' case . . . as one will find in the practice.").

[3] The City's reliance on State v. Grassi, 532 So. 2d 1055 (Fla. 1988) is misplaced. At issue in Grassi was a statutory change in the residency requirements for county commissioners, which provided that a candidate must be a resident "***at the time he qualifies***" for the office. Id. at 1055-56 (emphasis added). The constitution, however, provided that: "One commissioner residing in each district shall be

(Continued . . .)

B. The Term Limits Amendment Imposes A Disqualification On A Constitutional Office.

The City and Mr. Cook disagree on the basic issue of whether the Term Limits Amendment is an additional *qualification* for or *disqualification* from office. Mr. Cook's primary position[4] is that it is an additional disqualification that is unconstitutional under section article VI, section 4 of the Florida Constitution, Cobb, and State ex rel. Attorney General v. George, 23 Fla. 585, 3 So. 81 (1887).[5]

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elected as provided by law." 532 So. 2d at 1056 (quoting article VIII, section 1(e)). This Court interpreted section 1(e) to require "residency ***at the time of election***." Id. at 1056 (emphasis added). Because the statute imposed an additional qualification (i.e., earlier residency) than that required by the constitution, it was held unconstitutional. As such, Grassi is supportive of Mr. Cook's position because it reaffirms that restrictions beyond those in the constitution are impermissible. Further, this Court made clear that the clause – "as provided by law" – in section 1(e), which was a result of a 1968 constitutional revision, was a "substantive amendment delegating to the legislature the task of establishing ***procedures for election*** of county commissioners, not the power to set qualifications for that office." Id. at 1056 (emphasis added). In other words, the insertion of "as provided by law" created a new substantive power in the legislature to establish ***election procedures***; it did not create new legislative powers to set qualifications for or disqualifications from office. As such, Grassi supports Mr. Cook on this point because the Constitution has no language permitting a local government (or the legislature) to enact term limits as disqualifications from office beyond those in article VI, section 4.

[4] Alternatively, it is an additional qualification that is impermissible and intrudes upon an article V office.

[5] The City's position is that any distinction between disqualifications and qualifications are "irrelevant." [AB 20]

Mr. Cook's position is buttressed by Advisory Opinion to the Attorney General – Limited Political Terms in Certain Offices, 592 So. 2d 225 (Fla. 1991) in which this Court stated that the "[term limits] initiative proposal is intended to amend article VI, section 4 of the state constitution . . . The amendment, if passed, will add term limits as a further ***disqualification*** on holding office." Id. at 227-28 (emphasis added). The emphasized language demonstrates that term limits are first and foremost a disqualification from office, rather than a qualification for office.

The characterization of the Term Limits Amendment as exclusively a "qualification" is insupportable for two reasons. First, this characterization is inconsistent with the Florida Constitution, which explicitly places term limits under the section labeled "Disqualifications." While the City cites language in Ray v. Mortham, 742 So. 2d 1276 (Fla. 1999),[6] that mistakenly claimed that term limits are a "qualification" for office under Limited Political Terms, the better view – as actually expressed by this Court in Limited Political Terms – is that term limits are a "disqualification on holding office" beyond those set forth in article VI, section 4.

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[6] The opinion in Ray v. Mortham misstates that "in the Limited Political Terms opinion, this Court identified the amendment as one imposing a **qualification** on holding office." 742 So. 2d at 1285 (emphasis added; citing page 228 of Limited Political Terms). Instead, the explicit statement from page 228 of Limited Political Terms is that the term limits amendment "will add term limits as a further **disqualification** on holding office." 592 So. 2d 225 (emphasis added).

Second, the characterization of the Term Limits Amendment as primarily a "qualification" belies the specific language of the Term Limits Amendment itself. Section 12.11 of the Term Limits Amendment provides that "No person elected ***and qualified*** for two consecutive terms as Clerk of the Court" can run for reelection. City Charter, § 12.11; [A5]. The highlighted language makes clear that the Term Limits Amendment applies to otherwise "qualified" candidates by disqualifying them from seeking office. As such, the Term Limits Amendment is better characterized as a disqualification beyond those in article VI, section 4.

C. The Constitution Limits The Power Of Government, Including The City, To Impose Additional Disqualifications From Office.

Next, the City repeatedly emphasizes that the Florida Constitution is not a grant of power, but a limitation on governmental powers. Mr. Cook does not disagree with this principle. [IB 19-20] The City overlooks, however, that the Constitution has limited the power of governments – whether cities or counties, home rule[7] or otherwise – to place additional disqualifications on constitutional offices. That is the precise point of this appeal: the Florida Constitution has set forth the constitutional grounds for disqualification (felony/mental incompetence)

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[7] The City's acknowledgement that its home rule powers cannot be inconsistent with the constitution [AB 31] is a tacit recognition that the Term Limits Amendment is unconstitutional if in conflict with article VI, section 4 and applicable caselaw making further argument on the home rule issue unnecessary.

such that no others are permissible absent constitutional amendment. The City almost totally ignores this point, relegating its response to a mere paragraph. [AB 20-21] Its answer is that a term limits amendment is a "qualification" – without fully explaining why. But, many reasons exist why locally-imposed term limits on constitutional offices run directly afoul of constitutional principles.

First, empowering local governments to add additional grounds for disqualification from constitutional offices – via citizen initiative or otherwise – directly undermines the province of the Florida Constitution, which has set forth the sole grounds for disqualification (felony conviction/mental incompetence). Under the City's approach (and that of the Solicitor General), however, it would be permissible for a local government to impose as an additional disqualification that a candidate had been convicted of a *misdemeanor* or a non-criminal infraction such as an *ethics violation*. Under their approach, because the Florida Constitution speaks only to felony convictions, that leaves the field wide open for other locally-imposed disqualifiers such as misdemeanors and ethics infractions.

Taken to its logical end, it would not run afoul of this position if a local government disqualified persons from seeking a constitutional office who had been *charged* with a felony; or had filed bankruptcy; or had been adjudicated delinquent in credit card payments; or, had been treated medically for depression. A local government could make a plausible argument for each of these grounds for

disqualification (e.g., candidates must have good fiscal practices and standing in the community, and be of sound mind). This Court's precedents and the Constitution itself preclude each of these types of restriction as an impermissible additional disqualification. The City's and Solicitor General's position must fail where the Constitution has already spoken as to disqualifications thereby precluding all others that lack constitutional authority for their enactment.

D. Holley v. Adams Is An Eligibilty Case, Which Differs From Qualifications and Disqualifications Cases.

This Court's decision in Holley v. Adams, 238 So. 2d 401 (Fla. 1970) does not alter the conclusion that the Term Limits Amendment is an additional disqualification prohibited under the constitution. In Holley, this Court upheld a statutory requirement (Chapter 70-80, also dubbed the "resign-to-run law") that persons holding appointive or elective office must resign in advance of seeking to qualify for another office. A sitting circuit judge who intended to qualify for the office of Justice of the Supreme Court challenged the law as an impermissible additional qualification for a constitutional office. In its analysis, this Court stated that "the distinction between eligibility for office and qualifications or conditions imposed upon an office seeker should be kept clear." Id. at 404. In doing so, the Court held that Chapter 70-80 "does not prescribe additional qualifications for the office, as the candidate may well be qualified in a legal sense to hold either." Id. at

406. Rather, the resign-to-run law "does not relate to the qualifications one must possess in order to hold office, but merely conditions under which he may become eligible to be a candidate." Id. at 408. For this reason, this Court held that its decision in Cobb was inapplicable because no "qualifications" issue was present under the resign-to-run law. Instead, Chapter 70-80 was merely an ***eligibility*** requirement that did not preclude any person from seeking office, unlike the Term Limits Amendment, which disqualifies those who have served two terms.

In this regard, this Court emphasized that the resign-to-run law did not prevent or disqualify any person from becoming a candidate for any office for which they might wish to qualify. As this Court stated, the resign-to-run law is "not a limitation upon the right to seek another office, for ***the incumbent of any office has the choice under the statute to retain it unmolested or give it up and seek another.***" 238 So. 2d at 406 (emphasis added). The highlighted language emphasizes a key difference between the resign-to-run law and the Term Limits Amendment. The former does not disqualify a candidate from office; instead, it merely presents a ***choice*** of retaining one's current office or resigning to pursue another. In contrast, the latter presents no choice by conclusively ***disqualifying*** an otherwise qualified candidate from seeking re-election. Because the right-to-resign law upheld in Holley is so dissimilar from a term limits disqualification, the holding in Holley does not control the issues in this appeal.

The Solicitor General claims that if the Term Limits Amendment were held to be unconstitutional under Cobb, the "validity of the Resign-to-Run Law would be called into question." [SG 18] The Solicitor General, however, relies on the sole dissenter in Holley, which urged that the resign-to-run law is an impermissible "disqualification" from office. The Solicitor General overlooks that this Court in Holley held that the resign-to-run law was not a "qualification" or "disqualification" but, instead, was a condition of "eligibility" for the office. A holding that the Term Limits Amendment is an unconstitutional disqualification under Cobb would have no impact on Holley, which held the resign-to-run Law was an *eligibility* requirement, not a qualification or disqualification.

E. As To Article V, The City Fails To Mention the Ake Decision And Relies on Portions of The Florida Constitution Relating To The "Method of Election" Or The "Election Process," Neither of Which Relate To Term Limits.

In response to the point that clerks of the circuit court are judicial officers under article V, the City does two things. First, the City fails to even mention the key case, Times Publishing Company v. Ake, in which this Court held that "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." 660 So. 2d 255, 257 (Fla. 1995). As this holding indicates, clerks of the circuit courts are article V officers, which countenances against locally-imposed term limits as argued in Mr. Cook's initial brief. [IB 40-43]

Second, the City argues that Mr. Cook's article V arguments would leave other portions of the constitution without effect. Contrary to the First District's opinion and the City's position, however, Mr. Cook did not argue that each clerk of the circuit court has "statewide" powers or is a "statewide" officer. Rather, Mr. Cook's point is that clerks of the circuit court are "statewide" constitutional officers in the sense that the Constitution requires every county to have a clerk of the circuit court subject to uniform terms and grounds for disqualifications. Because these terms and disqualifications are established on a uniform statewide basis in the Constitution itself, the power to alter or amend them is beyond the power of local governments (or the legislature) absent constitutional amendment.

For this reason, the First District's and the City's reliance on article III, section 11(a)(1) – which relates to the prohibition on special laws or general laws of local application regarding elections, jurisdiction or duties of officers – is unjustified. The constitution permits local laws affecting the "election process" of "officers of municipalities, chartered counties, special districts or local government agencies." Art. III, § 11(a)(1), Fla. Const. Here, however, the Term Limits

Amendment does not affect the "election process";[8] instead, it creates additional disqualifications from the office itself. Moreover, the Term Limits Amendment does not affect "officers of municipalities, chartered counties, special districts or local government" within the meaning of section 11(a)(1). Mr. Cook does not contest (as the City claims [AB 29 n.11]) that local officers, such as the mayor and city councilpersons, may be subject to locally-adopted legislation that affects their terms, qualifications, and disqualifications. Constitutional officers, however, are different because their terms, qualifications and disqualifications are in the Constitution itself, rather than solely in the City's Charter.

F. Jurisdiction Exists Because The Matters Presented Are Of Great Public Importance And Are Likely To Recur.

As amicus curiae, the Solicitor General asserts that this case should be dismissed because no "bona fide" controversy exists or because the Term Limits Amendment is a "politically hot" issue that this Court should not consider despite its great public importance. Neither point is persuasive.

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[8] Nor does it relate to the "manner" in which local officers are chosen pursuant to article VIII, section 1(d). Rather, the "manner" in which local officers are chosen might include cumulative voting, single/multi-member districts, or even appointment rather than election. In contrast, the Term Limits Amendment does not affect the "manner" in which local officers are chosen; instead, it disqualifies otherwise qualified candidates from seeking election. As such, no inconsistency with article VIII, section 1(d) exists.

First, the Solicitor General states that Mr. Cook took no expedited efforts to obtain pre-election review of the First District's decision, implying that Mr. Cook simply "gave up" in his quest in seeking remedial relief.[9] The Solicitor General overlooks two points. The first is that Mr. Cook, with the City's concurrence, implored the First District to invoke by-pass jurisdiction to enable this Court to consider the matter on an expedited basis as was done in Ray v. Mortham just two months prior.[10] The First District denied that request thereby making it impracticable later to invoke this Court's jurisdiction.[11] The First District's opinion was released on August 22, 2000, which scarcely left time for clerk candidates to meet qualification deadlines for the primaries in Duval County, let alone to seek

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[9] The Solicitor General also claims that "Cook effectively received the affirmative relief he sought" below and is entitled to no further relief. [SG 7] The relief Mr. Cook received, however, was taken away by the First District's decision, which is why this case is before the Court.

[10] The Solicitor General cites to Ray v. Mortham as the paradigm for expedited review, a case that was cited and relied upon heavily in Mr. Cook's motion to the First District seeking by-pass jurisdiction. For unknown reasons, the First District certified to this Court that the term limits issues in Ray v. Mortham were of great public importance requiring immediate resolution, but denied such relief as to this case. As such, Mr. Cook cannot be characterized as not having sought expeditious review in this Court as was done in Ray v. Mortham.

[11] The Solicitor General's reliance on the dissent in Armstrong v. Harris, 773 So. 2d 7 (2000) misses the mark. Unlike the "strategies" that result in post-election judicial reversals in ballot summary/single subject litigation that the dissent condemned, Mr. Cook sought expeditious review and certainly had no pre-election "strategy" to overturn the Term Limits Amendment post-election.

judicial review in this Court. As a result, Mr. Cook was removed involuntarily by the Supervisor of Elections due to the First District's mandate shortly before the qualifications deadline. The point is that a bona fide controversy exists due to Mr. Cook's active efforts in seeking judicial review of the Term Limits Amendment.

Second, the Solicitor General asserts that the Court should not use this case to opine on the important questions presented because the "same issue is presented" in Pinellas County v. Eight is Enough. [SG 13] The Solicitor General, however, overlooks that little overlap of issues exists between Mr. Cook's case and the Pinellas County case. A review of the First and Second District opinions, as well as the parties' briefs in this Court, show that this case focuses on distinctly different issues from the issues in Pinellas County, which primarily focuses on the nature of the Pinellas County charter. While some similarities exist in the two cases, the resolution of issues in one case will not necessarily resolve those in the other and may create confusion without the Court's full consideration of different factual and legal contexts each presents.

Finally, the Solicitor General suggests mootness because election 2000 has come and gone, that no judicial relief would be available even if Mr. Cook's prevailed on appeal, that any decision will be an inappropriate advisory opinion, and that Mr. Cook's remedy is to simply run again in 2004. Each of these arguments runs counter to this Court's decision in Plante v. Smathers, 372 So. 2d

933 (Fla. 1979), which rejected these arguments in stating:

> This case, as it relates to the 1978 election, has become moot; however, we elect to retain jurisdiction and to resolve the constitutional issue because it is a matter of great importance and of general public interest and will probably recur in the next general election.

Id. at 935 (*citing* Sadowski v. Shevin, 345 So. 2d 330 (Fla. 1977)).[12] The Solicitor General relies on the concurrence in Plante, but acknowledges that this Court may retain jurisdiction and issue decisions in important matters, despite possible mootness. [SG 9-10]; *see, e.g.,* Holly v. Auld, 450 So. 2d 217, 218 n.1 (Fla. 1984). ("mootness does not destroy an appellate court's jurisdiction . . . when the questions raised are of great public importance or are likely to recur.").

Contrary to the Solicitor General's view, the resolution of the important issues presented go beyond Mr. Cook's interest and will affect directly all other constitutional officers, both in Duval County and elsewhere, who might otherwise run for re-election in the next local elections, but are precluded from doing so by

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[12] Likewise, in Sadowski this Court stated:

> Although the questions raised in this cause have become moot with the passing of the qualifying time and the election, we feel constrained to retain jurisdiction and resolve the question as to the constitutionality vel non of [the disputed statute] since this is a matter of great public importance in the administration of the law and is of general interest to the public.

345 So. 2d at 332.

local term limits. Because the issues are likely to recur in Duval County as well as other jurisdictions with local term limits, this Court should exercise jurisdiction and render a decision that will provide much needed guidance on the important issues presented.

CONCLUSION

Based upon the foregoing, Petitioner, Henry J. Cook, requests that this Court reverse the First District, affirm the trial court's decision below, and provide such other relief as is appropriate.

Respectfully Submitted,

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I hereby certify that a true and correct copy of the foregoing has been furnished to: Richard A. Mullaney and Loree L. French, Esqs., City Hall at St. James, 117 W. Duval Street, Suite 480, Jacksonville, FL 32202, and Thomas E. Warner and T. Kent Wetherell, II, Esqs., Office of the Solicitor General, The Capitol – Suite PL-01, Tallahassee, Florida 32399, by U.S. Mail this 27th day of April, 2001; and, that this Reply Brief uses the Times New Roman 14-point font.

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