IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC00-1908

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LOWER TRIBUNAL CASE NO. 2D99-836

KARLEEN F. DE BLAKER AS CLERK OF THE CIRCUIT COURT, W. FRED PETTY AS TAX COLLECTOR, and EVERETT S. RICE AS SHERIFF,

Petitioners,

-vs-

EIGHT IS ENOUGH IN PINELLAS,

Respondent.

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# PETITIONERS' SUPPLEMENTAL BRIEF ON *CITY OF JACKSONVILLE V. COOK*

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ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

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## III. BASIS FOR SUPPLEMENTAL BRIEF

In an Order dated August 29, 2001, this Court authorized the parties in the above-styled case "to file supplemental briefs addressing the cases cited by the First District Court of Appeal in City of Jacksonville v. Cook, 765 So. 2d 289 (Fla. 1st DCA 2000)." This Brief is filed in response to that Order by Petitioners, Karleen F. De Blaker, Clerk of the Circuit Court, and Everett S. Rice, Sheriff, Pinellas County, Florida (hereinafter collectively "Petitioners"), by and through their undersigned counsel.

The opinion of the First District Court of Appeal in City of Jacksonville v. Cook, 765 So. 2d 289 (Fla. 1st DCA 2000) (hereinafter "Cook"), affirmed one issue relating to expert witness testimony, which was not appealed to this Court, and therefore will not be addressed here. The Court also reversed the trial court on the issue of whether the imposition of term limits on the Clerk of Court through a local Charter initiative violated the Florida Constitution, relying on State ex rel. Askew v. Thomas, 293 So. 2d 40 (Fla. 1974) (hereinafter "Askew"), and State v. Grassi, 532 So. 2d 1055 (Fla. 1988) (hereinafter "Grassi"), to uphold the constitutionality of the term limits amendment. It also noted that the trial court relied on the cases of Thomas v. State ex rel. Cobb, 58 So. 2d 173 (Fla. 1952) (hereinafter " Cobb"), and State ex rel. Attorney General v. George, 3 So. 81 (Fla. 1887) (hereinafter "George"), to render

the amendment unconstitutional, but held that the " Cobb court's actual conclusion" was "not inconsistent with the supreme court's later decisions in Askew and Grassi."

## IV. SUMMARY OF ARGUMENT

In an alternative argument, Petitioners first will show that the George and Cobb cases are still the controlling cases on the imposition of qualifications for elected Constitutional Officers, that under these cases a locally imposed limitation on the term of a Constitutional Officer is unconstitutional, and the narrow rulings in Askew and Grassi can be reconciled with Cobb. The First District relied on Askew and Grassi to uphold locally initiated term limits, which this Court has held to be qualifications for election. Askew is not an election qualifications case, but is a post-election office-retention case, and therefore does not support the First District's ultimate holding. Grassi addresses a narrow issue, and reaches the right conclusions as the qualifications already in the Constitution preempting the Legislation from adding qualifications, but does not abrogate the more general holding in Cobb.

The First District failure to consider the Constitution as an integrated document. Where the Constitution has established criteria disqualifying persons as candidates for any office as in Article VI, § 4(a), no other disqualification criteria may be imposed

except by the Constitution. Furthermore, the imposition of term limits as disqualifying criteria on the offices of Lieutenant Governor, Cabinet members, state senators, and state representatives under Article VI, § 4(b), by Constitutional Amendment, also excludes the Legislature (or its delegates) from imposing term limits on other elected offices. (Term limits were earlier imposed on the office of Governor, but are described as "qualifications." § 5(b), Art. IV, Fla. Const. (1885).) As applied to Petitioners' case, this proposition renders unconstitutional the local imposition of term limits on these non-Charter Constitutional County Officers.

As an alternative interpretation, Petitioners next will show that the rule in George and Cobb, while originally construed to be a broad preemption of legislative and local governmental powers as to all Constitutional Offices, has evolved in the past forty years to a Constitutional Office-by-Constitutional Office preemption of legislative and local powers on issues of candidacy for office. Similarly, the governing Constitution was replaced in 1968, and the terminology describing election criteria is used interchangeably throughout. "Qualification" and "eligibility" for office are often synonymous. Thus, where the Constitution is silent as to qualifications for a particular office, or has delegated the right to establish qualifications to the Legislature, then as to that office, the Legislature or its delegate may establish qualifications. Conversely, when the Constitution establishes qualifications for a particular office, then, as in

Grassi, the Constitutional expression of qualifications for election is exclusive; in this instance, neither the Legislature nor local governments may impose additional qualifications to constitutional offices. As applied to Petitioners, this alternative interpretation also renders unconstitutional the local term limits Charter amendment because (1) only the Legislature could have imposed these qualifications, and/or (2) the term limits imposed on the board members causes the failure of the entire ballot question.

Finally, the First District also addressed the concept of whether the Clerk of Court is an Article V judicial officer, exempt from local imposition of term limits, and erroneously concluded that Article III, section 11(a)(1) precluded such an exemption. The First District both failed to reconcile the Office of Clerk of Court under its Article V and Article VIII classifications, at least in a manner that would apply in Pinellas County, and the First District misconstrued Article III, section 11(a)(1). Proper treatment of these issues would support Mr. Cook's thesis as applied to Pinellas County's Clerk of Circuit Court.

## V. ARGUMENT

### *A.COBB* AND PROGENY PREEMPT TO THE CONSTITUTION THE ESTABLISHMENT OF DISQUALIFYING CRITERIA AND QUALIFICATIONS FOR CANDIDACY FOR CONSTITUTIONAL OFFICES

#### 1. Constitutional Backdrop

Although Petitioners continue to support the argument for a narrower ruling on the Pinellas County Charter, as already fully briefed, Petitioners welcome this opportunity to address these additional compelling issues raised by the litigants in Cook. This has proven to be an exercise in getting back to basics, namely the Constitution of the State of Florida. Without starting with the Constitution, and returning to it time and again, the Cook issues as interpreted by later cases are seemingly incapable of resolution. Petitioners submit that part of the confusion with this case is that George and Cobb were decided with the 1885 Constitution in place. Askew and Grassi were decided under the 1968 Constitution. While Cobb is still good and applicable law for the principles it established, and continues to be cited and endorsed by the post-1968 Constitution cases, the changes in the 1968 Constitution, as amended in 1992, established for the first time a class of disqualifications for candidates not found in the 1885 Constitution and therefore not addressed by the Cobb case.

The 1885 Constitution, see pertinent portions in City of Jacksonville's Resp.

App. 4, "disqualified" persons from voting who were under guardianships, those adjudicated mentally incompetent, and convicted felons without restoration of civil rights (but did not disqualify them from holding office). § 4, Art. VI, Fla. Const. (1885). The Constitution delegated to the Legislature the power and obligation to "enact the necessary laws to exclude from every office of honor, power, trust or profit, civil or military, within the State" and to exclude from the right to vote, persons convicted of violations named in the section. § 5, Art. VI, Fla. Const. (1885). Until 1968, while the naming of all disqualifications for candidates was effected by the Constitution, the details and the enforcement of those disqualifications was delegated to the Legislature.

In contrast, the 1968 Constitution as adopted, see pertinent portions in City of Jacksonville's Resp. App. 5, first merged the former sections 4 and 5 of Article VI of the 1885 Constitution, then greatly reduced the list of disqualifying criteria for both the electors and candidates, and finally removed the Legislature from any role in implementing these Disqualifications. §4, Art. VI, Fla. Const. (1968). To the best of Petitioners' knowledge, these are the only stated "disqualifications" from office (and they apply to any person intending to "hold office" in the State) in the Constitution as adopted.

In addition, when the 1968 Constitution was adopted there were multiple

"qualifications" and "eligibility" requirements for various offices established, which are discussed in greater depth below at pages 21-24, including among various qualifications for the Governor, Lieutenant Governor and Cabinet members, one unique "qualification" for Governor: "No person who has, or but for resignation would have, served as governor or acting governor for more than six years in two consecutive terms shall be elected governor for the succeeding term." § 5, Art. IV, Fla. Const. (1968). This was a revision of a related provision in the prior Constitution which declared that the "Governor shall be elected . . . and shall hold his term for four years from the time of his installation, but shall not be eligible for re-election to said office the next succeeding term." § 2, Art. IV, Fla. Const. (1885) [emphasis added]. Until 1992, the Governor was the only term-limited officer under the Constitution, and that term limitation was defined as an eligibility requirement under the 1885 Constitution, and as a qualification under the 1968 Constitution.

Then in 1992, the electors in Florida approved an amendment to the Constitution which has received much attention by this Court. See Advisory Opinion to the Attorney General – Limited Political Terms in Certain Elective Offices, 592 So. 2d 225 (Fla. 1991) (hereinafter "Limited Political Terms"), and Ray v. Mortham, 742 So. 2d 1276 (Fla. 1999) (hereinafter "Mortham"). The original section 4 of Article VI was renumbered to become subsection 4(a), and the new disqualification, the limitation

on terms of specified Constitutional offices, was numbered subsection 4(b).

The placement within the Constitution of these term limit disqualifications on the four offices (two others having been held to be unconstitutional by the United States Supreme Court in U.S. Term Limits Inc. v. Thornton, 514 U.S. 779 (1995)) is significant. Section 4(a), as amended, applies to all elected (because Article VI addresses "Suffrage and Elections") office holders in the State, stating: "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." [Emphasis added.] Section 4(b), as adopted, imposes term limits on only four offices, but contextually has to have effect on all elected "office holders in the State" in the sense that it is an expression of the exclusivity of the Constitution to impose term limits. By adopting term limits on some offices in this section 4, which established state-wide disqualifications for Constitutional offices under subsection 4(a), the electorate chose to not impose term limits on any other Constitutional office, at least until further Constitutional amendment. This view is consistent with this Court's statement, when reviewing the Term Limits amendment ballot question, that section 4(b), "if passed, will add term limits as a further disqualification on holding office." Limited Political Terms, 592 So. 2d at 228. This statement was without regard to any individual office, and described the broad

preemptive application of Article VI, section 4.

Therefore, Petitioners begin their argument against this backdrop of the Florida Constitution, and with the understanding that the Disqualifications section of the 1968 Constitution, as amended in 1992, changed the law, so that disqualifications stated in the Constitution are exclusive to the Constitution. This exclusivity requires a constitutional amendment to expand or contract the types of disqualifications enunciated and the offices impacted. But because much of the remaining structure of qualifications assigned to various offices throughout the Constitution echoed the structure of the 1885 Constitution, the principles in Cobb still apply, in context.

2. The *George* and *Cobb* Cases

The George case, the authority for Cobb, held that where the Constitution and statutes were silent as to the qualifications for the office of marshal and collector, it was unconstitutional for the city to attempt to impose qualifications on a municipal candidates modeled after voter qualifications. George, 3 So. at 81-82. The Court considered the meaning of the lack of stated qualifications for office:

> The constitution prescribes no qualifications for office, except for governor, senators, and members of the house of representatives, and judges of the supreme and circuit courts; and as to these, only the governor, senators, and members are required to be qualified electors. It is silent as to the qualifications of all other officers. We do not infer from this that the framers of the constitution were unmindful of the importance of having only such persons put into office as would be endowed with suitable qualifications. . . .

> We are satisfied from the history of the convention which framed our present constitution in 1885 that the absence of qualifications for officers other than as above mentioned, either for the reason given, or some other, was intentional.

Id. at 82. Therefore, the constitutional establishment of qualifications for some offices intentionally precluded the local imposition of additional qualifications to run for other offices. Id. at 82-83.

The case of Thomas v. State ex rel. Cobb, 58 So. 2d 173 (Fla. 1952), was decided based on George and was relied upon by the Cook trial court to strike the locally initiated Charter amendment imposing term limits on the office of Clerk of Court. The First District, reversing the trial court, regarded the term limits as an additional qualification on the office of the Clerk not precluded by Constitutionally-expressed qualifications for the Clerk, consistent with Cobb. Cook at 292. Cobb was decided under the 1885 Constitution, so the text of the Constitution differs in many respects from the 1968 Constitution, as described supra at 5-9, but the principles announced are the same.

The Cobb court found there were at least five instances of "constitutional prohibitions or qualifications," none of which applied to the office before the Court, the Superintendent of Public Instruction. Cobb at 176-177. That holding was much broader than interpreted by the First District in Cook at 292. Instead, this Court in Cobb found section 230.25 to be "invalid and ineffective because it prescribes

qualifications for the office of Superintendent of Public Instruction in addition to those prescribed by the Constitution," Cobb at 183 [emphasis added], even where the Constitution provided no qualifications for the office of superintendent. Thus, the mere expression of qualifications for some offices rendered unconstitutional the imposition by the Legislature of qualifications for any other offices. The corollary to this is that the provision of qualifications in the Constitution for a given office renders unconstitutional the imposition of additional qualifications by the Legislature, consistent with the holdings in Wilson v. Newell and Grassi, infra.

This Court also considered that the Constitution delegated to the Legislature certain powers. First, there was the power to "provide for the election by the qualified electors in each county of . . . a Superintendent of Public Instruction," § 6, Art. VIII, Fla. Const. (1885). Second, there was the power applying to every elected office in the State

> to, and [the Legislature] shall, enact the necessary laws to exclude from every office of honor, power, trust or profit, civil or military, . . . 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.

Cobb at 177, quoting § 5, Art. VI, Fla. Const. (1885). What the Cobb Court "actually concluded" notwithstanding the First District's interpretation, was that the

Constitution's silence on professional qualifications for the office of Superintendent of Public Instruction precluded the Legislature from imposing professional qualifications under the guise of delegated election qualifications.

The Cobb Court's review of the George case caused it to conclude that "it is clearly apparent that the framers of the Constitution were of the settled view that where the Constitution prescribed definite qualifications for some offices and no qualifications for others, the provision in the Constitution '*for duly qualified electors would furnish sufficient safeguard against the choice of suitable persons'.*" Cobb at 181 [emphasis in original]. These principles are no less relevant to the cases before this Court.

3. Post-*Cobb* Cases Under the 1885 Constitution

Over the years, the Supreme Court's holdings based on the Cobb case have had differing manifestations, and viewed in a certain light, none of them need be read as altering of the holding in Cobb. The first set of cases were decided under the 1885 Constitution. In the case of Nichols v. State ex rel. Bolon, 177 So. 2d 467 (Fla. 1965), the Court concluded that the legislative Special Law Amendment to the City's Charter was not prohibited by the Constitution. Distinguishing Bolon from the Cobb case, the Court noted that Cobb "did not relate to municipal offices, but to the office of county superintendent of public instruction, an office specifically created in the

constitution. The legislature may not prescribe qualifications for a constitutional office unless specifically authorized by the constitution." Id. at 469. In short, absent a delegation of power to the Legislature, the qualifications for Constitutional office in the Constitution are exclusive.

In the case of Maloney v. Kirk, 212 So. 2d 609 (Fla. 1968), a Per Curiam Affirmed decision, Justice Roberts adopted the text of the trial court opinion as his specially concurring opinion. The plaintiff tested Governor Kirk's right to remain in office under section 104.27, Florida Statutes, which stated that a violation of section 99.161, Florida Statutes, pertaining to the handling of campaign funds, could result in a court's declaring the election to be void. The opinion appears to be the first to note the distinction between the "affirmative qualifications which are prerequisites to the holding of the office of governor" in section 3, Article IV of the Constitution, and the "disqualifications which prohibit certain persons from holding that office" in section 5, Article VI. Id. at 611 [emphasis added]. The Court finally endorsed the trial Court's holding: "[f]or these reasons, the Court holds that Section 104.27, Florida Statutes, attempts to add to the constitutional qualifications of candidates for governor and is, to the extent that it purports to authorize the avoidance of the election of a governor, invalid." Id. at 614. Where the Constitution stated specific qualifications for gubernatorial candidates, this holding conforms to the Cobb holding, although only

Justice Ervin's concurring opinion and Justice Drew's dissenting opinion cite to Cobb. Id. at 616, 623.

The case of Wilson v. Newell, 223 So. 2d 734 (Fla. 1969), quoting the trial court's opinion in pertinent part, held that "Section 99.032, Florida Statutes, is unconstitutional and invalid because it prescribes qualifications for the office of County Commissioners in addition to those prescribed by the Constitution." Id. at 735. The provisions of section 5, Article VIII of the 1885 Constitution set out the five Commission districts, and the manner of election for the four year terms. Those details were deemed to be sufficient to find that the statutory imposition of a six months' residency in the district to be an impermissible imposition of additional qualifications. The Court cited Cobb on the basis that the expressed limitations in Article VIII were exclusive, but did not need to address the constitutional exclusivity of the provisions in Article VI, section 5, cited above and relied upon by Cobb. The underlying holding of Cobb remained intact.

4. Post *Cobb* Cases Under the 1968 Constitution

The remaining significant cases relying on Cobb were decided under the 1968 Constitution. These cases (except for the first to be discussed), relied upon by the First District, cite Cobb as support for rulings on matters falling outside the realm of qualifications for or disqualifications from candidacy for a Constitutional Office. The

first of these was Holley v. Adams, 238 So. 2d 401 (Fla. 1970). This was a case under section 99.012, Florida Statutes, the "resign to run" statute. It also seems to be the case where the Court began its tortured definitions and redefinitions of qualifications, disqualifications, and eligibility requirements to run for office.

Notwithstanding the reliance on this case in Mr. Cook's appeal by the Solicitor General, Amicus Brief at 17-18, the Holley case can be distinguished on a critical ground. It is not a case on the qualifications or disqualifications for office, but rather whether a person is "eligible" to run for the office of Supreme Court Justice. This court expressly distinguished Holley from Cobb where the attempted requirement "was clearly a qualification for office and quite different from a statute pertaining to eligibility as a candidate for election." Holley v. Adams, 238 So. 2d at 405.

One of the two cases which were the basis for the First District's decision in Cook is State ex rel. Askew v. Thomas, 293 So. 2d 40 (Fla. 1974). The First District's reliance on this case was misplaced. Askew involved a school board member who, two years into her four-year term, moved from her district. Based upon section 230.19, Florida Statutes, her seat was deemed vacant. The Supreme Court reaffirmed the general rule in Cobb. "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. This

'constitutional voice' is the direct voice of the people which controls and cannot be changed by their representatives – the legislators. [citation to Cobb, Maloney v. Kirk, supra, Wilson v. Newell, supra, and Holley v. Adams, supra]." Askew at 42.

Like Holley, Askew involved the post-election retention of office, not a qualification to run for office in the first instance. Again, the Supreme Court endorsed Cobb as governing law, but then held that because no specific qualifications were mentioned for School Board members under Article IX of the Constitution, the Legislature was free to adopt the post-election-residency requirement. What is critical is that this Court could not both rely on the Cobb precedent and rule in Askew and Holley as it did without distinguishing between elections qualifications and post-election office retention requirements. Petitioners maintain that if the Askew Court applied Cobb to post-election office retention, as was the issue in Askew, it need not control here. Instead, Cobb, Wilson v. Newell, and Grassi infra, control the Constitutional right to run for office.

The second case principally relied upon by the First District is State v. Grassi, 532 So. 2d 1055 (Fla. 1988). This time, the Court relied on a single case, Askew, quoting the provision which Askew (at 42) cited to Cobb: "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." Grassi at 1056. Without disrupting the principles in Cobb, this Court correctly held that the imposition of an additional qualification standard by statute, in contravention to the stated constitutional provision for candidates for the County Commissioner, was unconstitutional. Id. See also, Wilson v. Newell, supra, not cited by the Grassi Court.

In reaching this decision, the Grassi Court addressed the State's argument that the 1984 amendment to section 1(e) of Article VIII of the Constitution allowed the statutory residency change. The 1968 Constitution was adopted with the following as the last sentence to section 1(e), Article VIII, Florida Constitution: "One commissioner residing in each district shall be elected by the electors of the county." This sentence was amended by the voters in November 1984 to read: "One commissioner residing in each district shall be elected as provided by law." Grassi at 1056. This Court ruled that "this is a substantive amendment delegating to the legislature the task of establishing procedures for election of county commissioner, not the power to set qualifications for that office. . . . Because article VIII, section 1(e) provides requirements for office of county commissioners, the legislature may not impose additional requirements." Id. Grassi can easily be viewed as this Court deciding the case on the narrower issue of qualifications for the single office without disturbing the broader principle of the Constitution exclusively establishing the qualifications for

candidacy of a constitutional officer.

Parenthetically, but significantly, the holding in Grassi dispositively renders unconstitutional the Committee's amendment to section 3.01 of the Pinellas County Charter in Petitioner's appeal to this Court from the Second District Court of Appeal. If the Legislature may not impose additional "qualifications for office," and this Court has called term limits "qualifications," see Mortham, 742 So. 2d at 1285 ("in the Limited Political Terms opinion, this Court identified the amendment as one imposing a qualification on holding office. 592 So. 2d at 228.")[1], then the Legislature may not delegate to Pinellas County or its electorate the imposition of additional qualifications on the Board members. Cobb at 183 ("The Legislature, not having the power or authority to prescribe these additional qualifications for this office, had no authority to delegate to any board, or boards, the authority to prescribe additional qualifications . . .") Accordingly, this Court is urged to set aside the amendment to section 3.01 of the Pinellas County Charter, imposing term limits on the members of the Board of County Commissioners, as the exercise of a non-delegable power under Cobb and Grassi.[2]

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[1] The provision to which the Mortham case referred actually states: "The amendment, if passed, will add term limits as a further disqualification on holding office." Advisory Opinion to the Attorney General – Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 228 (Fla. 1991).

[2] By extension, the amendment to section 4.03 affecting the Constitutional Officers in Petitioner's case must fail, as otherwise requiring this Court to rewrite

The final case of interest to consider Cobb was Newman v. State, 602 So. 2d 1351 (Fla. 3rd DCA 1992). Mr. Newman had attempted to qualify as a candidate for county court judge, and when it was learned that he did not meet the statutory requirement of being a member of the Florida Bar for five years prior to qualifying, he challenged the statute. Although there were a series of constitutional and statutory amendments central to this issue, the Court concluded that the applicable statute was constitutional under the applicable version of the Constitution establishing qualifications to serve as a judge (or under the later version eligibility requirements to run for a judicial seat) "unless otherwise provided by [general] law." Id. at 1352, 1353. The Court found that in the Cobb case and the case of State ex rel. Landis v. Ward, 158 So. 273 (Fla. 1934), "the question was whether the Legislature could add statutory requirements for holding the constitutional offices of county surveyor, and county school superintendent, where the Constitution did not specifically confer authority on the Legislature to do so. In the present case, we find that the constitutional language did expressly confer such authority." Newman v. State, 602 So. 2d at 1354. This case supports the exclusivity of the Constitution to establish qualifications for office, including the Constitution's exclusive right to delegate that authority to the Legislature. There has been no such delegation to the Legislature for any of the Article VIII

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the ballot question, under Smith v. American Airlines, Inc., 606 So. 2d 618 (Fla. 1992), and McGahey v. McLeod, 135 So. 2d 446 (Fla. 3d DCA 1961).

Constitutional Officers.

5. Reconciling *Cobb* and Subsequent Cases

In the end, a strict reading of the Constitution governs the matters of qualification, disqualification, and eligibility for any office created by Constitution. The provisions of Article VI, section 4, the Disqualification provisions covering all elected offices, and other provisions of the Constitution, for instance section 1(e) of Article VIII, may impose additional eligibility requirements or qualifications. As a general rule, neither the Legislature nor its designees may impose additional matters of qualification, disqualification, or eligibility for constitutional office candidates as held in Cobb and Grassi. The exception to the general rule is when the Constitution itself delegates authority to the Legislature, as it did for example in Newman v. State. Finally, outside the purview of Cobb election qualification and disqualification criteria are the post-election, office retention cases of Holley and Askew. All viewed from their proper perspective, need not abrogate the principles enunciated in Cobb.

## B. IN THE ALTERNATIVE, *COBB* AND PROGENY HAVE EVOLVED INTO A PREEMPTION TO THE CONSTITUTION OF THE ESTABLISHMENT OF QUALIFICATIONS FOR THE CANDIDACY OF INDIVIDUAL CONSTITUTIONAL OFFICES

### 1. While *Cobb* Applies to The Right to Run for Constitutional Office, The Imposition of Additional Qualifications for the Office Are Applied on an Office-By-Office Basis

The First District may have correctly described an evolution in the law which has taken place since this Court first issued Cobb. Over time, the broad exclusivity of the Constitution to establish qualifications for candidacy to Constitutional office may have been transformed into an office-by-office analysis. This Court continues to cite Cobb for the basic proposition that only the Constitution may impose qualifications for Constitutional Offices. However, if the First District is correct, this Court has actually receded from one aspect of Cobb, specifically that the Constitution's failure to establish qualifications for a given office will not necessarily be deemed to be an intentional preemption to the Constitution. Cook at 292. As an alternate position, Petitioners concede that this position may prevail, but also urge this Court to carefully consider the application to Petitioners' case, and the fact that the term limits amendment to the Pinellas County Charter, as adopted, is still unconstitutional on other grounds. Reminding the Court that the source, origin, and structure of the Jacksonville/Duval and Pinellas Charters are quite different, Petitioners

leave the application of this view to the case consolidated with this appeal to the briefs of the capable attorneys of Mr. Cook and the City of Jacksonville, except as otherwise discussed herein.

2. Distinguishing Or Equating Disqualifications From Qualifications From Eligibility Requirements for Elected Office Under the Constitution

Returning to the Constitution, the meanings of the terms "disqualification," "qualification," and "eligibility" in the area of elected officials seem to have been blurred and in the end rendered too confusing to aid this Court in resolving the cases before this Court. The precursor to the current Article VI was Article VI, titled "Suffrage and Eligibility," in the 1885 Constitution. The 1968 Constitution itself relies on the term "Disqualification" in Article VI, subsection 4(a) to establish matters which would prohibit some one from being a candidate for any elected State or local office in Florida, and in subsection 4(b) to establish term limits for four State offices. In addition to the Constitutional Disqualification provision, throughout the current Constitution specific "qualifications" and "eligibility" requirements are set out for specific offices as follows:

a. § 15, Art. III, "Terms and qualifications" of legislators including residency, age, term length requirements;

b. § 5(b), Art. IV, "Qualifications" for (i) Attorney General who must be a Florida lawyer for 5 years, (ii) Governor who may not run for a succeeding

term if he or she has served 6 years or two terms, (iii) Governor and all Cabinet members including age and residency requirements;

c. § 8, Art. V, "Eligibility" for Judges including residency, maximum age, number of years of Florida Bar membership;

d. §16, Art. V. for Clerk of the Circuit Courts, delegating certain matters to the Legislature, and directing selection of the Clerk is pursuant to §1, Article VIII;

e. §§ 17 & 18, Art. V, for State Attorney and Public Defender, including years of Florida Bar membership, and residency requirement;

f. § 1(d), Art. VIII, for Clerk of Circuit Court, Property Appraiser, Sheriff, Supervisor of Elections, and Tax Collector, including election for terms of four years with alternate selection and assignment of duties options;

g. § 1(e), Art. VIII, for Board of County Commissioners including residency; and

h. § 5, Art. IX for Superintendent of Schools, for terms as provided by law.

Wrecking utter confusion, the Constitution uses "qualification" for the residency requirement for legislators and "eligibility" for the residency requirement for judges. The Constitution uses "qualification" for the term limits for Governor, and

"disqualification" for the term limits for Lieutenant Governor, Cabinet members, senators and representatives. The provisions establishing similar matters of qualification for the Clerk, State Attorney, Public Defender, the County Constitutional Officer, the County Commissioners, and the Superintendent of Schools all use language similar the other enumerated offices, and yet none of them actually refer to "qualification" or "eligibility" for office. The cases relied upon by the parties in the Cook appeal are no less confusing in this area.

The George case (applying to the 1885 Constitution which applied slightly different language) used the phrase "qualifications necessary to eligibility" when discussing the concept of imposing additional qualifications on the right to run for office. George at 82. George apparently equated "qualifications" with "eligibility requirements." Cobb talked only about the imposition of additional "qualifications for the office of Superintendent for Public Instruction in addition to those prescribed by the Constitution," Cobb at 183, but also determined that it was relevant that the Court found "no such Constitutional prohibitions or qualifications," id. at 177. Cobb apparently equated disqualifications (prohibitions) with qualifications in its analysis of constitutional preemption.

Given the reality of qualifying as a candidate for an office, the application of any or all of adopted qualification, disqualification, and eligibility criteria may result in

someone not being able to run for a given or for any office. In that sense, distinctions between the three terms are often, although not always illusory. From another perspective, "disqualification" (a candidate may not run for any office if he is adjudicated mentally incompetent or if he is a convicted felon whose civil rights have not been restored) is not the same as "qualification" (you may run if and only if you are of majority age, a resident of the district, and have registered as an elector). Furthermore, "qualification" and "eligibility for office" are effectively equivalent in that both go to whether the candidate has either performed or otherwise met the minimum requirements. In the end, Petitioners suggest that this Court has before it an opportunity to clarify the law in this area.

### 3. The Establishment of Causes For Disqualification For All Elected Offices is Preempted to the Constitution Under Art. VI, Sections 4(a) and (b), While the Establishment of Qualifications Are Either Set Forth in the Constitution or Delegated to the Legislature Expressly or Implicitly

This is really this Court's first opportunity to consider the impact of the 1992 amendment to Art. VI, § 4. Although the constitutionality of the amendment itself has been well-considered by this Court in Limited Political Terms and Mortham, the Court has not resolved the meaning of adopting term limits as disqualification criteria on four types of enumerated offices. Resolving this may aid in clarifying the terms "qualification," "disqualification," and "eligibility" and the rules of construction associated with each.

The resolution which seems obvious to the Petitioners is the following. First, because of the broad language and self-contained, stand-alone construction of Article VI, section 4 as amended in 1992, the disqualifications set forth there apply statewide, and are the exclusive disqualifications for candidacy for Constitutional office at a minimum, and perhaps for candidacy for any office in the State at a maximum. Second, "qualification" and "eligibility" for election, since the adoption of the 1968 Constitution, are generally synonyms, and the case law has to be reconciled accordingly. For instance, where cases blur the meanings, treat them as qualification issues; where the cases endeavor to define them separately, as in Holley for example, honor the distinction if the application does not run afoul of the controlling law. In Holley, where this is not an election case but rather a right to retain office case, this can be managed.[3]

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[3] With all due respect to the Holley Court, this case should be viewed with a critical eye. The most important point is that the Court continued to favorably cite Cobb, but as Justice Ervin observed, the majority opinion really disregarded Cobb and Wilson v. Newell, supra. Id. at 412 (Ervin, J., dissenting). The majority opinion's conclusion that resign to run was an issue of eligibility to run, not qualification, and at the same time it affected the right to retain one office, not the right to run for another office, is contorted and flawed. Justice Ervin's well-reasoned dissenting opinion demonstrated why the qualification-disqualification-eligibility distinctions result in, as he said, "sheer sophistry." Id. at 410 (Ervin, J. dissenting). It is fair to say that in any of these cases, for a person to run, qualifications for office, disqualifications from office, and eligibility to run for office, all require satisfying, by action or inherent characteristic or condition, a "condition precedent." Id. For the purposes of the instant consolidated appeal, Petitioners urge this Court to recede from the Holley case to the extent it conflicts

Under this view, the position urged by the City of Jacksonville, and adopted by the First District, is that the existence or non-existence of Constitutional qualifications must be determined on an office-by-office basis. For example, where the Constitution spells out qualifications for a given office, e.g. county commission members under § 1(e), Art. VIII, see Grassi, then the Legislature and any local government are precluded from imposing term limits as an additional qualification. In the Pinellas County case, the amendment to section 3.01 of the Charter is therefore unconstitutional as a matter of law, and by extension the amendment to section 4.03 fails. See note 3 supra.

In contradistinction, where no qualifications are established under the Constitution beyond the length of term of office, then this Court has held that "statutes imposing additional qualifications for office are unconstitutional where the" Constitution has established qualifications, Askew at 42, and by extension, "the rejection of specific constitutional residency requirements argues IN FAVOR OF legislative control." Id. at 43 [capitals in original, emphasis added]. Under this scenario, where [if and only if this is true] there are arguably no qualifications specified for County Constitutional Officers, then the Legislature would be free to adopt term limits for these offices. In the case of the Pinellas County Charter, adopted by Special

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with Cobb.

Law of the Legislature, there has been no delegation by the Legislature to the County, through the Charter or any other vehicle demonstrated by the Committee, to impose additional qualifications on the offices of Clerk, Sheriff and the other Constitutional Officers. Accordingly, the Committee's amendment to section 4.03 of the Charter imposing additional term limitation qualifications on these offices by local initiative, without Legislative intervention, is unconstitutional.[4]

### C. THE FIRST DISTRICT MISAPPLIED THE PROVISIONS OF ARTICLE VIII, SECTION 1(D) AND ARTICLE III, SECTION 11(A) TO UPHOLD THE LOCAL IMPOSITION OF TERM LIMITS ON CONSTITUTIONAL OFFICERS

Mr. Cook has asserted that his role as Clerk of Court in Jacksonville, as defined in the City's Charter, is as an Article V, Judicial Constitutional Officer. Certainly the duties of that office are pure court functions. See Art. V, §16 and Art. VIII, § 1(d), Fla. Const., and § 12.06, City of Jacksonville Charter. The First District rejected this argument on two grounds. First, the Court said that such a construction would render a portion of Article VIII "useless," Cook at 293, which would accordingly conflict

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[4] Furthermore, although Petitioners suggest (but for the severability clause relied on in Mortham at 1238) that the dissenting opinion in Mortham correctly ascertained that the 1992 amendment failed the single-subject test, and that after Thornton, this Court was being asked to rewrite a ballot question, a greater singleness of purpose would be achieved by the section 4, Article VI amendment if it functioned as the exclusive (except for Governor) expression of term limits. Mortham at 1286-90 (J. Lewis, dissenting).

with the legal principal that "[i]f Jacksonville's charter provision can coexist with the Florida Constitution, then it is not unconstitutional." Id. While that is the principle recited in State v. Sarasota County, 549 So. 2d 659, 660 (Fla. 1989), the conclusion that the charter provision can coexist is erroneous. The same is true with respect to the Pinellas County Charter.

Returning to the Constitution, Article V, section 16 establishes the Clerk as a Constitutional Officer with functions serving both the Judiciary and the Board of County Commissioners, but which office may be "divided by special or general law between two officers." Clearly the division of these functions into a pure Judicial Officer and a Board Officer must be accomplished by the Legislature. This division was accomplished in Jacksonville by the Special Law establishing the current charter prior to the local initiative amendment, and the functions performed by this Clerk of Court are judicial, as this Court has held. See, e.g. Times Publishing Co. v. Ake, 660 So. 2d 255, 257 (Fla. 1995) ("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.") No such division of Office and functions of the Clerk has been accomplished in Pinellas County. Section 16 also states that the Clerk shall

be "selected pursuant" to the provisions of Article VIII.

Article VIII, section 1(d) establishes the Clerk as an elected (the method of "selection") Constitutional Office with functions serving both the Court system and the Board of County Commissioners, unless the latter functions are changed or reassigned by "county charter or special law approved by vote of the electors," and unless the "county charter or special law approved by vote of the electors" states that the Clerk "be chosen in another manner." The language provides procedures in addition to those under Article V and therefore are not rendered "useless" as the First District concluded under Mr. Cook's theory.

None of the Clerk's provisions in Articles V or VIII contemplate local (or Legislative) intervention in the imposition of qualifications. They discuss dividing functions between two offices (requiring legislative acts), or abolishing the office and reassigning duties (not permitted under section 9, Article VIII, of the 1885 Constitution or the Jacksonville Charter, and not accomplished in Pinellas County) or designating an alternative method of selection. These last two actions may be accomplished by charter or special law approved by the electors, and in Pinellas County, they are one in the same, meaning Legislative action would be required. In neither Jacksonville nor Pinellas County has the Legislature participated in the imposition of term limits; in both counties, they were adopted by local initiative without the benefit of delegated

authority.

Finally, the First District erroneously stated that the provisions of Article III, section 11(a)(1) conflicted with Mr. Cook's argument. Petitioners submit that the Court misinterpreted the significance of this constitutional provision. That provision states: "[t]here shall be no special law or general law of local application pertaining to: (1) Election, jurisdiction or duties of officers, except officers of municipalities, chartered counties, special districts or local governmental agencies." The First District said "[t]he constitution clearly contemplates that Jacksonville's charter provisions relating to elections will have local, not statewide application." Cook at 293.

That Court's conclusion that the locally-initiated election-related amendment to the Charter (procedurally identical to the Committee's amendment to the Pinellas County Charter) was proper, is seriously flawed on two grounds. First, the Constitution (to rephrase section 11(1)(a)) allows a special law or a general law of local application pertaining to elections. Neither Jacksonville's term limits amendments nor Pinellas County's term limits amendments were accomplished by the Legislature, the only body in the State capable of adopting a special law or a general law of local application. Second, the imposition of term limits is not a matter of election[5], it is

[5] The Cobb court favorably quoted from an Illinois case differentiating the imposition of qualifications for election from the "manner of conducting elections." "The Legislature may determine the manner of conducting elections, and the means of ascertaining and declaring the result, but it has not right to interfere with the

instead a matter of qualification for election.

Furthermore, with respect to Pinellas County's Charter, the First District's analysis is flawed in a third way: section 11(1)(a) prohibits a special law or a general law of local application pertaining to "election, jurisdiction or duties of officers, except officers of . . . chartered counties . . .." In Pinellas County, the Clerk, Sheriff, Tax Collector, Supervisor of Elections and Property Appraiser are Constitutional County officers in a chartered county. Only the members of the Board are officers of a chartered county.

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freedom of choice, which is the meaning of freedom of election." Cobb at 181, quoting People ex rel. Hoyne v. McCormick, 103 N.E. 1053, 1056 (Ill. 1915).

## V. CONCLUSION

For the reasons stated, as applied to the Petitioners herein and the Charter in Pinellas County, the First District's opinion in City of Jacksonville v. Cook is erroneous. The general rule in Cobb, that the Constitutional statement of qualifications for office preclude the Legislature or any delegate of the Legislature from imposing additional qualifications renders unconstitutional the Committee's term limits amendment on Pinellas County's Constitutional Officers. Alternatively, even if the cases relied upon by the First District, Askew and Grassi, changed the law to require a case-by-case analysis of the Legislative ability to impose qualifications, term limits are disqualifying criteria under the Constitution, and may be imposed only by the Constitution. More importantly, Askew is a case involving vacancy in office and Grassi in no way changes the holding in Cobb, particularly as to the amendments to the Pinellas County Charter. Finally, rather than support the amendment to the two charters, Article III, section 11(a)(1) would render both unconstitutional (if they are even elections matters) because neither was adopted by special law or general law of local application. The First District's opinion should therefore be reversed and the trial court's judgment reinstated, or if not reversed the holding in Cook should be determined by this Court be distinguished from the Petitioners and the Pinellas County Charter.

## VII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by U.S. Mail on Michael S. Hooker, Esquire and Guy P. McConnell, Esquire, Glenn, Rasmussen & Fogarty, P.A., 100 South Ashley Drive, Suite 1300, Tampa, FL 33601, Kenza van Assenderp, Esquire, Young, van Assenderp & Varnadoe, P.O. Box 1833, Tallahassee, FL 32302-1833, Marion Hale, Esquire, Johnson, Blakley, et al., 911 Chestnut Street, Clearwater, FL 33756, Bernie McCabe, State Attorney for the Sixth Judicial Circuit, 14250 49th Street North, Room 100, Clearwater, FL 33760, Raymond Ehrlich, Esquire, and Scott Makar, Esquire, Holland & Knight, P.O. Box 52687, Jacksonville, FL 32201-2687, Loree Lea French, Esquire, Office of the General Counsel, 117 W. Duval St., Suite 480, Jacksonville, FL 32202-3700, Richard G. Rumrell, Rumrell, Wagner & Costabel LLP, P.O. Box 550668, Jacksonville, FL 32255-0668, this _____ day of September, 2001.

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## VIII. CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Supplemental Brief was prepared and printed in Times New Roman 14-point font, comporting with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure, as recently amended.


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