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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF HOERGER,

Appellant,

-against-

No. 237

SPOTA,

Respondent.

20 Eagle Street
Albany, New York 12207
August 21, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

MARTIN E. CONNOR, ESQ.
MARTIN E. CONNOR, COUNSELOR AT LAW
Attorneys for Appellant
61 Pierrepont Street
#71
Brooklyn, NY 11201

THOMAS J. GARRY, ESQ.
HARRIS BEACH PLLC
Attorneys for Respondent
333 Earle Ovington Boulevard
Suite 901
Uniondale, NY 11553

Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 237, Matter of
2 Hoerger v. Spota. Counselor?

3 MR. CONNOR: Good afternoon, Your Honors.
4 May I reserve two minutes for rebuttal?

5 CHIEF JUDGE LIPPMAN: Of course. Go ahead,
6 counselor.

7 MR. CONNOR: Thank you. May it please the
8 court, I'm Martin Connor, and I represent the
9 appellants here, who are three people who duly filed
10 objections and specifications as well as an opposing
11 candidate, who has standing under the election law.

12 The issue is - - - is quite simple, but not
13 obvious, I suppose, and that is duty - - - does the
14 County of Suffolk, in this case acting through its -
15 - - both its legislature and its voters, permitted to
16 place term limits on the office - - -

17 CHIEF JUDGE LIPPMAN: Counselor, let me ask
18 you a question.

19 MR. CONNOR: Certainly.

20 CHIEF JUDGE LIPPMAN: How would you define
21 the role of the District Attorney in Suffolk County?

22 MR. CONNOR: Well - - -

23 CHIEF JUDGE LIPPMAN: Is - - - is he a
24 state constitutional officer, yes or no? And is he a
25 local official, yes or no?

1 MR. CONNOR: He's both, Your Honor.

2 CHIEF JUDGE LIPPMAN: Okay.

3 MR. CONNOR: He is both. And the State
4 clearly has an interest in that office. And the
5 State has expressed that in certainty.

6 JUDGE SMITH: Who - - - who pays his
7 salary?

8 MR. CONNOR: His salary is paid by the
9 County. His salary is paid by the County. He - - -
10 he files his ethics disclosure with the County, not
11 with the State - - -

12 JUDGE GRAFFEO: Is the salary set by the
13 County or by the State?

14 MR. CONNOR: That's interesting, too. The
15 County's above 100,000. The salary is mandated by
16 the legislature. And this court has said that
17 certainly there is a sufficient State interest for
18 the legislature to - - -

19 CHIEF JUDGE LIPPMAN: What about the term
20 of office?

21 MR. CONNOR: Pardon?

22 CHIEF JUDGE LIPPMAN: What about the term
23 of office?

24 MR. CONNOR: The Constitution says the term
25 of office shall be three or four years. Legislation

1 says it's four years. That's the term of office,
2 which of course, is not the same of the number of
3 terms.

4 CHIEF JUDGE LIPPMAN: Okay. Counsel, who
5 has the ability to remove the district attorney or to
6 appoint a successor, and why does the governor have
7 that power?

8 MR. CONNOR: Because the governor has the
9 power to remove every local official. What the
10 governor doesn't have is the power to remove State
11 officials. The governor can't remove the
12 comptroller, the attorney general, the lieutenant
13 governor. He can't remove a judge. He can't remove
14 State legislators.

15 JUDGE SMITH: Can he - - - can he remove a
16 - - - can he remove the New York City Mayor
17 Comptroller for misfeasance?

18 MR. CONNOR: Absolutely. Jimmy Walker
19 proves that.

20 JUDGE SMITH: Even - - - even though they
21 are term-limited?

22 MR. CONNOR: Right. But the governor can
23 remove them.

24 JUDGE SMITH: Their term - - - their - - -

25 MR. CONNOR: The governor can remove - - -

1 JUDGE SMITH: - - - term - - -

2 MR. CONNOR: - - - local - - -

3 JUDGE SMITH: - - - of legislation.

4 MR. CONNOR: - - - local officials. It's
5 clear. But he can't remove real State officials.
6 They're either impeached, which used to apply to
7 judges, except - - -

8 CHIEF JUDGE LIPPMAN: What about appointing
9 their successor? What - - - what significance does
10 that have or not have?

11 MR. CONNOR: Well, the governor can do that
12 for many offices, obviously. He can do it for State
13 offices like judges. But I think that's an ex - - -
14 statutorily set forth what we concede is a State
15 interest in the Office of District Attorney.

16 CHIEF JUDGE LIPPMAN: So your - - - your
17 argument is there is a State interest, but what? But
18 he's really a local - - -

19 MR. CONNOR: But it has some - - -

20 CHIEF JUDGE LIPPMAN: - - - official? What
21 - - - and therefore the County can - - - can set this
22 - - - this term limit?

23 MR. CONNOR: Yes, in the absence of State
24 legislation.

25 CHIEF JUDGE LIPPMAN: In much - - - yeah.

1 MR. CONNOR: We concede that the State
2 legislature could decide we don't like term limits -
3 - - and obviously I'm the last person, if we're
4 talking politically, to talk about how great term
5 limits are. But - - -

6 CHIEF JUDGE LIPPMAN: Let me ask a
7 question. Is term limit a qualification for office?

8 MR. CONNOR: Yes, it is. And the
9 interesting thing is, to use the *expressio unius*
10 analogy, it really - - - which the majority below
11 embrace as well as the court below - - - the Supreme
12 Court. When there's a list of qualifications, that
13 in - - - that principle of interpretation applies.

14 There is no list of qualifications in the
15 Constitution for - - -

16 JUDGE PIGOTT: Mr. Connor, when - - - when
17 you said legislation - - - that the Constitution says
18 shall be three or four years, and there's legislation
19 that says it'll be four, what legislation are you
20 talking about?

21 MR. CONNOR: In the County law it says that
22 the term is four years.

23 JUDGE PIGOTT: So the County - - - well,
24 did the County here - - -

25 MR. CONNOR: The State - - - it's State

1 law.

2 JUDGE PIGOTT: Right. But did the County
3 here decide that it was going to be a four-year term?

4 MR. CONNOR: No, the State legislature did.

5 JUDGE PIGOTT: Well, Nassau County - - -

6 MR. CONNOR: Well - - -

7 JUDGE PIGOTT: - - - passed a local law
8 saying it'll be four years for their county?

9 MR. CONNOR: Nassau? Well, look this court
10 has ruled before when a county has passed a law
11 setting a different term than that prescribed by
12 State legislation or the Constitution that - - -

13 JUDGE GRAFFEO: Counsel - - -

14 CHIEF JUDGE LIPPMAN: Counsel, what about -
15 - -

16 JUDGE GRAFFEO: - - - that provision of the
17 Constitution says - - - I believe it says "as" - - -

18 MR. CONNOR: As provided in the law.

19 JUDGE GRAFFEO: As - - - no, it says, "as
20 the legislature shall direct."

21 MR. CONNOR: Right. The State - - -

22 JUDGE GRAFFEO: By "legislature" there, the
23 reference is to State legislature - - -

24 MR. CONNOR: Absolutely, Your Honor.

25 JUDGE GRAFFEO: - - - correct?

1 MR. CONNOR: The State has an interest - -
2 - the State legislature could, we concede, say - - -

3 JUDGE GRAFFEO: So why isn't - - -

4 MR. CONNOR: - - - no term limits for DA -
5 - -

6 JUDGE GRAFFEO: - - - why isn't that - - -

7 MR. CONNOR: - - - but it hasn't done it.

8 JUDGE GRAFFEO: - - - why isn't that
9 interest, then, superior to the local - - - to the
10 county?

11 MR. CONNOR: It is. Except the State - - -

12 JUDGE GRAFFEO: Then the locality would
13 want to change its terms?

14 MR. CONNOR: It absolutely is. But the
15 State legislature has not passed a law saying - - -

16 CHIEF JUDGE LIPPMAN: Okay, let - - -

17 MR. CONNOR: - - - no term limits.

18 CHIEF JUDGE LIPPMAN: - - - let me ask you
19 about that, counsel. You both argue about the so-
20 called silence of the legislature - - -

21 MR. CONNOR: Right.

22 CHIEF JUDGE LIPPMAN: - - - on this.
23 Doesn't that cut both ways? What does it mean that
24 they - - - they haven't specifically said - - - what
25 - - - under the law, what - - - what's the

1 significance of it?

2 MR. CONNOR: Here's the significance in my
3 opinion, Your Honor. My clients urge the following,
4 that since there's silence, and this is a local
5 office - - - this court has held, you know, the
6 Kelley against McGee case and other contexts, it's a
7 local office. Public Officers' Law says it's a local
8 office. That unless the State exercised - - -
9 positively exercises, through the State legislature,
10 its State interest in this office - - -

11 CHIEF JUDGE LIPPMAN: Couldn't you argue
12 exactly the opposite? And isn't that what the
13 majority opinion in the Appellate Division argues?

14 MR. CONNOR: I don't think you can. I
15 think the municipal - - - we have a constitutional
16 basis here. We have the Municipal Home Rule section
17 of the State Constitution. And we have the Municipal
18 Home Rule Law, which accords the counties power over
19 their local officials' qualifications, et cetera.

20 JUDGE READ: Well, can't you say that the
21 legislature has set qualifications? You've got to be
22 over eighteen. You've got to be an attorney. The
23 term is four years - - -

24 MR. CONNOR: The legislature never said
25 that, Your Honor. This court said that in 1995 after

1 nearly 200 years of having laypersons serve as
2 district attorney. So - - - but it is now clearly a
3 qualification.

4 JUDGE READ: So can't you say that the
5 legislature specified the qualifications and one of
6 the qualifications they didn't specify - - - I guess
7 this goes to what the Chief Judge was saying - - -
8 they didn't specify that - - - that you had to have
9 served fewer than twelve years, I guess, or - - -

10 MR. CONNOR: Right.

11 JUDGE READ: - - - fewer than three terms.
12 Why - - - why doesn't that cut against you, then?

13 MR. CONNOR: Judge Read, let me say this.
14 It - - - it doesn't, for the following reason. The
15 eighteen-year-old qualification applies to everyone
16 who holds every office from school board to whatever
17 in New York State. So you can't say that's a - - -
18 the legislature had specified a unique qualification
19 for district attorney, when it says you have to be
20 eighteen, or obviously, being a citizen is - - -
21 applies to every office in New York State.

22 As to the Office of District Attorney, the
23 legislature has not prescribed any specific
24 qualification.

25 CHIEF JUDGE LIPPMAN: Counsel, let me ask

1 you a policy question related to that. Is it - - -
2 from a policy perspective - - - forget the legal
3 perspective or any other - - - is it a good idea that
4 local counties would all have different requirements
5 vis-a-vis the district attorney who represents the
6 people of the state when they come into court? Is it
7 a good idea to have different qualifications for
8 district - - - the district attorney in different
9 counties, or doesn't it matter?

10 MR. CONNOR: See, it doesn't matter,
11 because we're not dealing with the powers of the
12 office. We're not dealing with the functions of the
13 office. This law doesn't go to functions of the
14 District Attorney's Office. It goes to who can run
15 for district attorney.

16 And as this court said in Roth against
17 Cuevas, or as this court affirmed the court below,
18 nobody has a right to hold an office. And so what
19 we're talking about here, you know, from a policy
20 standpoint - - -

21 JUDGE GRAFFEO: Counsel - - -

22 MR. CONNOR: - - - my opinion doesn't
23 matter. It's my client's. It's really the public -
24 - -

25 JUDGE RIVERA: Let's say - - -

1 JUDGE GRAFFEO: Counsel - - -

2 JUDGE RIVERA: - - - could the - - - could
3 the State legislature pass a law saying DAs will not
4 be term-limited?

5 MR. CONNOR: Certainly could. It hasn't.

6 JUDGE RIVERA: Okay. So why would - - -
7 why is it not more logical to assume that since term
8 limits don't apply unless you say so, that that's - -
9 - that's the State's position; that that's really
10 what silence means?

11 MR. CONNOR: No, the State - - -

12 JUDGE RIVERA: If they could pass such a
13 law?

14 MR. CONNOR: With all due respect, Your
15 Honor, our position is the following. The voters of
16 Suffolk County, acting under the Municipal Home Rule
17 amendment to the Constitution - - - section of the
18 Constitution - - - and Home Rule Law, have acted.

19 And, you know, what do we see here? The
20 County won't defend its law - - - its twenty-year-old
21 law. The County legislature won't defend it. The
22 County executive won't defend it. They basically
23 gave up after a lower court decision on a declaratory
24 judgment.

25 JUDGE SMITH: You're saying that's because

1 politicians don't like term limits?

2 MR. CONNOR: No, I'm saying it's
3 politicians are trying to pass off to the courts
4 what's their job, what they ought to stand up and do
5 in front - - - and like it or not, actually New York
6 City's municipal government elected officials did
7 that about term limits.

8 CHIEF JUDGE LIPPMAN: Well, there - - -
9 there was some little wrinkle that came up about that
10 later. Right?

11 MR. CONNOR: I understand.

12 JUDGE READ: Let me ask you this - - - this
13 - - -

14 MR. CONNOR: Well - - -

15 JUDGE READ: - - - just out of curiosity's
16 sake. If we agree with you, what happens? What
17 happens in this election?

18 MR. CONNOR: Well, in this election?

19 JUDGE READ: Yeah.

20 MR. CONNOR: Oh, the - - - the committees
21 on vacancies will have to substitute candidates.

22 JUDGE READ: For all the parties?

23 MR. CONNOR: For all the parties, sure.

24 CHIEF JUDGE LIPPMAN: Okay, counselor.

25 MR. CONNOR: It's not like my client, Mr.

1 Perini, is looking for a free ride here.

2 CHIEF JUDGE LIPPMAN: Okay, counselor,
3 you'll have rebuttal - - -

4 MR. CONNOR: He's not getting it.

5 CHIEF JUDGE LIPPMAN: - - - time. Let's
6 hear from your adversary.

7 MR. CONNOR: Thank you.

8 CHIEF JUDGE LIPPMAN: Thanks, counselor.

9 MR. GARRY: Good afternoon, Your Honor.
10 May it please the court, my name is Thomas Garry. I
11 represent the respondent candidate, Thomas Spota.

12 CHIEF JUDGE LIPPMAN: Coun - - - counsel,
13 let me ask you the same questions.

14 MR. GARRY: Um-hum.

15 CHIEF JUDGE LIPPMAN: Are they State
16 constitutional officers, yes or no? Or are they
17 local officials, yes or no?

18 MR. GARRY: I think - - - I think clearly
19 they are State constitutional officers, as this court
20 has held on numerous occasions. The issue of local
21 officers has come up in matters of finance and
22 budgetary constraints.

23 CHIEF JUDGE LIPPMAN: So they're - - - so
24 in your view, your argument is they're local
25 officials for certain purposes?

1 MR. GARRY: Yes, I think - - - I think if
2 we look at - - - if we look at even what Kelley found
3 - - - the Kelley court finding them to be a local
4 office, Kelley did still find - - - this court found
5 that there is a - - - clearly a State concern in the
6 Office of District Attorney.

7 JUDGE SMITH: Yeah, but he - - - I don't -
8 - - I don't think Mr. Connor's saying that there's
9 not a State concern. He's saying the State has not
10 legislated. He said - - -

11 MR. GARRY: Well, I would disagree with
12 that. In - - - if you look at the amount - - - the
13 question was asked about term limits and when - - -
14 when the legislature opined on that subject. Clearly
15 our position, and the position of the majority below,
16 is that the silence is intentionally omitted on the
17 issue of term limits. But if you look at this court
18 - - - excuse me. If you look at the State's other
19 sections of the Constitution, whether they be Article
20 VI, I think Section 25(b) concerning judiciary.
21 There are dur - - - durational time limits for a
22 judge. And it's cited below on the issue - - -

23 CHIEF JUDGE LIPPMAN: What's the relevance
24 of that to this - - -

25 MR. GARRY: Well, because - - - because

1 there is - - - and now in November, we have, on the
2 general election ballot, we have six ballot
3 propositions, one of which is the extension of term
4 li - - - excuse me, the extension of the durational
5 time limits for the judiciary on the ballot in
6 November; whereas, if you look at the issue of, I
7 think it is, Article III Sections 2 and 7, with
8 respect to members of the assembly and members of the
9 senate, there is no reference there to the issue of
10 term limits. It merely talks about five years'
11 residency in the State of New York, one year - - -

12 JUDGE SMITH: Well, I'm not - - - I'm not
13 quite following. Why does that prove that the
14 legislature has prohibited term limits for district
15 attorneys?

16 MR. GARRY: Well, because when they want to
17 act upon the issue of restricting the office in
18 question, they do so.

19 JUDGE SMITH: Well, and - - - well, but
20 isn't that Mr. Connor's point? Yeah, when they want
21 to restrict it they do so, and they didn't - - - and
22 they didn't restrict it, and therefore the County can
23 do what it wants.

24 MR. GARRY: Well, no, in every other
25 instance they haven't. Okay? They haven't in

1 district - - - they haven't in district attorney;
2 they have not in senate; they have not in the
3 assembly.

4 JUDGE SMITH: Okay, well, but the question
5 is not whether the - - - whether the - - - you say
6 the legislature hasn't done anything. The question
7 is why isn't the - - - why isn't the County then free
8 to do what it wants?

9 MR. GARRY: Oh, because they clear - - - I
10 think clearly that the State has evidenced a clear
11 State concern over the office, as - - -

12 JUDGE SMITH: I - - - granting that.

13 MR. GARRY: Um-hum.

14 JUDGE SMITH: The State has - - - the State
15 has an interest in the office. The State can
16 prescribe either that there shall be or there shall
17 not be term limits.

18 MR. GARRY: Um-hum.

19 JUDGE SMITH: The State has been silent.
20 Why does the County not have the power to resolve the
21 question?

22 MR. GARRY: Because the office is of such a
23 great State concern that the County should not be
24 able to restrict a constitutional - - -

25 JUDGE SMITH: Why is - - -

1 MR. GARRY: - - - officer of the State.

2 JUDGE SMITH: - - - why is the - - - why is
3 the District Attorney of Suffolk County a more State
4 concern than, say, the Mayor of New York?

5 MR. GARRY: Well - - - well, because I
6 think the Mayor of New York has been found in the
7 Roth decision as to be a purely local office for all
8 purposes - - - I think - - - the court in Roth v.
9 Cuevas. Whereas, in - - - in - - -

10 JUDGE SMITH: But you wouldn't say there's
11 no State interest in the - - -

12 MR. GARRY: No, I wouldn't - - -

13 JUDGE SMITH: - - - mayor - - -

14 MR. GARRY: - - - I would not say that,
15 Judge Smith. I would not say that. What I would
16 say, though, if you look at - - - at the dissent's
17 reliance upon the criteria of a Municipal Home Rule
18 Law, of where the State has or has not opined on the
19 subject, you look at powers and duties, the duties
20 and powers of the district attorney are set forth in
21 the County law, Section 700 and 927. Specifically
22 927 deals with the Five County district attorneys and
23 the City of New York. You talk about the mode of
24 selection, Article - - -

25 JUDGE SMITH: But I mean, to me what you're

1 saying is, the State has done a lot of legislating
2 about district attorneys.

3 MR. GARRY: Um-hum.

4 JUDGE SMITH: The State has a great
5 interest in the issue of district attorneys.

6 MR. GARRY: Um-hum.

7 JUDGE SMITH: The State has not said word
8 one about whether terms are limited or not.

9 MR. GARRY: Intentionally so. And I think
10 the analogous - - -

11 JUDGE SMITH: But why - - - why does that -
12 - - why should that be interpreted to mean there
13 shall be no term limits and not to mean the County
14 can choose?

15 MR. GARRY: Well, I think there can. The
16 question was asked by Justice - - - Judge Rivera.
17 The question is can the State of New York term limit
18 the district attorneys? I think - - - I think the
19 answer to that is yes.

20 CHIEF JUDGE LIPPMAN: Counselor, but - - -
21 but let me ask you the same question - - -

22 MR. GARRY: Um-hum.

23 CHIEF JUDGE LIPPMAN: - - - I asked your
24 adversary. You agree that this issue of silence - -

25 -

1 MR. GARRY: Um-hum.

2 CHIEF JUDGE LIPPMAN: - - - can be argued
3 both ways, right?

4 MR. GARRY: Well, yes, Your Honor. I do.
5 However, I do think where the - - -

6 CHIEF JUDGE LIPPMAN: Does this case turn
7 on - - - on whether they specifically said it or not?

8 MR. GARRY: No, I don't think it turns on
9 they specifically said it or not. I think it talks
10 about the totality of the office in question. You
11 asked the questions about the district attorney
12 filling the vacancy, the district attorney doing the
13 removal.

14 CHIEF JUDGE LIPPMAN: The governor, you
15 mean?

16 MR. GARRY: The - - - excuse me, the
17 governor doing the removal and the filling of the
18 vacancies.

19 I do think if you do look at the reliance
20 upon - - - even the dissent's reliance upon Kelley -
21 - -

22 CHIEF JUDGE LIPPMAN: So your basic
23 argument is when you look at the totality of the
24 picture, this is a State constitutional officer, and
25 that there's indicia of that? Is that your basic

1 argument - - -

2 MR. GARRY: Yeah - - -

3 CHIEF JUDGE LIPPMAN: - - - as opposed to a
4 local official for certain purposes? Is that the
5 kernel of your argument?

6 MR. GARRY: Well, yes. I - - - and I think
7 that makes sense in light of the fact that the
8 budgetary constraints of, and the fiscal
9 responsibilities of the maintaining of the office,
10 the physical number of staff and so on, that's for
11 the most part, borne by the County, without question.

12 CHIEF JUDGE LIPPMAN: All right. Let me -
13 - - let me ask you to frame the policy issue that I
14 asked your adversary about. Is it good or bad, does
15 it matter, if the different counties were to set
16 different crit - - - if we assume that term limits
17 are a qualification of office - - -

18 MR. GARRY: Um-hum.

19 CHIEF JUDGE LIPPMAN: - - - does it matter?
20 Is it good, bad or indifferent that different
21 counties, if we were to agree with your adversary,
22 could put different qualifications on the office?
23 Would that matter?

24 MR. GARRY: Well, I think clearly, I think
25 - - - I think this court time and time again - - -

1 CHIEF JUDGE LIPPMAN: And why? That's what
2 I'm saying. Frame that issue, if it's relevant.

3 MR. GARRY: I think it is relevant. I
4 think time and time again, this court has ruled that
5 it is a State constitutional office, is that it has a
6 grave concern of issues involving the State. If we
7 have a - - - a hodge - - -

8 CHIEF JUDGE LIPPMAN: Well, would it matter
9 if one county did a one-term limit, one county did a
10 two-term limit, one county did a three-term limit,
11 different counties set other different
12 qualifications? Why does it matter?

13 MR. GARRY: Well, because I think it is
14 also a restriction on the office. As the court - - -
15 as the United States Court of - - - excuse me - - -
16 the United States Supreme Court held - - - it's
17 interesting. And the rationale - - - one of the
18 rationale - - -

19 JUDGE SMITH: No, but the question is why -
20 - - why is the inconsistency a problem?

21 MR. GARRY: The inconsistency - - - I'm not
22 sure I follow the - - -

23 CHIEF JUDGE LIPPMAN: Well, from a policy
24 perspective - - -

25 MR. GARRY: Um-hum.

1 CHIEF JUDGE LIPPMAN: - - - why would it be
2 a bad thing, if it is a bad thing - - -

3 MR. GARRY: Um-hum.

4 CHIEF JUDGE LIPPMAN: - - - for different
5 counties to have different qualifications to be the
6 district attorney?

7 MR. GARRY: Because the office would - - -
8 would lose its nature. The office is put into place
9 for the purposes of enforcing the penal code - - -
10 among other things, the penal code of the State of
11 New York. The State of New York has a valid state
12 interest in ensuring that that is - - - that is
13 attempted to be uniformly enacted throughout the
14 state. I mean, in - - - below, the issue - - - in
15 the underlying action to disqualify the petition, it
16 relies upon a statement, as Mr. Connor pointed out
17 earlier, specifications of objections by the
18 underlying objectors. And it's - - -

19 CHIEF JUDGE LIPPMAN: Does the - - - does
20 the DA represent the People of the State of New York
21 and the People of Suffolk County? You know, when we
22 say, you know, within our culture - - -

23 MR. GARRY: Um-hum.

24 CHIEF JUDGE LIPPMAN: - - - when we say
25 "representing the People, Joe Shmoe", what does that

1 mean? Does he represent the People of the State of
2 New York? Are you talking about the penal law, or
3 what are we talking about?

4 MR. GARRY: I think - - - I think - - -
5 yes, we're talking about - - -

6 CHIEF JUDGE LIPPMAN: What about local
7 laws?

8 MR. GARRY: We're speaking to the penal
9 law; we're speaking to local law as well. But
10 however, it is uniformly applied, the penal law - - -
11 we attempt and hope that the penal law be uniformly
12 applied throughout the state, that the state - - -

13 JUDGE SMITH: No, but do you - - -

14 JUDGE RIVERA: But then - - - but doesn't
15 that mean you favor people being in this office for
16 forty years? And it's not necessarily the case.
17 Someone might only be in one or two terms. I think
18 you haven't really addressed why it matters - - -

19 MR. GARRY: Well - - -

20 JUDGE RIVERA: - - - from a State interest
21 perspective, whether or not, in one place, people can
22 be in the office forty years - - -

23 MR. GARRY: Um-hum.

24 JUDGE RIVERA: - - - or only twelve years?

25 MR. GARRY: Well, the issue of whether or

1 not term limits should be applicable to a State
2 constitutional officeholder, is within the - - -
3 within the purview of the State. That is our
4 position.

5 JUDGE PIGOTT: Well, let me ask you about
6 Article XIII. I mentioned to Mr. Connor, because
7 Article XIII, Section 13 says, "In each county, a
8 district attorney shall be chosen by the electors
9 once in every three or four years, as the legislature
10 shall direct."

11 MR. GARRY: Um-hum.

12 JUDGE PIGOTT: Now, that's the - - - isn't
13 that the local legislature that determines whether
14 it's for three or four years?

15 MR. GARRY: No, no. I think this court - -
16 - I think this court held in the Enders case in
17 Oneida County, where they put a public referendum on
18 the ballot, to call the clerk, the district attorney,
19 and I believe the sheriff, for a four-year term, this
20 court found that to be violative of the constitution.
21 It was subsequently amended where they could permit -
22 - - the State supplement - - - subsequently amended
23 it, and the State permitted the term of four years.
24 But - - -

25 JUDGE ABDUS SALAAM: Counsel, I'd like - -

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MR. GARRY: But - - -

JUDGE ABDUS SALAAM: - - - to - - - I'm
sorry. I'd like to return to the question about why
it matters whether there is a twelve-year limit, or
the DA decides after only one term to step down - - -

MR. GARRY: Um-hum.

JUDGE ABDUS SALAAM: - - - then somebody
else comes in to become the DA, why does that - - -
why does that make it a qualification not to have a
term limit.

MR. GARRY: Well, I also think the United
States Supreme Court in Term Limit case, analogous to
the Congress, I was mentioning before, one of the
rationale behind this particular law, Law 27 of 1993,
was at the time, 1992-1993, about fourteen - - -
twelve or fourteen states were passing legis - - -
was passing significant legislation involving term-
limiting members of Congress. Okay. That was
subsequently ruled to be unconstitutional by the
United States Supreme Court, where they found that
the office - - - excuse me, the qualification - - -
term limits as a qualification, because you are now
restricting the office from someone who had served in
that role for the last - - - in this case - - -

1 twelve years. So - - -

2 JUDGE ABDUS SALAAM: So they said that
3 tenure was a qualification?

4 MR. GARRY: Yes.

5 JUDGE SMITH: Suppose - - - suppose a
6 county - - - say, Nassau County - - -

7 MR. GARRY: Um-hum.

8 JUDGE SMITH: - - - passes a local law that
9 says the district attorney - - - anyone wants to run
10 for district attorney has to have been practicing law
11 for at least ten years. Would that be valid?

12 MR. GARRY: No. I don't believe it would
13 be. I think that's within the purview of the State.
14 I think that - - -

15 JUDGE SMITH: Well, should - - - wouldn't -
16 - - doesn't it make sense for maybe - - - to have a
17 qualification like that, maybe in some of the bigger,
18 more cosmopolitan counties where you can - - - where
19 it would be wise - - - where maybe St. Lawrence
20 County wouldn't want to be that strict?

21 MR. GARRY: I don't - - - I don't - - - I'm
22 not standing here trying to argue against the wisdom
23 of that, nor am I standing here arguing against the
24 wisdom of the Term Limits case. There's a reason - -
25 - and I believe there's a reason in the Roth case

1 involving the mayor, the public advocate, and so on
2 and so forth in the City of New York, there's a
3 reason that the district attorney was not included -
4 - - in my opinion, was not included - - -

5 CHIEF JUDGE LIPPMAN: Counsel - - -

6 MR. GARRY: - - - in that.

7 CHIEF JUDGE LIPPMAN: - - - let me ask
8 another question - - -

9 MR. GARRY: Um-hum.

10 CHIEF JUDGE LIPPMAN: - - - similar lines.
11 Why - - - why is it that a county, as we know, did
12 exactly happen - - - why is it bad that a county says
13 we don't have enough lawyers in our county and
14 therefore the DA maybe doesn't have to be a lawyer?

15 MR. GARRY: Um-hum.

16 CHIEF JUDGE LIPPMAN: Is that - - - where
17 does that fit along these kinds of questions that
18 you're being asked?

19 MR. GARRY: I think - - - I think this
20 court has held that an - - - I think the Chief Judge
21 is referring to Hamilton County. And this court
22 found that it is a - - - it is a qualification of the
23 office to be an attorney.

24 CHIEF JUDGE LIPPMAN: Okay, cou - - -

25 JUDGE PIGOTT: Does he have to be a

1 resident of the county as well?

2 MR. GARRY: Yes - - - well as Judge Read
3 mentioned before, the Public Officer Law does set
4 forth eighteen years of age, resident of the state,
5 and so forth. So this is another criteria (sic) on
6 that, the same way the term limits would be deemed
7 under the United States Supreme Court. Thank you - -
8 -

9 JUDGE PIGOTT: So just to follow up on
10 that. So if Hamilton County had only one lawyer in
11 it, he's the DA?

12 MR. GARRY: That's a practical - - - that
13 is a practical problem. And in the facts in that
14 case, I think it was six law - - - six attorneys in
15 the county, three of which were already elected
16 officials. So you've dealt with that in that case.
17 And the practical effect of that is difficult, but
18 you've dealt with it.

19 CHIEF JUDGE LIPPMAN: Okay. Thanks
20 counselor.

21 MR. GARRY: Thank you, Your Honor.

22 CHIEF JUDGE LIPPMAN: Counsel, let me go
23 back to that same question for you. If you can't say
24 that the district attorney doesn't have to be a
25 lawyer - - - if Hamilton County can't say that, why

1 can Suffolk County say district attorney has to be
2 someone who serves no more than twelve years? Why
3 are those two situations different?

4 MR. CONNOR: Well, they are different,
5 because the first situation, Currey against Hosley -
6 - - and I have a second residence in Hamilton County,
7 as well - - -

8 CHIEF JUDGE LIPPMAN: You could be the
9 district attorney.

10 MR. CONNOR: I could just change my
11 registration and run for DA. But I think I've had
12 enough public service.

13 CHIEF JUDGE LIPPMAN: This case does it for
14 you. Go ahead.

15 MR. CONNOR: But the fact is, in that case
16 it's about the qualif - - - the functioning of the
17 office. In the case of term limits - - -

18 CHIEF JUDGE LIPPMAN: Or is it about the
19 qualification of - - - for office? And what about
20 the Supreme Court - - -

21 MR. CONNOR: Well - - -

22 CHIEF JUDGE LIPPMAN: - - - that says term
23 limits is a qualification? A different kind of
24 qualification - - -

25 MR. CONNOR: Different kind of - - -

1 CHIEF JUDGE LIPPMAN: - - - and not the
2 same?

3 MR. CONNOR: - - - qualification. That
4 goes to the functioning of the office. You have a
5 layperson, and they did for a many, many years,
6 functioning as DA. Here - - -

7 JUDGE ABDUS SALAAM: Counsel, what - - -

8 MR. CONNOR: - - - here it's - - -

9 JUDGE ABDUS SALAAM: - - - doesn't your
10 adversary make a good point that in the Roth case
11 that the DA is not included among those offices that
12 are term-limited in the City of New York?

13 MR. CONNOR: That was a political choice by
14 the people who amended the city charter and put that
15 on the ballot. And if you look at who the DAs were
16 at the time, it was a political choice. I can't
17 argue with that. But it didn't - - - nowhere did
18 they say we're not allowed to do this.

19 JUDGE SMITH: So they - - -

20 MR. CONNOR: They decided not to do it.

21 JUDGE SMITH: - - - they could have chosen
22 otherwise? They could have chosen otherwise? They
23 could have term limited - - -

24 MR. CONNOR: I believe so. But I think we
25 all know - - -

1 JUDGE GRAFFEO: Is there any - - -

2 MR. CONNOR: - - - what - - -

3 JUDGE GRAFFEO: - - - is there any example
4 that you can point to where the State legislature has
5 expressly said for any office that there shall be no
6 term limits?

7 MR. CONNOR: No, and - - -

8 JUDGE GRAFFEO: Because you - - -

9 MR. CONNOR: - - - no, and I reject - - -

10 JUDGE GRAFFEO: - - - you've argued that
11 they didn't say that here. But I'm not aware that
12 they've said that, ever.

13 MR. CONNOR: They've never said there
14 should be; they've never said there shouldn't be.
15 The Constitution - - - and I disagree with the
16 analogy to the judiciary. It's not term limits.
17 They have an age limit - - - an unwise, in my
18 opinion, age limit. It relates back to a different
19 era - - -

20 JUDGE READ: Well, could the - - - could
21 the county - - - could Suffolk County - - - could
22 Suffolk County adopt term limits for county court
23 judges? Say county court judges could only serve one
24 term?

25 MR. CONNOR: No. No, you know, judges are

1 state officers, even county court judges.

2 JUDGE READ: So that's different, in your
3 view?

4 MR. CONNOR: That's different. They are
5 state officers, not local officers - - -

6 CHIEF JUDGE LIPPMAN: Coun - - -

7 MR. CONNOR: - - - ever.

8 CHIEF JUDGE LIPPMAN: Counsel, let me just
9 finish with one question along these policy lines
10 that I keep talking about. Does it matter that you
11 have a legendary district attorney in New York County
12 who served for his lifetime, whatever it was, thirty
13 years, and in Suffolk County, the legislature would
14 be saying, our district attorney can only serve
15 twelve years? What about that? Is there any
16 relevance?

17 MR. CONNOR: It really doesn't matter. The
18 office still has the same powers, functions and
19 whatever.

20 JUDGE PIGOTT: Well, the concern - - -

21 MR. CONNOR: Who's the DA, doesn't matter.

22 JUDGE PIGOTT: One of the concerns Mr.
23 Connor, it seems to me, on the public policy point of
24 view, is let's just assume for - - - you want an
25 independent DA. You want someone - - -

1 MR. CONNOR: Absolutely.

2 JUDGE PIGOTT: - - - who acts for - - - you
3 know, much like a judicial officer. If the county
4 legislature is of an opposite party and decides we're
5 never going to beat this person, why don't we term-
6 limit him or her, and then at least we'll have a shot
7 four years from now to get the DA's office back.
8 Wouldn't that be interfering with the independence of
9 the Office of the District Attorney?

10 MR. CONNOR: It might. But no more than if
11 some county leader of a major political party says I
12 don't like this DA; I'm going to give him a primary
13 or I'm going to give him an election.

14 CHIEF JUDGE LIPPMAN: But - - -

15 MR. CONNOR: Unfortunately we have an
16 elected situation. And the Constitution does say in
17 the statutes it's a four-year term.

18 CHIEF JUDGE LIPPMAN: Counsel, but this - -
19 - that isn't so far-fetched a scenario, particularly
20 in Suffolk County, that, you know - - -

21 MR. CONNOR: Something like that happened
22 in my county.

23 CHIEF JUDGE LIPPMAN: Yes, these things do
24 happen. So anyway - - -

25 MR. CONNOR: But that's just part of the

1 system, unfortunately. Maybe not the good - - - the
2 not good part of an elected system.

3 CHIEF JUDGE LIPPMAN: You're saying it's a
4 - - - that could be a - - -

5 MR. CONNOR: It's politics. It happens.

6 CHIEF JUDGE LIPPMAN: - - - political
7 decision.

8 MR. CONNOR: It happens.

9 CHIEF JUDGE LIPPMAN: Thank you both.

10 MR. CONNOR: Thank you.

11 CHIEF JUDGE LIPPMAN: Appreciate it.

12 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Hoerger v. Spota, No. 237 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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