

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Committee of Seventy, Philadelphia 3.0, Jordan
Strauss, Brian Krisch, and Katherine Rivera,

Petitioners,

v.

No. 611 CD 2017

Anthony Clark, in his official capacity as City
Commissioner, Al Schmidt, in his official
capacity as City Commissioner, and Lisa M. Deeley,
in her official capacity as City Commissioner,

Respondents.

BRIEF OF APPELLANTS

**Appeal From the Order of the Court of Common Pleas of
Philadelphia County, April Term, 2017, Case No. 3418**

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction to review the May 15, 2017 Memorandum Opinion and Order of the Court of Common Pleas of Philadelphia County pursuant to 42 Pa.C.S. § 762(a)(4)(i).

II. ORDER OR OTHER DETERMINATION IN QUESTION

AND NOW, this 15th day of May, 2017, upon consideration of the “Petition Action for Declaratory Judgment — Election Matter” filed on April 24, 2017, the Preliminary Objections of Respondents the City Commissioners filed on May 11, 2017 and oral argument presented on May 12, 2017, it is hereby ORDERED and DECREED that the Petitioners’ request is denied with prejudice.⁴

fn. 4: Respondents’ Preliminary Objections are dismissed as moot.

III. STATEMENT OF THE SCOPE OF REVIEW AND THE STANDARD OF REVIEW

This appeal “requires this Court to engage in statutory interpretation of the Election Code, which, as a question of law, is subject to a de novo standard of review and a plenary scope of review.” *Banfield v. Cortés*, 110 A.3d 155, 166 (Pa. 2015).

IV. STATEMENT OF THE QUESTIONS INVOLVED

- A. Does Section 301(c) of the Election Code have any application in Philadelphia?**

Answer of the Court of Common Pleas: No.

Suggested answer: Yes.

- B. When Section 301(b) of the Election Code refers to Philadelphia as among “counties which have adopted home rule charters,” does a reference in Section 301(c) to “an existing county Home Rule Charter” include the Philadelphia Home Rule Charter, thus making the City Commissioners ineligible to oversee elections that feature ballot questions about amending that Charter?**

Answer of the Court of Common Pleas: No.

Suggested answer: Yes.

- C. Does the Philadelphia Home Rule Charter remain a “city Home Rule Charter” but not a “county Home Rule Charter” following the consolidation of the City of Philadelphia and the County of Philadelphia?**

Answer of the Court of Common Pleas: Yes.

Suggested answer: No.

V. STATEMENT OF THE CASE

A. Form of Action and Procedural History

This is an appeal from the Memorandum Order and Opinion of the Court of Common Pleas of Philadelphia County.

Petitioners initiated this action on April 24, 2017 by filing a Petition in the Court of Common Pleas. (R. 6a-69a.) The Petition requested “a declaratory judgment that Respondents are statutorily ineligible to carry out the functions of their offices as City Commissioners whenever there appears on the ballot a question relating to amendments to the Philadelphia Home Rule Charter, including the primary election scheduled for May 16, 2017.” (R. 32a.)

The Court of Common Pleas entered a Rule to Show Cause Order on May 2 that set a schedule for briefing and argument. (R. 77a.) On May 11, Respondents filed Preliminary Objections (R. 78a-83a) and a brief in support thereof (R. 84a-107a). The Court of Common Pleas held oral argument on May 12. (R. 108a-117a (transcript of argument).) On May 15, on the day before the primary election, the Court of Common Pleas entered the Memorandum Opinion and Order that is the subject of this appeal. Exhibit A (“Opinion”). Petitioners filed a notice of appeal to this Court on May 18.

B. Prior Determinations

The only prior determination in this matter is the Memorandum Opinion and Order of May 15, 2017, which has not been reported.

On March 27, 2017, before filing their Petition in the Court of Common Pleas, Petitioners filed an original-jurisdiction Petition for Review in the Pennsylvania Supreme Court (case number 36 EM 2017) seeking extraordinary relief in the form of a writ of mandamus directing the President Judge of the Court of Common Pleas of Philadelphia County to appoint judges or electors of Philadelphia to serve in the stead of the Philadelphia City Commissioners for the May 16, 2017 primary election because a question relating to an amendment to the Philadelphia Home Rule Charter was going to be on the ballot. (*See* R. 12a-13a (summarizing the proceedings before the Supreme Court).) On April 19, the Supreme Court issued a *per curiam* order denying the Petition for Review. (R. 53a.) The Supreme Court did not issue an opinion in the case, and its order has not been reported.¹

¹ Because the Supreme Court issued no opinion, its action did not have any preclusive effect concerning the present suit. *See generally* *Cnty. of Berks ex rel. Baldwin v. Pa. Labor Relations Bd.*, 678 A.2d 355, 359 (Pa. 1996) (“It is axiomatic that in order for either collateral estoppel or res judicata to apply, the issue or issues must have been actually litigated and determined by a valid and final judgment. . . . [W]here this court has issued an order without opinion denying extraordinary relief, that order alone is insufficient to establish that there has been a full and final adjudication of the claims raised.”).

C. Name of the Judge Whose Determination Is To Be Reviewed

The Memorandum Opinion and Order was issued by the Honorable Sheila Woods-Skipper, President Judge of the Court of Common Pleas of Philadelphia County.

D. Chronological Statement of Facts

1. The Parties

Petitioner the Committee of Seventy (“Seventy”) is a non-profit, non-partisan 501(c)(3) organization that has worked for better government and the integrity of elections in Philadelphia since 1904. (R. 13a.) Seventy identified the Pennsylvania Election Code provision at issue in this case in 2016 and ever since has committed staff time and other resources to researching and attempting to secure compliance with this provision by Philadelphia’s election officials. (R. 14a.)

Petitioner Philadelphia 3.0 is a 501(c)(4) organization that has been working since 2015 to reform and modernize Philadelphia municipal government, including the administration of elections. (R. 14a-15a.) Part of Philadelphia 3.0’s work involves recruiting citizens to run for local offices, including in divisional races for Judge of Election and Inspector of Election. (R. 15a.) Philadelphia 3.0 has partnered with Seventy in committing resources to research these issues and to attempt to secure compliance with this provision by Philadelphia’s election officials.

Both Seventy and Philadelphia 3.0 have monitored and reported upon problems with election administration under the jurisdiction of the Philadelphia City Commissioners, including slow and error-prone processing of voter registrations, belated mailing of absentee ballots, improper training of poll workers, inconsistent procedures at different polling places, and accessibility problems for voters with disabilities or with limited English proficiency. (R. 19a.) Both organizations are engaged in ongoing efforts to replace Philadelphia's current model of elected City Commissioners with appointed and experienced professionals to oversee, administer, and modernize Philadelphia's elections. (R. 11a.)

Petitioners Jordan Strauss, Brian Krisch, and Katherine Rivera were all first-time candidates in divisional races in Philadelphia on May 16, 2017. (R. 16a-17a.) Petitioner Strauss ran for Judge of Election for Ward 1, Division 4; Petitioner Krisch ran for Judge of Election for Ward 15, Division 3; and Petitioner Rivera ran for Inspector of Election for Ward 31, Division 3. Petitioners Strauss, Krisch, and Rivera are, in addition, registered voters in Philadelphia who voted in the May 16, 2017 election and plan to vote in future elections. (R. 16a-18a.)

Respondents are the three Philadelphia City Commissioners, who together compose a board of elected officials responsible for administering voter registration and conducting elections in Philadelphia. (R. 18a-19a.) They are

named as Respondents only in their official capacities. (R. 8a.) The Respondents were elected to four-year terms as City Commissioners in 2015, and none appeared on the May 16, 2017 ballot as candidates for nomination or election. (R. 21a.)

2. The May 16, 2017 Ballot and Administration of the Election

The May 16, 2017 ballot in Philadelphia featured statewide primaries for judicial offices and Philadelphia-wide primaries for District Attorney and City Controller, as well as divisional races for Judge of Election and Inspector of Election. (R. 16a.) In addition, it contained two questions relating to amendments to the Philadelphia Home Rule Charter. (R. 21a.) One of the proposed amendments would change Philadelphia’s procurement practices by modifying the “lowest responsible bidder” provision of the Home Rule Charter to allow for “best value” contracting in certain situations. (R. 55a-58a.) The other proposed amendment would create a “Philadelphia Community Reinvestment Commission.” (R. 59a-64a.)

On January 18, the leaders of Seventy and Philadelphia 3.0 jointly sent a letter to the President Judge of the Court of Common Pleas of Philadelphia County alerting her to the placement on the ballot of the “lowest responsible bidder” question and requesting that she appoint interim officials to serve in the stead of the City Commissioners for the May 16 election. (R. 45a-47a.) On March 6, 2017, Dominic J. Rossi, Esq., Deputy Court Administrator of the First Judicial District of

Pennsylvania, sent a response stating that “President Judge Woods-Skipper is unable to respond to your letter” and that she “may be asked to decide the legal question you raise.” (R. 49a-50a.)

Respondents continued to carry out their duties as City Commissioners through the May 16 election. Petitioners Strauss and Rivera won their races; Petitioner Krisch did not.

E. Statement of the Order Under Review

The Memorandum Opinion and Order denied with prejudice Petitioners’ request for a declaratory judgment.

VI. SUMMARY OF ARGUMENT

Among the largest cities and counties in the United States, only Philadelphia elects multiple officials whose sole job is to run elections. Under the watch of these obscure elected officials—the City Commissioners—Philadelphia has accumulated a long and unfortunate history of problematic election administration. Well-documented troubles include time-sensitive voter registration forms that were processed incorrectly or not at all, absentee ballots mailed to voters too late or never, and polling places that have been inaccessible to voters with disabilities or with limited English proficiency. These inaccuracies, delays, and barriers interfere with the basic constitutional right of Philadelphians to participate in democracy.

To prevent actual or perceived conflicts of interest, Section 301(c) of the Pennsylvania Election Code, 25 P.S. § 2641(c),² requires the interim replacement of the City Commissioners as the overseers of elections in Philadelphia under two circumstances: (1) when they are running for reelection or other office, and (2) when a question appears on the ballot to amend the Philadelphia Home Rule Charter. For decades, the City Commissioners and the Philadelphia Court of Common Pleas have adhered to the first requirement—every four years, City Commissioners who are running for reelection step aside from their duties and are temporarily replaced by appointees of the President Judge. However, the City

² Like the decision below, this brief will refer to this provision as 25 P.S. § 2641.

Commissioners and President Judges have consistently overlooked or disregarded the second requirement, and so the City Commissioners have overseen elections featuring charter-change questions, including the May 16, 2017 primary. Attempts to amend the Philadelphia Home Rule Charter were rare prior to 2002, but over the past fifteen years such ballot questions have become increasingly common.

Philadelphia elections must be fair, well-run, and compliant with the Pennsylvania Election Code. Toward that end, the appropriate election officials under state law must oversee and administer elections. That means that interim officials must serve in the stead of the City Commissioners whenever the City Commissioners are running for election or whenever there is an amendment to the Philadelphia Home Rule Charter on the ballot. This is first and foremost a matter of applying the unambiguous text of the Election Code, but it also serves the important policy interest of avoiding conflicts of interest.

The Court of Common Pleas has now issued a decision that not only provides a flawed justification for ignoring the second requirement of 25 P.S. § 2641(c), but that also threatens to undercut the first requirement. The decision below is based on a misreading of § 2641 that stands contrary to the Pennsylvania Constitution, Election Code, and other statutes, and that impermissibly treats certain language in the Election Code as surplusage. Reversal is necessary to ensure that future elections in Philadelphia will be conducted fairly and lawfully.

VII. ARGUMENT FOR APPELLANTS

This is a statutory-interpretation case about the Pennsylvania Election Code, 25 P.S. § 2641, and whether under § 2641 the Philadelphia City Commissioners must be replaced with interim election officials when running for election or when a home rule charter amendment is on the ballot. The statute reads, in full:

(a) There shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act.

(b) In each county of the Commonwealth, the county board of elections shall consist of the county commissioners of such county ex officio, or any officials or board who are performing or may perform the duties of the county commissioners, who shall serve without additional compensation as such. Except in counties of the first class, in counties which have adopted home rule charters or optional plans the board of elections shall consist of the members of the county body which performs legislative functions unless the county charter or optional plan provides for the appointment of the board of elections. In either case, there shall be minority representation on the board. The county body which performs legislative functions shall in the case where the board does not contain minority representation appoint such representation from a list submitted by the county chairman of the minority party.

(c) Whenever a member of the board of county commissioners is a candidate for nomination or election to any public office, the President Judge of the Court of Common Pleas shall appoint a judge or an elector of the county to serve in his stead. Whenever there appears on the ballot a question relating to the adoption of a Home Rule Charter for the county or amendments to an existing county Home Rule Charter, the President Judge of the Court of Common Pleas shall appoint judges or electors of the county to serve in the stead of the county commissioners. Appointees who are not currently elected office holders shall receive compensation for such service as determined by the salary board plus mileage as specified by the county for expenses incurred when performing election board business.

The court below incorrectly concluded that the second sentence of § 2641(c)—requiring the interim replacement of “the county commissioners” whenever there appears on the ballot a question relating to amendments to an existing “county Home Rule Charter”—does not apply in Philadelphia. Its decision advanced two reasons for this reading: Philadelphia lacks “county commissioners,” and the Philadelphia Home Rule Charter is not a “county Home Rule Charter.” Both conclusions are incorrect, founded on errors of construction of the Election Code. This case can be resolved entirely by reversing these errors of statutory construction. Alternatively, even if it were necessary to look beyond the text, purpose, and history of the Election Code and to examine broader constitutional questions about the consolidation of the City and County of Philadelphia, the decision below is still erroneous and should be reversed.

Before turning to these arguments, it is worth noting why this case remains ripe and why this controversy still matters. Even though the May 16 primary has already taken place, this case continues to present a controversy ripe for adjudication. Pennsylvania appellate courts routinely consider election-law matters after the election in question has occurred, particularly when, as here, there was not time for full consideration of the issue by an appellate court prior to the election.³ *E.g., In re Stevenson*, 40 A.3d 1212, 1219 (Pa. 2012); *Nutter v. Dougherty*, 938

³ The Court of Common Pleas issued its decision at 1:39 p.m. on May 15, 2017—the day before the primary. (R. 4a.)

A.2d 401, 405 n.8 (Pa. 2007); *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1226 n.3 (Pa. 2004); *W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 515 A.2d 1331, 1333 (Pa. 1986).

Moreover, this situation will continue to recur, and correcting the misinterpretation of the Election Code will have a significant impact on election administration in Philadelphia. Under a proper application of § 2641(c), the City Commissioners will be disqualified from overseeing elections nearly three-quarters of the time, given the recent rate of ballot questions concerning Philadelphia Home Rule Charter amendments plus the need for the quadrennial appointment of interim replacements. Frequent attempts to amend the Philadelphia Home Rule Charter are a recent innovation: since 2002 there have been such ballot questions at more elections than not, but from 1965 to 2001 there appear to have been only four such ballot questions at some seventy-four elections held in Philadelphia. The last time the General Assembly amended § 2641 was in 1982, well before the acceleration in Philadelphia's use of the ballot question. Act of June 10, 1982, P.L. 458, No. 135, § 1.⁴ That the City Commissioners must be replaced in far more elections than not highlights the obsolescence of Philadelphia's current model of elected City

⁴ At the time, the General Assembly correctly considered home rule charter amendments to be "rare." See Pennsylvania House of Representatives Legislative Journal, 1982 Session, No. 19 (Mar. 3, 1982), at 527 (remarks of Rep. Kukovich) ("Currently the county commissioners sit as the election board except in rare circumstances: that is, once every 4 years whenever they are candidates, or in the circumstance where there is a home-rule charter for a county which is being voted on, or an amendment to a county home-rule charter.").

Commissioners. If the General Assembly feels that the increased frequency of Home Rule Charter ballot questions in Philadelphia warrants amendment of § 2641 so that the City Commissioners could oversee some or all elections that feature such ballot questions, it could easily amend the Election Code. Indeed, a pending bill would do just that.⁵ But absent passage of such an amendment, it is not the role of the judiciary to disregard the letter of the statute “under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b); *see also, e.g., Commonwealth v. Donahue*, 98 A.3d 1223, 1240 (Pa. 2014) (“We leave the task of rectifying perceived deficiencies in the statutory scheme . . . to the legislature.”).

A. Section 301(c) of the Election Code Applies in Philadelphia

Until the issuance of the decision below, there had never been any dispute that references in § 2641(c) to “county commissioners” include the Philadelphia City Commissioners. For many years, when the City Commissioners have run for reelection (every four years), they have voluntarily ceased any involvement in the day-to-day operations of Philadelphia’s election administration, and interim appointees have taken their places. (R. 20a.) Indeed, when the City Commissioners were most recently up for reelection in 2015, President Judge Woods-Skipper herself issued three orders that each stated:

⁵ S.B. 708, Printer’s No. 837, 201st Gen. Assemb., Reg. Sess. (Pa. 2017) (proposing to add “Except in counties of the first class” to the beginning of the second sentence of 25 P.S. § 2641(c)).

[P]ursuant to 25 P.S. § 2641(c) which provides in pertinent part that, “Whenever a member of the board of county commissioners is a candidate for nomination or election to any public office, the President Judge of the Court of Common Pleas shall appoint a judge or an elector of the county to serve in his stead,” it is hereby ORDERED and DECREED that the following judge of the County is appointed to serve in place of Commissioner [Name]:

Exhibit B at 1-3. Previous President Judges entered similar orders in 2011 and 2007, all specifically citing § 2641(c). Exhibit B at 4-6. The City Commissioners themselves have consistently acknowledged that they are “county commissioners” within the meaning of § 2641(c). (*See* R. 98a n.6 (City Commissioners’ brief acknowledging that “[f]or the purposes of the Election Code, a reference to ‘county commissioners’ includes in its meaning the City Commissioners” and that “when the City Commissioners are up for election, they must be replaced pursuant to the first portion of Section 2641(c)”)).)

But the Court of Common Pleas has abruptly reversed course, announcing in a footnote that “Philadelphia does not have ‘county commissioners,’” Opinion at 7 n.2, and thus that § 2641(c) does not apply in Philadelphia. This is an incorrect holding that seriously threatens to alter election administration in Philadelphia whenever City Commissioners run for reelection or for higher office.

This is not just a matter of tradition. As the City Commissioners have noted (R. 98a n.6), the Pennsylvania Constitution specifically categorizes them as county commissioners. Pa. Const. Schedule 1, § 33 (“The words ‘county commissioners,’

wherever used in this Constitution and in any ordinance accompanying the same, shall be held to include the commissioners for the city of Philadelphia.”). Likewise, 16 P.S. § 9201 provides that “[i]n all cases where a city containing over three hundred thousand inhabitants is co-extensive in boundaries with the county, all of the officers known therein as city treasurer, city controller, city commissioners, shall severally be regarded as county officers” Philadelphia is of course Pennsylvania’s only city with over three hundred thousand inhabitants and co-extensive boundaries with the county.

The opinion below erroneously relied on a former version of § 2641(c) that was in effect from 1976 to 1979 in reaching its conclusion that § 2641(c) applies only to “county commissioners who are the legislative body of the county.” Opinion at 7. This distinction did not appear in the 1976 statute, and it is missing from the current statute as well. The 1976 version stated that “Whenever the members of the board of county commissioners are candidates for nomination or election to any public office . . . the county commissioners shall not sit as the county board of elections.” In Philadelphia, the City Commissioners not only serve as the “county commissioners,” as discussed above, but also constitute the “county board of elections,” *see* 25 P.S. § 2641(a) (“There shall be a county board of elections in and for each county of this Commonwealth”); Phila. Code § 2-112(4) (“All the powers, duties and functions of the City Commissioners in their

capacity as the County Board of Elections relating to the conduct of primaries and elections shall continue to be exercised by the City Commissioners.”). Therefore, in 1976 this provision unambiguously applied in Philadelphia, as does the provision now in effect.⁶

After holding that the City Commissioners are not county commissioners, the decision below states, without citing any statute or other authority:

“Nonetheless, we do appoint judges to act in place of Philadelphia’s county board of election whenever a City Commissioner is a candidate for reelection to that position in order to avoid a conflict of interest.” Opinion at 7 n.2. But the Court of Common Pleas does not have free-ranging, *sua sponte* power to suspend elected officials from carrying out all the duties of their offices and to select replacement officials whenever it perceives a conflict of interest.⁷ The only source of authority

⁶ The decision below, Opinion at 5, also makes reference to the Act of May 2, 1929, P.L. 1729, No. 449. But by its own terms, the 1929 Act “does not apply to counties of the first class,” *id.* § 2, and “does not include any provisions, and shall not be construed to repeal any acts relating to . . . Conduct of elections,” *id.* § 2(d). The fact that the 1929 Act contains provisions pertaining to county commissioners in counties of the second through eighth classes, Opinion at 5, does not somehow demonstrate that counties of the first class lack county commissioners. The 1929 Act is simply silent as to first-class counties.

⁷ A narrow conflict-of-interest principle exists at common law, under which a member of a local legislative body “is disqualified from voting in any matter or proceeding where he or she has a *direct personal or pecuniary interest.*” *McAdoo Borough v. Commonwealth*, 485 A.2d 761, 766 (Pa. 1984). A court can remedy a violation of this principle by voiding a specific enactment or appointment when a disqualified member has cast a deciding vote. *See Consumers Educ. & Protective Ass’n v. Schwartz*, 432 A.2d 173, 176-78 (Pa. 1981) (collecting cases). And when given specific statutory authorization, courts may fill vacancies by appointing replacement officials. *E.g.*, 16 P.S. § 1424 (“Court May Appoint a District Attorney for the Time Being”). But in the absence of any statutory authorization, a court cannot disqualify elected officials from

for the court below to appoint interim election officials is § 2641(c); without such authority, Philadelphia’s City Commissioners must be permitted to carry out their duties even when running for reelection, including counting and certifying the results of their own election. Particularly given the long, well-documented history of malfeasance in the administration of elections in Philadelphia (*see* R. 9a & n.1, R. 30a-31a & n.4), it would be absurd to interpret § 2641(c) as making Philadelphia the only place in the Commonwealth where elected officials oversee elections in which they are themselves candidates. *See generally* 1 Pa.C.S. § 1922(1) (Statutory Construction Act presumption “[t]hat the General Assembly does not intend a result that is absurd”).

For these reasons, the Court should correct the error below and affirm the many previous orders of the Court of Common Pleas, Exhibit B, that the City Commissioners are “county commissioners” subject to § 2641(c).

B. As Used in the Election Code, the Term “County Home Rule Charter” Includes the Philadelphia Home Rule Charter

The second sentence of 25 P.S. § 2641(c) states: “Whenever there appears on the ballot a question relating to the adoption of a Home Rule Charter for the county or amendments to an existing county Home Rule Charter, the President

carrying out the full spectrum of their duties, let alone appoint judges or anyone else to serve as interim replacements for elected officials in the executive or legislative branches. To hold otherwise would dangerously erode the separation of powers among the three branches of government.

Judge of the Court of Common Pleas shall appoint judges or electors of the county to serve in the stead of the county commissioners.” But since at least 2002, the City Commissioners and their predecessors have continued to carry out the functions of their office during many elections when questions relating to the adoption of amendments to the Philadelphia Home Rule Charter have appeared on the ballot.⁸ This includes the May 16, 2017 election, when two proposed amendments to the Philadelphia Home Rule Charter were on the ballot. (*See* R. 55a-64a.)

The decision below concluded that the second sentence of § 2641(c) does not apply in Philadelphia for two reasons. First, it concluded that Philadelphia lacks “county commissioners,” which is incorrect as discussed above. Second, it held that the Philadelphia Home Rule Charter is not a “county Home Rule Charter.” This holding cannot be squared with § 2641(b).

Section 2641(b) includes this sentence:

Except in counties of the first class, in counties which have adopted home rule charters or optional plans the board of elections shall consist of the members of the county body which performs legislative functions unless the county charter or optional plan provides for the appointment of the board of elections.

This sentence unmistakably treats the Philadelphia Home Rule Charter as a charter adopted by a county. Philadelphia is Pennsylvania’s only county of the first class.

⁸ On occasion, Philadelphia Home Rule Charter questions have appeared on the ballot when the City Commissioners were running for reelection and thus were temporarily replaced under the first sentence of § 2641(c). They last ran in 2015 and will not appear on the ballot for reelection until 2019.

See, e.g., 16 P.S. § 210(1); *Bd. of Revision of Taxes v. City of Phila.*, 4 A.3d 610, 624 (Pa. 2010). Section 2641(b) is just one of many examples of the General Assembly’s singling out Philadelphia in a statute by referencing “counties of the first class.”⁹

The core error of the decision below was ignoring core principles of statutory construction by treating as surplusage the first seven words of that sentence from § 2641(b). According to the Court of Common Pleas, those seven words are a “prefatory clause” devoid of meaning, and the second sentence of § 2641(b) does not apply to Philadelphia because it is not a “county” which has adopted a home rule charter or optional plan. *See* Opinion at 7. Under that interpretation, the second sentence of § 2641(b) would mean the same thing

⁹ *E.g.*, 3 P.S. § 459-1002 (“Any county except counties of the first class, two or more counties which form a joint dog control agency or any humane society or association for the prevention of cruelty to animals”); 3 P.S. § 914.1(h) (“By March 1 of each year, the State board shall make an annual allocation among counties, except counties of the first class, for the purchase of agricultural conservation easements.”); 10 P.S. § 308 (“If the district attorney finds probable cause to believe that a violation [of the Bingo Law] has occurred, he may file a complaint against the alleged violator in the court of common pleas in the court of said county, except in counties of the first class where the complaint may be filed in the municipal court.”); 16 P.S. § 12005(a) (“In all counties, except counties of the first class, single-county departments of health or joint-county departments of health may be authorized by resolution or by referendum, or by a combination of these methods, as provided in this section.”).

In their brief to the court below, the City Commissioners suggested that “statutory provisions relating to counties of the first class may apply to counties other than Philadelphia should another counties’ [sic] population increase beyond 1,500,000.” (R. 105a.) That possibility is a legal fiction. Pennsylvania’s second-largest county is Allegheny County, which has 1.22 million people and has shrunk in every Census since 1960; the third-largest county is Montgomery County, with approximately 800,000 people. In fact, the legislature has at times adjusted the population cutoff for first-class counties to accommodate fluctuations in the populations of Philadelphia and Allegheny Counties, to ensure that Philadelphia is at all times the only county of the first class. *E.g.*, Act of Feb. 5, 1982, P.L. 7, No. 3, § 1.

regardless of whether or not the first seven words were present. This error requires reversal. *See, e.g.*, 1 Pa.C.S. § 1921(a) (“Every statute shall be construed, if possible, to give effect to all its provisions.”); *Thomas Jefferson Univ. Hosps., Inc. v. Pa. Dep’t of Labor & Indus.*, No. 30 EAP 2016, ___ A.3d ___, 2017 Pa. LEXIS 1381, at *21 (Pa. June 20, 2017) (noting that courts interpret statutes so as to give each word “some meaning such that it is not mere surplusage”); *Commonwealth v. Driscoll*, 401 A.2d 312, 315 (Pa. 1979) (“We must assume that the legislature intends every word of the statute to have effect.”).

A more straightforward reading of that sentence from § 2641(b) gives meaning to every word. Under this reading, some counties have adopted home rule charters without creating an appointed board of elections; in these counties, the county commissioners serve as the board of elections.¹⁰ Some other counties have adopted home rule charters that provide for the appointment of the board of elections; in these counties, the county commissioners do not dually serve as the

¹⁰ *E.g.*, Lackawanna County Home Rule Charter § 1.3-302(h), *available at* <http://www.lackawannacounty.org/uploads/2013-01-21%20-%20HOME%20RULE%20CHARTER.pdf> (“All legislative powers which may be exercised by the County . . . shall be vested in the Board of Commissioners The Board of Commissioners shall have . . . the following powers: to serve as an elections board and board of return except when eligible for re-election. In such an instance the Court of Common Pleas will assume jurisdiction and may delegate its function in a manner consistent with law.”); *see also Pilchesky v. Lackawanna Cnty.*, 88 A.3d 954, 957 (Pa. 2014) (“In light of the fact that the ballot question related to proposed amendments to the [Lackawanna County Home Rule] Charter, on February 7, 2013, President Judge Thomas J. Munley of the Lackawanna County Court of Common Pleas appointed himself along with two other judges of the same court, Judges Terrence R. Nealon and Vito P. Geroulo, to serve as the Lackawanna County Board of Elections.”).

board of elections.¹¹ Philadelphia County has also adopted a home rule charter (as the Election Code uses the term), but in Philadelphia “the members of the county body which performs legislative functions”—i.e., City Council—do not serve as the board of elections, nor does the county charter “provide[] for the appointment of the board of elections”; instead, the voters of Philadelphia *elect* the board of elections.¹² Without the first seven words of § 2641(b), this arrangement would not be possible in Philadelphia, because as a “count[y] which ha[s] adopted [a] home rule charter[],” Philadelphia’s only choices would be (1) to have City Council serve as the county board of elections or (2) to have an appointed county board of elections. But thanks to those seven words, Philadelphia is uniquely empowered to exercise a third option: (3) to have a standalone, elected county board of elections.

Since the Election Code refers to the Philadelphia Home Rule Charter as a “home rule charter” adopted by a “count[y]” in § 2641(b), then the Philadelphia Home Rule Charter must also be a “county Home Rule Charter” under § 2641(c).

¹¹ *E.g.*, Delaware County Home Rule Charter § 421, available at <http://ecode360.com/13342064> (“Council shall establish a Board of Elections. The Board shall be responsible for the registration of electors and the conduct of elections as required by law. The Board shall consist of two appointees representing the party with the largest total vote cast for a seat on Council in the most recent municipal election and one appointee representing the party with the second ranking total vote cast in the most recent municipal election. The term of office for the Board of Elections shall be two years.”).

¹² Phila. Code § 2-112(1) (“There shall continue to be three City Commissioners who shall continue to be elected as now provided by law, of whom not more than two shall be members of the same political party or body.”); *id.* § 2-112(4) (“All the powers, duties and functions of the City Commissioners in their capacity as the County Board of Elections relating to the conduct of primaries and elections shall continue to be exercised by the City Commissioners.”).

See Housing Auth. v. Pa. State Civ. Serv. Comm'n, 730 A.2d 935, 946 (Pa. 1999) (“When the meaning of a word or phrase is clear when used in one section, it will be construed to mean the same thing in another section of the same statute.”). Another principle of statutory construction reinforces this conclusion: Having *expressly* singled out Philadelphia in subsection (b) with the words “Except in counties of the first class,” § 2641 cannot be read as *implicitly* singling out Philadelphia in subsection (c), which lacks those seven words. *See generally In re Vencil*, 152 A.3d 235, 244 (Pa. 2017) (“[W]here the legislature includes specific language in one section of the statute and excludes it from another, the language should not be implied where excluded. . . . [W]here a section of a statute contains a given provision, the omission of such a provision from a similar section is significant to show a different legislative intent.” (alterations in original)).

When a statute is unambiguous, courts “need not consider the legislative history or policy arguments.” *Thomas Jefferson Univ. Hosps., Inc.*, ___ A.3d at ___, 2017 Pa. LEXIS 1381, at *22 n.5; *see also* 1 Pa.C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”). But even if it were appropriate here to resort to such considerations, the Court should reject the interpretations of the decision below.

The Court of Common Pleas correctly noted that “there is no legislative history to explain the reasons for the addition of” the second sentence of § 2641(b), Opinion at 6, but it offered a policy argument in support of its conclusion: that in counties where the county commissioners also serve as the election board, a conflict is present “whenever there appear[s] on the ballot a question adopting or amending a county charter which they, as the legislative body, had adopted,” but that in Philadelphia, the City Commissioners never have a conflict of interest in presiding over an election with a ballot question, because City Council, not the City Commissioners, places questions on the ballot in Philadelphia. *See* Opinion at 9. No such distinction can be found in the text or history of § 2641.

Besides, Home Rule Charter questions in Philadelphia often present stark conflicts of interest for the City Commissioners. This includes one of the questions that was on the May 16, 2017 ballot, about whether to modify procurement practices across Philadelphia’s departments and agencies, including the City Commissioners. (R. 55a-58a.) Notably, the City Commissioners will play a key role in the procurement process for voting machines to replace Philadelphia’s current electronic voting machines. *See Banfield v. Cortés*, 110 A.3d 155, 160 (Pa. 2015) (“A county board of elections may choose among the certified electronic

voting systems and independently procure such system for use in its districts.”
(citing 25 P.S. § 3031.4).¹³

A May 2014 ballot question presented an even more glaring conflict of interest for the City Commissioners. The proposed amendment would have eliminated from the Philadelphia Home Rule Charter the “resign to run” rule for elected officeholders, including City Commissioners. (R. 66a-69a.) The current rule states: “[n]o officer or employee of the City, except elected officers running for re-election, shall be a candidate for nomination or election to any public office unless he shall have first resigned from his then office or employment.” Phila. Home Rule Charter § 10-107(5). Had Philadelphia’s voters approved the proposed amendment, elected officeholders would have been allowed to run without resigning. This would have permitted, for instance, a City Commissioner to run for state senator without first resigning as City Commissioner.¹⁴

¹³ Cf. Bob Warner, *Firm Awarded Voting Machine Contract Hires Election Official’s Kin*, Phila. Daily News, May 8, 2002, at 10 (“The Illinois company awarded a \$19-million city contract for new voting machines has given a temporary, six-week job to the daughter of the city’s top election official[:] Mary Rossi, the youngest of City Commissioner Marge Tartaglione’s five daughters Until Rossi was hired, Danaher [the voting machine company] was looking to former city commissioner Maurice Floyd to lead its battalion of election-day trouble-shooters. Floyd, a city commissioner from 1988 through 1991, said he was employed by Danaher for more than a year. He declined to disclose his pay.”).

¹⁴ A pending proposal for a charter change further illustrates the significance of § 2641(c)’s disqualification of the City Commissioners whenever such a question is on the ballot. A proposal recently introduced in Philadelphia City Council would amend the charter to create a fund for the public financing of campaigns in Philadelphia, including for the City Commissioners themselves. Unless this Court reverses the decision below, the City Commissioners will oversee an election that will determine whether their own reelection campaigns will be subject to public financing,

The conflicts of interest that ballot questions present in Philadelphia are often at least as stark as those in other counties. On numerous occasions, county home rule charter amendments outside of Philadelphia have posed only the mildest of conflicts of interest for the county commissioners. A 2000 ballot question in Lehigh County, for example, asked whether to “amend[] Section 204(a) of the Lehigh County Home Rule Charter so as to make the elected position of Coroner a full time position.” Lehigh County Ordinance No. 1999-169, *available at* [http://www.boarddocs.com/pa/lehc/Board.nsf/files/AHW5BF82251C/\\$file/1999-169-ORD.pdf](http://www.boarddocs.com/pa/lehc/Board.nsf/files/AHW5BF82251C/$file/1999-169-ORD.pdf). It would be anomalous to identify no conflict of interest for the Philadelphia City Commissioners to oversee an election affecting their ability to run for other positions without resigning, while finding a disqualifying conflict of interest in the Lehigh coroner matter.

At bottom, the policy rationale identified by the decision below would mean that Philadelphia voters would enjoy fewer safeguards against election overseers’ conflicts of interest than would voters of other counties. To say the least, this is an

should Council approve the ballot question. *See* Council of the City of Philadelphia, Proposed Resolution No. 170696 (introduced June 22, 2017), *available at* <https://phila.legistar.com/LegislationDetail.aspx?ID=3088296&GUID=66342073-56E2-41C8-8986-1505510FC8D0&Options=ID%7CText%7C&Search=170696&FullText=1>.

Several recent ballot questions proposing amendments to the Philadelphia Home Rule Charter also posed conflicts of interest for the City Commissioners, because the amendments would have affected all City departments, including the Office of the City Commissioners. These proposed amendments included Board of Ethics (2006) and Increasing the Number of Deputies Exempt from Civil Service in City Departments, Civil Service Preference for Bona Fide Residents of Philadelphia (2008).

unlikely account of the General Assembly's intent, especially in light of repeated scandals involving past City Commissioners.¹⁵ Indeed, when the General Assembly added § 2641(c) to the Election Code in 1976, federal courts had recently found that two longtime Philadelphia City Commissioners had participated in illegal kickback schemes concerning bids for printing ballots and purchasing voting machines. *See United States v. Osser*, 483 F.2d 727 (3d Cir. 1973) (affirming 1972 convictions of Commissioner Maurice Osser); *Estate of McHenry v. Commissioner*, 33 T.C.M. (CCH) 1409 (T.C. Dec. 11, 1974) (United States Tax Court finding that Commissioner Thomas McHenry had received kickback payments from a voting machines company totaling over \$100,000). Any analysis of the legislative history or policy arguments around § 2641 must face up to Philadelphia's uniquely protracted and notorious history of serious improprieties in election administration.

¹⁵ *See, e.g., Marks v. Stinson*, No. 93-cv-6157, 1994 U.S. Dist. LEXIS 5273, at *11 (E.D. Pa. Apr. 26, 1994) ("The [Philadelphia City Commissioners are] under a statutory duty to strictly enforce the Election Code to avoid any partiality in the conduct of elections."), *aff'd without opinion*, 37 F.3d 1487 (3d Cir. 1994); *id.* at *55 ("In sum, the [Philadelphia City] Commissioners' Office generally has not followed the Election Code. Specifically with reference to the 1993 Special Election, Commissioners Talmadge and Tartaglione and other members of the Commissioners' Office specifically aided and favored the Democrat candidate. As discussed in the court's prior findings, Commissioners Talmadge and Tartaglione could have prevented much of the illegal activity that occurred even if the Stinson campaign had acted illegally. If the Commissioners would have observed and enforced the Election Code, the Stinson Campaign could not have illegally altered the outcome of the election. Not only did the Commission not correct the known illegal activities, the Commission also facilitated the scheme and then attempted to conceal the conspiracy.").

The Court should therefore reverse the decision of the Court of Common Pleas as to the second sentence of 25 P.S. § 2641(c).

C. Even if the Words Are Read Outside the Context of the Election Code, the Philadelphia Home Rule Charter is Still a “County Home Rule Charter”

The Election Code’s term “county Home Rule Charter” is not free-floating and lacking in context: it is situated within a statute and should be interpreted consistently with the remainder of that statute. As such, this case can be resolved purely as a matter of statutory interpretation, and the full text of 25 P.S. § 2641 shows that the statute conclusively embraces Philadelphia in its use of the term “county Home Rule Charter,” regardless of what that term might mean in different contexts. Thus there is no need to dive into the metaphysics of the constitutional consolidation of the City of Philadelphia and the County of Philadelphia. *See generally Housing Auth. v. Pa. State Civ. Serv. Comm’n*, 730 A.2d 935, 948 (Pa. 1999) (courts “strive to interpret statutes in a manner which avoids constitutional questions”).

Nonetheless, the Court of Common Pleas focused primarily on what the term “county Home Rule Charter” might mean *in the abstract*, as opposed to what the legislature meant by that term within the context of § 2641. *See* Opinion at 3-4. This is the wrong place to look. *See O’Rourke v. Dep’t of Corr.*, 778 A.2d 1194, 1201 (Pa. 2001) (instructing that courts “should not interpret statutory words in

isolation, but must read them with reference to the context in which they appear”); *see also Commonwealth v. Fant*, 146 A.3d 1254, 1260 (Pa. 2016) (“We must read a section of a statute in conjunction with other sections, construing them always with reference to the entire statute. By the same token, we cannot arrive at the meaning of a word, even the ‘ordinary’ meaning, without considering the surrounding words and provisions.” (citation omitted)); *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality opinion) (“In law as in life, however, the same words, placed in different contexts, sometimes mean different things.”), *cited with approval by A.S. v. Pa. State Police*, 143 A.3d 896, 906 (Pa. 2016).

Even if it were appropriate to consider the term in the abstract, it would still be clear that the Philadelphia Home Rule Charter is a “county Home Rule Charter.” A timeline helps illustrate the history of City-County consolidation:

- a. 1949: The General Assembly enacted the First Class City Home Rule Act, 53 P.S. §§ 13101-13157. This Act provided that “Any city of the first class may frame and adopt a charter for its own government and may amend its charter whether the same has been originally adopted under the provisions of this act or provided by local, special or general law.” *Id.* § 13101. The City of Philadelphia was and is the only city of the first class. *See* 53 P.S. § 101.
- b. April 17, 1951: “Philadelphia adopted its home rule charter under the terms of the First Class City Home Rule Act on April 17, 1951; it went into effect on January 7, 1952.” *City of Phila. v. Schweiker*, 858 A.2d 75, 81 n.9 (Pa. 2004). At the time of the adoption of the Philadelphia Home Rule Charter, the City of Philadelphia and the County of Philadelphia were separate entities within the same geographic area. *E.g.*, *Cornman v. City of Phila.*, 111 A.2d 121, 123 (Pa. 1955).

- c. November 6, 1951: A state constitutional amendment abolished all Philadelphia county offices and provided that “the city shall henceforth perform all functions of county government within its area.” *See generally Lennox v. Clark*, 93 A.2d 834, 838-39 (Pa. 1953). These provisions are repeated verbatim in the current state constitution. Pa. Const. Art. IX, § 13 (1968).
- d. 1953 and 1963: The General Assembly amended the 1949 Home Rule Act to “complet[e] consolidation of City and County government.” *Bd. of Revision of Taxes v. City of Phila.*, 4 A.3d 610, 623 (Pa. 2010). These amendments gave “Philadelphia City Council . . . unqualified authority over the local offices of Sheriff, City Commissioner, and Registration Commission, including the power to abolish them.” *Id.* (citing 53 P.S. § 13132(c)).
- e. 1976: Twenty-five years after the city-county consolidation, the General Assembly added subsection (c) to 25 P.S. § 2641. Act of Dec. 2, 1976, P.L. 1221, No. 269, § 1.

The effect of the consolidation of Philadelphia City and Philadelphia County was to empower the unified government of Philadelphia—uniquely within Pennsylvania—to function as both a city and a county, beginning on November 6, 1951. *See generally* Pa. Const. Art. IX, § 13(a) (“In Philadelphia all county offices are hereby abolished, and the city shall henceforth perform all functions of county government within its area through officers selected in such manner as may be provided by law.”). Consolidation having long ago reached completion, the City of Philadelphia and the County of Philadelphia are now a hair that cannot be split.

As affirmed by the 1953 and 1963 amendments to the Home Rule Act, the Philadelphia Home Rule Charter serves as the organic law of both the City and the County. Thus, by the time § 2641(c) was added to the Election Code in December

1976, Philadelphia had long been operating as a fully consolidated city-county, and the provision applies to Philadelphia just as it applies to other counties with home rule charters. Because the Philadelphia Home Rule Charter operates as the home rule charter for the County of Philadelphia, the second sentence of 25 P.S. § 2641(c) fully applies whenever there is a ballot question related to the adoption of an amendment to the Philadelphia Home Rule Charter.

The decision below made note of the fact that the Philadelphia Home Rule Charter was not adopted pursuant to the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. §§ 2901 *et seq.* Opinion at 3. But that law “applies to all municipalities except cities of the first class and counties of the first class,” *id.* § 2901(b). Just as is the case with the Act of May 2, 1929, *see supra* note 6, this statute expressly has nothing to do with Philadelphia and thus has no relevance to whether the Philadelphia Home Rule Charter is, in the abstract, a county home rule charter. So even if it were necessary to consider whether, in the abstract, the Philadelphia Home Rule Charter is a “county Home Rule Charter,” the Court should reverse the decision below.

VIII. CONCLUSION

For the foregoing reasons, the decision of the Court of Common Pleas should be reversed, and this Court should direct the Court of Common Pleas to enter a declaratory judgment that the Philadelphia City Commissioners are statutorily ineligible to carry out the functions of their offices whenever there appears on the ballot a question relating to amendments to the Philadelphia Home Rule Charter.

Respectfully submitted,

/s/ Benjamin D. Geffen _____

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Strauss, Brian Krisch, & Katherine Rivera*

Dated: July 7, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Appellants complies with the length requirements of Pa.R.A.P. 2135. According to the word count of the word processing system used to prepare this brief, the brief contains 8,262 words, not including the supplementary matter as described in Pa.R.A.P. 2135(b).

/s/ Benjamin D. Geffen
Benjamin D. Geffen

Dated: July 7, 2017

Exhibit A

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**

Committee of Seventy, Philadelphia 3.0, Jordan Strauss,
Brian Krisch, and Katherine Rivera
Petitioners,

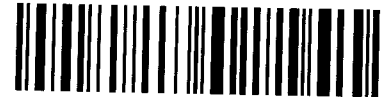
vs.

Anthony Clark, in his official capacity as City
Commissioner, Al Schmidt, in his official capacity as
City Commissioner, and Lisa M. Deeley, in her official
Capacity as City Commissioner
Respondents,

April Term, 2017

No. 3418

Committee Of Seventy Et-ORDRF



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Control No. 00-17047000

MEMORANDUM OPINION AND ORDER

The Petitioners, the Committee of Seventy, a self-described “independent elective watchdog in Philadelphia,” Petition at ¶5, Philadelphia 3.0, a self-described “leading advocate for election reform in Philadelphia,” *Id.* (“Organizational Petitioners), and the three named candidates who are running for local posts as Judge of Elections and Inspector of Elections, filed the underlying action on April 24, 2017, styled as a “Petition Action for Declaratory Judgment – Election Matter,” against the three named City Commissioners who comprise the Election Board in Philadelphia County (“Respondents”).

The Petitioners seek a declaration that the Respondents are statutorily ineligible to carry out the functions of their office as Philadelphia City Commissioners whenever there appears on the ballot a question relating to amendments to the Philadelphia Home Rule Charter. Because there are two ballot questions in the upcoming Primary Election on May 16, 2017, Petitioners request resolution of this matter on an expedited basis, before the May 16, 2017 Primary

Election.¹

The instant action represents the Organizational Petitioners third attempt to secure the replacement of the City Commissioners for the May 16, 2017 Primary Election.

By letter dated January 18, 2017, the Organizational Petitioners requested that the undersigned, as President Judge of the Court of Common Pleas, appoint judges or electors, pursuant to subsection 301 of the Election Code, 25 P.S. § 2641 (c), to “serve in the stead of the county commissioners” in overseeing the 2017 Primary Election. Neither the letter nor the hand-delivered envelope bore a street address, a return address, or an email address of either of the two signatories and, because the request was *ex parte*, no action could be taken thereon. *See Petition, Exhibit 1A and Exhibit 1B.*

On March 27, 2017 the Organizational Petitioners filed with the Supreme Court of Pennsylvania a *Petition for Review in the Nature of Mandamus* requesting the Supreme Court to compel the undersigned to appoint judges or electors, pursuant to subsection 2641 (c), to “serve in the stead of the county commissioners” in overseeing the 2017 Primary Election. The City Commissioners were granted leave to intervene and filed preliminary objections. By order dated April 19, 2017, the Supreme Court denied Petitioners’ *Petition for Review in the Nature of Mandamus* and dismissed the City Commissioners’ preliminary objections. *See Petition, Exhibit B.*

¹ The Organizational Petitioners noted in their Petition its interest in enforcing the Election Code as follows:

The two organizational Petitioners have an additional interest in enforcing this provision of the Election Code. If the City Commissioners are declared ineligible under the Election Code, it will render them unable to do their job and oversee elections nearly three-quarters of the time, given the recent frequency of ballot questions concerning Home Rule Charter amendments plus the undisputed need for the quadrennial appointment of interim replacements. The fact that the City Commissioners must be replaced in far more elections than not highlights the obsolescence of Philadelphia’s current model of elected City Commissioners, and it supports the organizational Petitioners’ efforts to replace that body with appointed and experienced professionals to oversee, administer, and modernize Philadelphia’s elections.

Petition, at ¶6.

Petitioners now request that the Court review Section 301 of the Election Code, 25 P.S. § 2641 and, pursuant to the Declaratory Judgment Act, 42 Pa. C.S. §§ 7531 *et seq.*, declare that the Philadelphia City Commissioners are disqualified from overseeing an election that includes a ballot question relating to amending the Philadelphia Home Rule Charter, and more specifically, from overseeing the May 16, 2017 Primary Election which includes a ballot question regarding an amendment to the Philadelphia Home Rule Charter. The City Commissioners filed preliminary objections to the Petition for Declaratory Judgment raising lack of jurisdiction for Petitioners' failure to add all interested parties, namely all of the candidate on the May 16, 2017 Primary ballot, and for "failure to state a claim (demurrer)."

The parties argued at length in their briefs and during the May 12, 2017 hearing whether or not Philadelphia's Home Rule Charter is a "County Home Rule Charter." If it is, some of the sections of the election code at issue may apply; if it is not, these sections do not apply. The Court notes that Philadelphia's Home Rule Charter was enacted in 1951 pursuant to the First Class City Home Rule Act, Act of April 21, 1949, P.L. 665, No. 155, 53 P.S. § 13101 *et seq.*, which provides, in part: "Any city of the first class may frame and adopt a charter for its own government and may amend its charter whether the same has been originally adopted under the provisions of this act or provided by local, special or general law." The First Class City Home Rule Act has not been repealed, and in fact was last amended in 2004, and remains in full force and effect. *See* Act of November 30, 2004, P.L. 1523, No. 193. Similarly, Philadelphia's Home Rule Charter, which was adopted in 1951 and became effective in 1952, remains in full force and effect pursuant to the First Class City Home Rule Act. The Court further notes that county home rule charters are adopted pursuant to the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. § 2901 *et seq.*, which "... applies to all municipalities except cities of the first class and counties of the first class." Philadelphia is both a city of the first class as well as a county of the first class.

Clearly, then, the Philadelphia's Home Rule Charter is not a county home rule charter and references in 25 P.S. § 2641 to "county charter" or "Home Rule Charter" do not apply to Philadelphia.

We next turn to the statutory language of the Election Code section at issue, which currently provides as follows:

§ 2641. County boards of elections; membership

(a) There shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act.

(b) In each county of the Commonwealth, the county board of elections shall consist of the county commissioners of such county *ex officio*, or any officials or board who are performing or may perform the duties of the county commissioners, who shall serve without additional compensation as such. Except in counties of the first class, in counties which have adopted home rule charters or optional plans the board of elections shall consist of the members of the county body which performs legislative functions unless the county charter or optional plan provides for the appointment of the board of elections. In either case, there shall be minority representation on the board. The county body which performs legislative functions shall in the case where the board does not contain minority representation appoint such representation from a list submitted by the county chairman of the minority party.

(c) Whenever a member of the board of county commissioners is a candidate for nomination or election to any public office, the President Judge of the Court of Common Pleas shall appoint a judge or an elector of the county to serve in his stead. Whenever there appears on the ballot a question relating to the adoption of a Home Rule Charter for the county or amendments to an existing county Home Rule Charter, the President Judge of the Court of Common Pleas shall appoint judges or electors of the county to serve in the stead of the county commissioners. Appointees who are not currently elected office holders shall receive compensation for such service as determined by the salary board plus mileage as specified by the county for expenses incurred when performing election board business.

However, not all of the provisions of the above section were adopted at the same time and we must therefore review them in context. As we do, we must be mindful to apply the provisions of the Statutory Construction Act of 1972 ("SCA"). Under the SCA, it is fundamental that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly[,] and that [e]very statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S. § 1921(a). In this regard, the SCA instructs that "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be

disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b). Pennsylvania Gaming Control Bd. v. City Council of Philadelphia, 593 Pa. 241, 254–55, 928 A.2d 1255, 1263 (2007). When the words of a statute are not explicit, the General Assembly’s intent may be ascertained by considering the contemporaneous legislative history, the former law, the mischief to be remedied, and the circumstances under which it was enacted. 1 Pa.C.S. § 1921 (c). Finally, under the SCA, a court may presume that the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable; does not intend to violate the Constitution of the United States or that of Pennsylvania; and intends the entire statute to be certain and effective. 1 Pa.C.S. § 1922(1)-(3).

Subsection 2641 (a) was initially adopted in 1937 and has not been amended since even though other sections of Section 2641 have been amended. *See* Act of June 3, 1937, P.L. 1333, Art. 3, §301. This subsection clearly provides that each county in the Commonwealth shall have a county board of elections which shall have jurisdiction over the conduct of the primaries and elections.

The first sentence of Subsection 2641 (b) was also adopted in 1937 and clearly provides that the county board of elections shall consist of the county commissioners or any official or board that performs the duties of the county commissioners (i.e., the legislative body of the county). It should be noted that the “county commissioner” as early as 1929 only applied to counties of the second through eighth classes. *See* Act of May 2, 1929, P.L. 1279. In fact, Act 447 of 1929 specifically provides that it does not apply to counties of the first class. *Id.*, at Section 2. The duties and powers of the County Commissioners include the power “to adopt resolutions and ordinances prescribing the manner in which powers of the county shall be carried out and generally regulating the affairs of the county.” *See* Act of May 2, 1937, P.L. 2129, No. 435, §1; 16 P.S. § 509.

This provision of Section 2641 (b) also has not been amended. However, the second sentence of Subsection 2641 (b) was adopted in 1978. *See* Act of June 1, 1978, P.L. 458, No. 135, and has not been amended. That provision provides as follows:

Except in counties of the first class, in counties which have adopted home rule charters or optional plans the board of elections shall consist of the members of the county body which performs legislative functions unless the county charter or optional plan provides for the appointment of the board of elections. In either case, there shall be minority representation on the board. The county body which performs legislative functions shall in the case where the board does not contain minority representation appoint such representation from a list submitted by the county chairman of the minority party.

Although there is no legislative history to explain the reasons for the addition of the quoted language, no such explanation is necessary. The General Assembly was well aware in 1976 and 1978 that Philadelphia, a county of the first class as well as a city of the first class, had adopted a City Ordinance in 1965 establishing its election board, as authorized by the Pennsylvania Constitution, Philadelphia's Home Rule Charter, and the consolidation of the City and County. The 1965 City Ordinance provides as follows:

§ 2-112. City Commissioners.

(1) *Composition.* There shall continue to be three City Commissioners who shall continue to be elected as now provided by law, of whom not more than two shall be members of the same political party or body. The City Commissioners shall take office on the first Monday in January in the year following their election. The term of office of the City Commissioners presently in office shall continue until the expiration of the term for which they were elected. Vacancies in the office of City Commissioner shall be filled by appointment of the Mayor with the approval of the Council for the unexpired term of the member causing the vacancy. In the event of the death of any person elected as a City Commissioner prior to his taking office, the same shall constitute a vacancy under this Section.

(4) *Powers, Duties and Functions.* All powers, duties and functions of the Registration Commission, including, but not limited to, those relating to the registration of voters are transferred to the City Commissioners. All the powers, duties and functions of the City Commissioners in their capacity as the County Board of Elections relating to the conduct of primaries and elections shall continue to be exercised by the City Commissioners.

Philadelphia Code, Section 2-112. Therefore, the language the General Assembly used in Section 2641 (b) expressed its clear intent to exempt Philadelphia from the provision adopted by the General Assembly in 1978 because Philadelphia already had a similar provision in place for its

election board. Moreover, the language which followed the prefatory clause (“*Except in counties of the first class*”), namely “*in counties which have adopted home rule charters or optional plans*” is a reference not to Philadelphia but to county home rule charters which are adopted pursuant to the Home Rule Charter and Optional Plans Law as provided in 53 Pa. C.S. § 2901 *et seq.* *See supra.*

Lastly, Subsection 2641 (c) as initially adopted in 1976 provided as follows:

(c) Whenever the ***members of the board of county commissioners*** are candidates for nomination or election to any public office or whenever there appears on the ballot a question relating to the adoption of a home rule charter for the county or amendments to an existing county home rule charter, the county commissioners ***shall not sit as the county board of elections***. The President Judge of the court of common pleas shall appoint judges to serve as the county board of election or where an insufficient number of judges are present, the president judge shall appoint a reputable elector of the county to serve as a member, with the judges on the county board of elections.

See Act of December 2, 1976, P.L. 1221, Section 1, No. 269. Emphasis supplied. The intent of this section was clear: the county commissioners who are the legislative body of the county² and also its election board were not to act as the county board of election if they were candidates for any public office or whenever there was a ballot a question relating to the adoption of a home rule charter for the county or amendments to an existing county home rule charter which they, as the legislative body, had adopted.

The above quoted 1976 language was replaced in 1979 with the following:

(c) Whenever a member of the board of county commissioners is a candidate for nomination or election to any public office, the President Judge of the Court of Common Pleas shall appoint a judge or an elector of the county to serve in his stead. Whenever there appears on the ballot a question relating to the adoption of a Home Rule Charter for the county or amendments to an existing county Home Rule Charter, the President Judge of the Court of Common Pleas shall appoint judges or electors of the county to serve in the stead of the county commissioners.

² Philadelphia does not have “county commissioners.” Only counties of the second through eight classes have “County Commissioner” who may exercise the legislative duties of the county. In Philadelphia, the legislative power of the City are exercised by “. . . a Council, subject only to the provisions of [the Philadelphia Home Rule Charter]. *See* Philadelphia Home Rule Charter, Section 1-101. Nonetheless, we do appoint judges to act in place of Philadelphia’s county board of election whenever a City Commissioner is a candidate for reelection to that position in order to avoid a conflict of interest.

Act of July 21, 1979, P.L. 189, No. 63. The legislative history does shed light into the reasons for the amendment. This amendment was proposed because the subsection was interpreted to require all county commissioners to be replaced even if only one was a candidate for elective office and also to address the situation when not enough judges are available to appoint to act as the election board.³

³ On May 7, 1979, when House Bill 208 was being considered for the third time in the House, the below exchange explains the rationale for the amendment of Subsection 2641 (c):

Mr. BRANDT. ... In a brief explanation of the amendment, numbered 851, the judges in Lancaster County court were concerned about the language in subsection (c) under section 301, particularly where it says, "Whenever the members of the board of county commissioners are candidates for nomination or election to any public office" They felt that this language should be changed, because it was their opinion, depending on who would read this, that all commissioners would have to resign regardless of whether they were on the ballot or not, and in that specific instance the suggested amendment says, "Whenever a member . . ." so they can change that particular member.

Mr. PICCOLA. ... *The amendment only deals with the fact that when one member of the board of county commissioners becomes a candidate for any office, even though the other two may not seek any office, all three of them are automatically disqualified from serving as the board of elections. This amendment will correct that by saying that only that member who is a candidate for a public office is disqualified. If the other two choose not to run for any office or run for reelection, then they will not be disqualified from sitting as members of the board of elections.*

* * *

Mr. RITTER. Mr. Speaker, as I read the present language, the existing law, where it talks about members of the county board of commissioners who are candidates for nomination or election, in that instance, under present law, "The President Judge of the Court of Common Pleas shall appoint judges to serve as the county board of elections or where an insufficient number of judges are present, the president judge shall appoint a reputable elector of the county to serve as a member, with the judges on the county board of elections." Mr. Brandt's amendment seeks to take that out, because there are brackets, Mr. Speaker, around subparagraph (c). The whole subparagraph (c) is going to be replaced by this language: "Whenever a member of the board of county commissioners is a candidate, the President Judge of the Court of Common Pleas shall appoint a judge or an elector of the county to serve in his stead." The difference is that under present law it is when there is an insufficient number of judges to take those places that an elector shall be appointed. Mr. Brandt's amendment takes the part out about an insufficient number of judges and gives the discretion automatically to the president judge that if you do not want to make judges sit on the board of elections, you can appoint anyone. My argument is that I think the present law is sufficient, and we ought to have the judges filling those vacancies only in the event where there are not enough judges. Then go out and take a qualified elector.

Legislative Journal, May 7, 1979, at p. 672. Emphasis supplied.

Therefore, there was no intent to change the previous application of Subsection (c) which, as implemented, clearly required the replacement of the county commissioners, *qua* election board, whenever they were running for reelection (or for any elected office) or whenever there appeared on the ballot a question adopting or amending a county charter which they, as the legislative body, had adopted. In those situations, a clear conflict existed due to their conflicting duties as legislative body and supervisors of the election during which legislation they enacted as county commissioners would be on the ballot in an election they supervised. Therefore they needed to be replaced in connection with their duties as the election board. Moreover, as discussed *supra*, references to the adoption or amendment of the “Home Rule Charter for the county” are nor references to Philadelphia’s Home Rule Charter but to charters adopted pursuant to the Home Rule Charter and Optional Plans Law. For these reasons, we cannot grant Petitioners’ requested relief and enter the following

ORDER

AND NOW, this 15th day of May, 2017, upon consideration of the “Petition Action for Declaratory Judgment – Election Matter” filed on April 24, 2017, the Preliminary Objections of Respondents the City Commissioners filed on May 11, 2017 and oral argument presented on May 12, 2017, it is hereby ORDERED and DECREED that the Petitioners’ request is denied with prejudice.⁴

BY THE COURT:



Hon. Sheila Woods-Skipper,
President Judge, Court of Common Pleas
Philadelphia County

⁴ Respondents’ Preliminary Objections are dismissed as moot.

Exhibit B

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

IN RE: COUNTY BOARD OF ELECTIONS

ORDER

AND NOW, this 20th day of January, 2015, pursuant to 25 P.S. § 2641(c) which provides in pertinent part that, "Whenever a member of the Board of County Commissioners is a candidate for nomination or election to any public office, the President Judge of the Court of Common Pleas shall appoint a Judge or an elector of the County to serve in his stead," it is hereby ORDERED and DECREED that the following judge of the County is appointed to serve in place of Commissioner Al Schmidt:

1. Honorable Paula Patrick

BY THE COURT:


SHEILA WOODS-SKIPPER, P.J.

CERTIFIED FROM THE RECORD OF 1-20-15
ERIC FEDER
DIRECTOR, OFFICE OF JUDICIAL RECORDS
PHILADELPHIA COUNTY

BY 

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

IN RE: COUNTY BOARD OF ELECTIONS

ORDER

AND NOW, this ^{30th} day of January, 2015, pursuant to 25 P.S. § 2641(c) which provides in pertinent part that, "Whenever a member of the Board of County Commissioners is a candidate for nomination or election to any public office, the President Judge of the Court of Common Pleas shall appoint a Judge or an elector of the County to serve in his stead," it is hereby ORDERED and DECREED that the following judge of the County is appointed:

The Honorable Maria McLaughlin

RECEIVED
JAN 30 2015
OFFICE OF JUDICIAL
RECORDS

BY THE COURT:

Sheila Woods-Skipper
SHEILA WOODS-SKIPPER, PJ.

CERTIFIED FROM THE RECORD OF 1-30-15
ERIC FEDER
DIRECTOR, OFFICE OF JUDICIAL RECORDS
PHILADELPHIA COUNTY
Eric Feder

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

IN RE: COUNTY BOARD OF ELECTIONS

ORDER

AND NOW, this *23rd* day of February, 2015, pursuant to 25 P.S. § 2641(c) which provides in pertinent part that, "Whenever a member of the Board of County Commissioners is a candidate for nomination or election to any public office, the President Judge of the Court of Common Pleas shall appoint a Judge or an elector of the County to serve in his stead," it is hereby ORDERED and DECREED that the following judge of the County is appointed:

The Honorable Lori Dumas - Chair

BY THE COURT:

Sheila Woods Skipper

SHEILA WOODS-SKIPPER
PRESIDENT JUDGE

CERTIFIED FROM THE RECORD OF _____
ERIC FEDER
DIRECTOR, OFFICE OF JUDICIAL RECORDS
PHILADELPHIA COUNTY

BY *Donna Kelly*

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

IN RE: COUNTY BOARD OF ELECTIONS

NO. ____ of 2011

ORDER

AND NOW, this 4th day of February, 2011, pursuant to 25 P.S. §2641(c), which provides in pertinent part that “Whenever a member of the Board of County Commissioners is a candidate for nomination or election to any public office, the President Judge of the Court of Common Pleas shall appoint a Judge or an elector of the County to serve in his stead,” it appearing that the three County Commissioners are candidates for public office, it is hereby **ORDERED** and **DECREED** that the following Judges of the County are appointed in their stead:

1. Honorable Pamela Pryor Dembe
2. Honorable Charles J. Cunningham, III
3. Honorable Leon Tucker

BY THE COURT:

/s/ Honorable Pamela Pryor Dembe
PAMELA PRYOR DEMBE
PRESIDENT JUDGE

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

IN RE: COUNTY BOARD OF ELECTIONS

ORDER

AND NOW, this 19th day of June, 2007, pursuant to 25 P.S. § 2641(c) which provides in pertinent part that “Whenever a member of the Board of County Commissioners is a candidate for nomination or election to any public office, the President Judge of the Court of Common Pleas shall appoint a Judge or an elector of the County to serve in his stead,” it is hereby ORDERED and DECREED that the following Judges of the County are appointed:

1. Hon. Chris R. Wogan
2. Hon. Pamela Pryor Dembe

BY THE COURT:

C. DARNELL JONES, II PJ.

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

IN RE: COUNTY BOARD OF ELECTIONS

ORDER

AND NOW, this 15th day of February, 2007, pursuant to 25 P.S. § 2641 which in pertinent part reads:

“[c] Whenever a member of the Board of County Commissioners is a candidate for nomination or election to any public office, the President Judge of the Court of Common Pleas shall appoint a Judge or an elector of the County to serve in his stead.”¹

The following electors of the County are appointed:

1. Honorable Nelson A. Diaz (retired).
2. Honorable Paul L. Jaffe (retired).
3. Honorable Gene D. Cohen (retired).

BY THE COURT:

C. DARNELL JONES, II, J.
PRESIDENT JUDGE

¹By tradition the President Judge of the Court of Common Pleas of Philadelphia has appointed sitting Judges to act as Commissioners. Since the President Judge is a candidate for the Supreme Court of Pennsylvania in the election over which the appointees shall preside, retired Judges not in any way subject to the supervision of the President Judge who are qualified as electors of the county are hereby appointed.