IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Committee of Seventy, Philadelphia 3.0, Jordan Strauss, Brian Krisch, and Katherine Rivera, *Petitioners*, v. 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*.	No. 611 CD 2017

REPLY 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. SUMMARY OF ARGUMENT

The City Commissioners ask the Court to imagine what the phrase "county Home Rule Charter" might mean in a vacuum, and they conclude that it would not include the Philadelphia Home Rule Charter. If that were the question facing the Court, the City Commissioners' answer would be wrong, because after the consolidation of the City and the County of Philadelphia, the Philadelphia Home Rule Charter serves as the organic law of the merged entity.

But that phrase does not appear in a vacuum. Instead, it appears (in slightly different forms) in two different subsections of 25 P.S. § 2641. One of those subsections—§ 2641(b)—makes clear that the phrase includes the Philadelphia Home Rule Charter. In the other subsection—§ 2641(c)—that phrase must have the same meaning. Nothing more than that is required to decide this case.

Nonetheless, the City Commissioners ask the Court to ignore seven key words in § 2641(b) as meaningless surplusage; to unearth in § 2641(c) a convoluted, *sub silentio* provision limiting the types of conflicts of interest addressed by the statute; to find that the General Assembly has singled out Philadelphia's City Commissioners as uniquely incorruptible; and to dread the supposedly destabilizing consequences of a straightforward application of the Election Code. The Court should reject the arguments of the City Commissioners and reverse the decision of the Court of Common Pleas.

II. ARGUMENT

A. Every Word of § 2641(b) Has Effect

The City Commissioners offer two inconsistent interpretations of the meaning of the first seven words of the second sentence of 25 P.S. § 2641(b) ("Except in counties of the first class…."). Neither interpretation hangs together.

First, the City Commissioners propose that that phrase does not single out Philadelphia, because "counties of the first class" could come to include other home-rule counties. (City Commissioners' Brief ("Comm'rs' Br.") at 18-19.) As previously discussed, this possibility is a legal fiction.[1] (Appellants' Brief at 22 n.9.) But even if there were a genuine chance that Allegheny County, Pennsylvania's second-largest county, may become a first-class county, the City Commissioners' argument is logically inconsistent. On the one hand, the City Commissioners suggest that this is a now-meaningless phrase that would spring

[1] Moreover, contrary to the City Commissioners' claim that the General Assembly in referring to counties of the first class was not targeting Philadelphia, the legislative history underlying the county classification structure demonstrates that for a long time the General Assembly has used "first-class county" as a synonym for "Philadelphia." (Appellants' Brief at 22 n.9.) The current law dividing counties into classes, 16 P.S. § 210, was passed in 1955. As originally enacted, the population cutoff for first-class counties was 1.8 million. In the 1950 Census, Philadelphia had 2.07 million people and Allegheny had 1.52 million, making Philadelphia the only first-class county at the time. In the 1980 Census, Philadelphia's population had dropped below 1.8 million for the first time (to 1.69 million) and Allegheny County's population had dropped to 1.45 million. In early 1982, the General Assembly amended the law to set the population cutoff for first-class counties at 1.5 million. Act of Feb. 5, 1982, P.L. 7, No. 3, § 1. This sequence of events makes it clear that the statutory scheme was designed, and later redesigned, to distinguish Philadelphia as the only county of the first class.

into effect if somehow Allegheny County's declining population would grow from its current 1,220,000 people to beyond 1,500,000. (Comm'rs' Br. at 19.) On the other hand, they contend that counties of the first class cannot have county home rule charters, because they are not subject to the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. § 2901 *et seq.* (Comm'rs' Br. at 12 & n.3; *accord* Order at 3-4.) So under their own theory, if Allegheny County grew to over 1,500,000 inhabitants, it would *cease to be* a home-rule county, and those seven words would still have no effect.

In response, the City Commissioners may argue that Allegheny County *adopted* its home rule charter while it was a second-class county subject to the Home Rule Charter and Optional Plans Law, and so its county home rule charter could remain in effect once it became a first-class county. This argument would also collapse. Under that theory, the newly swollen Allegheny County would lose all authority to exercise the powers designated by its home rule charter, because the relevant legislative grant of authority, *see* 53 Pa.C.S. § 2961, does not apply in "counties of the first class," *id.* § 2901(b). Similarly, under this theory, Allegheny County would lose the power to amend or repeal its charter. *See* 53 Pa.C.S. §§ 2941-2944, 2967. In short, under any of the City Commissioners' possible theories involving future counties of the first class, these seven words would still have no effect.

Having argued in one paragraph that the phrase "Except in counties of the first class" does not single out Philadelphia, the City Commissioners urge in the very next paragraph that the phrase was added to "provide[] clarity . . . . [g]iven the history of litigations regarding the City/County relationship in Philadelphia and the nature of Philadelphia's government in light of the City/County Consolidation Act." (Comm'rs' Br. at 19; *see also id.* at 20 n.5.) This second argument is in obvious tension with the first. It's also wrong.

The Statutory Construction Act requires that "Every statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S. § 1921(a). The City Commissioners' interpretation of "Except in counties of the first class" is that the phrase "provides clarity" or is "to avoid confusion." (Comm'rs' Br. at 19-20.) Under that interpretation, the phrase merely underscores the meaning of the remainder of § 2641(b) but has no independent effect; in a word, it is surplusage. *See Black's Law Dictionary* 1484 (8th ed. 2004) (defining "surplusage" as "Redundant words in a statute or legal instrument; language that does not add meaning"). "The legislature, however, is presumed not to intend any statutory language to exist as mere surplusage and, accordingly, courts must construe a statute so as to give effect to every word." *Commonwealth v. Ostrosky*, 909 A.2d 1224, 1232 (Pa. 2006); *see also, e.g.*, *Dep't of Conservation & Natural Res. v. Office of Open Records*, 1 A.3d 929, 938 (Pa. Commw. Ct. 2010) (en banc) ("To

conclude otherwise would essentially render the carve-out exception for public officials and agency employees unnecessary and mere surplusage—a construction we must avoid.").

The City Commissioners also cite, in support of their interpretation of § 2641(c), the co-sponsorship memorandum for a bill pending in the Pennsylvania Senate. (Comm'rs' Br. at 20-21 & n.6.) A memorandum regarding a pending bill is of no value in determining the meaning of a decades-old statute, nor would the freshman legislator who penned it have any actual insight into the General Assembly's intent when it crafted this provision many decades ago. To the extent the bill pertains at all to the question before the Court, the perceived need for the bill highlights that the law as currently enacted *does* apply to Philadelphia. *Cf. Sawink, Inc. v. Phila. Parking Auth.*, 34 A.3d 926, 931 (Pa. Commw. Ct.) (en banc) ("If the legislature had wanted to make *any* vehicle that violates any part of Section 5714 subject to impoundment, it easily could have said so, but it did not. . . . In effect, the Parking Authority's reading of the statute renders Subsection (e) mere surplusage, a result that is to be avoided in statutory construction."), *aff'd without opinion*, 57 A.3d 644 (Pa. 2012).

Two fundamental principles of statutory construction require the Court to reverse the decision of the court below: a statute shall be construed, where possible, to give effect to all its provisions; and, when the meaning of a word or

phrase is clear when used in one section, it should be construed to mean the same thing in another section of the same statute. (Appellants' Brief at 21-25) The Election Code unmistakably refers to the Philadelphia Home Rule Charter as a "home rule charter" adopted by a county in § 2641(b) lest the seven words "[e]xcept in counties of the first class" have no meaning. And since the Election Code includes the Philadelphia Home Rule Charter as a home rule charter adopted by a county in this section, then the Philadelphia Home Rule Charter must also be a "county Home Rule Charter" under §2641(c). Accordingly, § 2641(c) requires the interim replacement of the City Commissioners whenever there appears on the ballot a question relating to an amendment to the Philadelphia Home Rule Charter.[2]

B. There is No Implicit "Conflict of Interest" Test in § 2641(c)

The City Commissioners argue that if the statute were ambiguous, the Court should identify the "occasion and necessity" for the disputed second sentence of § 2641(c) as "prevent[ing] commissioners from overseeing the voting process and the vote when they would have a clear conflict of interest because they either were

[2] Contrary to the erroneous reasoning in the Opinion below that § 2641(c) also does not apply to Philadelphia because Philadelphia does not have "county commissioners," (Opinion at 7, n.2) the City Commissioners acknowledge that "for the purposes of the Election Code, references to 'county commissioners' include the city commissioners." (Comm'rs' Br. at 26 citing Pa. Const. Schedule 1, § 33 ("The words, 'county commissioners, whenever used in this Constitution and in any ordinance accompanying the same, shall be held to include the commissioners for the city of Philadelphia.")) *See* Appellants' Brief at 16-20.

involved in drafting the legislation or because they are appointed by (and could be fired by) the legislators who drafted the legislation." (Comm'rs' Br. at 21-22.) This invented test, which has no basis in the text or history of the statute, is weighed down with cumbersome qualifications that, miraculously, treat Philadelphia differently from every other county.

Applying Occam's razor, the "occasion and necessity" can be more simply identified as: preventing commissioners from overseeing elections when they would have a conflict of interest or the appearance of a conflict of interest. *Cf., e.g., Rendell v. Pa. State Ethics Comm'n*, 983 A.2d 708, 716 (Pa. 2009) (noting "the legislative objectives of the [Public Official and Employee Ethics Act] pertaining to the avoidance of impropriety or the appearance of impropriety"). This account of the "occasion and necessity" not only has the virtue of simplicity; it also recognizes that the provision applies in Philadelphia, where, as the legislature has long been aware, there is a richer history of malfeasance in election administration than in any other Pennsylvania county.[3]

The City Commissioners misconstrue Petitioners' account of the legislature's intent. Petitioners do not argue that the second sentence of § 2641(c)

[3] In addition to the examples previously cited, this Court can further take judicial notice of the fact that two federal lawsuits are presently pending against the City Commissioners for their alleged failure to prevent illegal voter intimidation and other malfeasance during a recent special election in the 197th House District. *See Acosta v. Democratic City Committee* and *Little v. Vazquez*, consolidated at Civ. Action No. 17-1462 (E.D. Pa.).

"require[s] President Judges to evaluate the substance of potential conflicts" whenever a Philadelphia Home Rule Charter amendment is on the ballot. (Comm'rs' Br. at 8; *see also id.* at 24.) Rather, Petitioners' point is that § 2641(c) means what it says, and the City Commissioners are disqualified from overseeing elections "*Whenever* there appears on the ballot a question relating to . . . amendments to an existing county Home Rule Charter." 25 P.S. § 2641(c) (emphasis added). There is no need for the President Judge to weigh the degree to which any given ballot question poses a conflict of interest for the City Commissioners. Rather, the legislature was rightly concerned that these ballot questions would often pose conflicts or the appearance of conflicts for the City Commissioners, and so it created a bright-line rule.

In addition, the City Commissioners ask the Court, in applying the Statutory Construction Act, to consider the Petitioners' goals in bringing this litigation. (Comm'rs' Br. at 25.) They cite 1 Pa.C.S. § 1921(c)(4), which states: "When the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters . . . The object to be attained."). The relevant "object to be attained," however, is the object of the *General Assembly*, not the object of the *petitioners*. *See, e.g.*, *Mountain Vill. v. Bd. of Supervisors*, 874 A.2d 1, 11 (Pa. 2005) ("[W]e are mandated to consider, among

other specified criteria, the object to be attained *by the statute*." (emphasis added) (citing 1 Pa.C.S. § 1921(c)(4))).

C. Reversing the Decision Below Would Have No Effects Beyond the Administration of Ballot-Question Elections in Philadelphia

The City Commissioners warn of various frightful consequences of reversal. In reality, reversal would mean only that Philadelphia's City Commissioners would have to step away from their duties whenever they run for reelection or whenever a home rule charter question is on the ballot, just like their peers in other counties.

The City Commissioners claim that "Embracing Appellants' argument that the Home Rule Charter is also a charter for Philadelphia County would destabilize Philadelphia's clear status as an autonomous entity governed by a city charter." (Comm'rs' Br. at 14.) This case is about what the Election Code means by "county Home Rule Charter," and holding that the Election Code's phrase includes the Philadelphia Home Rule Charter will impact no statute, ordinance, or other authority apart from 25 P.S. § 2641(c). Even if the Court were to rule that the Philadelphia Home Rule Charter is in all contexts a county home rule charter, the City Commissioners have not identified—and Petitioners are unaware of—any effects that would flow from such a holding, other than its consequences for § 2641(c).

Still more dramatically, the City Commissioners say that reversal would "contravene[e] the will of legislatures and voters and undermin[e] the statutorily

prescribed election processes in Philadelphia." (Comm'rs' Br. at 25.) Not so. The only effect would be the interim replacement of the City Commissioners for elections when Philadelphia City Council chooses to put home rule charter amendments on the ballot.

What are the legislative policy options if the Court reverses? It is Philadelphia City Council that has accelerated the use of ballot questions over the last fifteen years, and if City Council does not want the City Commissioners to be disqualified so often, it would be within City Council's competence to decelerate that trend. Another option would be for City Council to reserve home rule charter questions for quadrennial elections when the City Commissioners are disqualified anyway because they are running for reelection. Alternatively, it would be within the General Assembly's competence to pass the pending bill to add an exemption for Philadelphia to § 2641(c). Yet another option—the option that Petitioners favor—would be for City Council or the General Assembly to modernize election administration in Philadelphia by replacing the City Commissioners with a bipartisan, non-salaried body of appointed professionals.

But those are all political questions to be decided by City Council or the General Assembly. This Court's role is to apply the law as written. *E.g.*, *Discovery Charter Sch. v. Sch. Dist. of Phila.*, No. 16 EAP 2016, __ A.3d __, 2017 Pa.

LEXIS 1877, at *31 (Pa. Aug. 8, 2017) (noting that "it is not the province of the judiciary to augment the legislative scheme," and collecting cases).

III. CONCLUSION

For the reasons stated above and in Petitioners' opening brief, the decision of the Court of Common Pleas should be reversed.

Respectfully submitted,

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