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IN THE SUPREME COURT OF PENNSYLVANIA

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

Petitioners,

v.

The Honorable Sheila A. Woods-Skipper, in her official
capacity as President Judge of the Court of Common Pleas
of Philadelphia,

Respondent.

Docket No.
36 EM 2017

**ANSWER TO APPLICATION FOR LEAVE TO INTERVENE BY THE
CITY COMMISSIONERS OF THE CITY OF PHILADELPHIA**

Petitioners, through their counsel, hereby file this Answer to the Application
for Leave to Intervene by the City Commissioners of the City of Philadelphia.

Petitioners do not concede that the City Commissioners are indispensable parties. Nor do Petitioners admit to the City Commissioners' characterizations of the Petition for Review or the City Commissioners' conclusions of law contained in their Application for Leave to Intervene.

Nonetheless, in the interest of a speedy and final resolution of the important question presented by this case, Petitioners will not oppose the Application.

If the Court grants the Application, Petitioners respectfully request that the Court accept for filing Petitioners' Answer to the City Commissioners' Preliminary Objection and Brief in support thereof, which are attached hereto as Exhibit A.

Respectfully submitted,

/s/ Benjamin D. Geffen

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*Counsel for Petitioners Committee of Seventy,
Jordan Strauss, Brian Krisch, & Katherine Rivera*

Dated: April 7, 2017

Exhibit A
to Answer to
Application
for Leave to
Intervene

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And

The Philadelphia City Commissioners, Anthony Clark, Al
Schmidt, and Lisa Deeley, in Their Official Capacities Only,

Intervenors.

Docket No.
36 EM 2017

ANSWER TO CITY COMMISSIONERS' PRELIMINARY OBJECTION

Petitioners, through their counsel and pursuant to Rules 1516(b) and 1517 of the Pennsylvania Rules of Appellate Procedure and Rules 1028 and 1029 of the Pennsylvania Rules of Civil Procedure, hereby submit the following responses to the averments in the Preliminary Objection of Intervenors to the Petition for Review.

RESPONSES

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted in part; denied in part. Petitioners admit that 25 P.S. § 2641(c) mandates that “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 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.” Any remaining averments in paragraph 4 purport to summarize the Petition, which speaks for itself, and they are deemed denied. Petitioners refer to their Petition for a full and accurate description of its contents.
5. Admitted in part; denied in part. Petitioners admit that the City Commissioners have applied for party status in this matter as Intervenors.

The remaining averments in paragraph 5 either purport to summarize the Petition, which speaks for itself, or contain conclusions of law to which no response is required, and they are deemed denied. Petitioners refer to their Petition for a full and accurate description of its contents.

6. Petitioners hereby incorporate the preceding paragraphs of this Answer.
7. Denied. The averments in paragraph 7 are conclusions of law to which no response is required and are deemed denied.
8. Denied. The averments in paragraph 8 are conclusions of law to which no response is required and are deemed denied.
9. Denied. The averments in paragraph 9 are conclusions of law to which no response is required and are deemed denied.

WHEREFORE, Petitioners respectfully request this Court to overrule the City Commissioners' Preliminary Objection and issue the requested writ of mandamus.

Respectfully submitted,

/s/ Benjamin D. Geffen

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Dated: April 7, 2017

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BRIEF IN OPPOSITION TO
CITY COMMISSIONERS' PRELIMINARY OBJECTION

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Section 301(c) of the Election Code requires the President Judge of the Court of Common Pleas to replace the City Commissioners with interim election officials whenever an amendment to the Philadelphia Home Rule Charter is on the ballot. This mandate can be seen from the statute's plain text, without a dive into the metaphysics of city-county consolidation, and without recourse to policy rationales for why the Election Code ought to distinguish Philadelphia's City Commissioners from election overseers elsewhere in the Commonwealth. But even if the Court were to look beyond the plain text of the statute, none of the City Commissioners' arguments can sustain their position that Philadelphia is impliedly exempt from 25 P.S. § 2641(c).

In short, the City Commissioners ask the Court to discern a special exception for Philadelphia in § 2641(c). But no amount of discerning can find an exception that is not there. The Court should therefore overrule the City Commissioners' Preliminary Objection and issue the requested writ of mandamus.

DISCUSSION

Petitioners have set forth their position in the Petition for Review. This brief does not repeat at length the analysis of the Petition for Review, but it responds to arguments that the City Commissioners have raised in their brief.¹ For the reasons

¹ The Petitioners disagree with the City Commissioners and also with Respondent, President Judge Woods-Skipper, that "[a] Petition filed in the Common Pleas Court would provide an opportunity for all parties impacted to be heard prior to a Court decision as to the interpretation

set forth in the Petition for Review and in this brief, the Court should overrule the City Commissioners' Preliminary Objection.

A. The statute applies to Philadelphia

In explaining what they consider the “unambiguous” meaning of 25 P.S. § 2641(c), the City Commissioners nevertheless devote their attention to the constitutional history of city-county consolidation. (City Commissioners' Brief (“Br.”) at 7-14.) This is the wrong place to look. To interpret the statute, the Court should look at the statute. *See generally 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)).

It is clear for two reasons that the second sentence of § 2641(c) applies to Philadelphia. First, the General Assembly wrote an explicit exception for

of the Election Code” and that “[a]n adequate remedy other than mandamus exists in President Judge Woods-Skipper’s Court.” (Respondent’s Answer to Petition for Review, at 2-3; *see also* City Commissioners’ Brief at 7 n.6.)

The City Commissioners and the President Judge appear to envision a lawsuit filed only against the City Commissioners. But the Election Code imposes a statutory duty upon the President Judge to appoint, not on the City Commissioners to recuse, and so an action against only the City Commissioners would be deficient as a matter of law and not anchored in the statute. Nor could Petitioners initiate an action in the Court of Common Pleas without naming **any** respondent or defendant: civil actions are brought by one or more parties against one or more parties. Rather, the President Judge would be a necessary respondent in any action to enforce § 2641(c), in any court. Plainly, the President Judge could not adjudicate a dispute in which she herself were a party. So Petitioners’ only option was to file for a writ of mandamus in the Supreme Court.

Philadelphia into § 2641(b): “Except in counties of the first class” When the General Assembly has expressly singled out Philadelphia in one subsection, it should not be assumed to have implicitly singled out Philadelphia in the next subsection. (*See* Pet. ¶ 53.) The City Commissioners misconstrue the significance of this point (*see* Br. at 16 n.11), which is that the General Assembly knows well how to create an exception for Philadelphia. Indeed, it has done so on scores of occasions, in a wide range of contexts.² Courts should not find more such exceptions where the General Assembly has omitted them.

Second, and crucially, § 2641(b) refers to the Philadelphia Home Rule Charter as a **county** home rule charter. (*See* Pet. ¶ 54.) The key sentence from § 2641(b) reads: “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.” If the General Assembly had omitted the words “Except in counties of

² Multiple examples illustrate the point. *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.”).

the first class” from that sentence, under the City Commissioners’ theory that omission would have worked no change at all in the meaning of the statute. In other words, the City Commissioners regard those seven words as surplusage. If, on the other hand, those seven words are construed so as to give them effect, as required by the Statutory Construction Act, 1 Pa.C.S. § 1921(a), then Philadelphia must be among the “counties which have adopted home rule charters or optional plans” (and no one argues that Philadelphia has adopted an optional plan). Since the General Assembly 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).

The City Commissioners never address this second argument. Instead they focus on whether **in the abstract** the Philadelphia Home Rule Charter is a “city” or a “county” home rule charter. (*See, e.g.*, Br. at 13 (“[T]he City of Philadelphia’s Home Rule Charter, adopted pursuant to the First Class Cities Home Rule Act, is not and never was a county charter”).) The principal question presented in this case, however, is not what the phrase “county Home Rule Charter” might mean if it were a free-floating, context-less phrase; the question is what that phrase means **within the context of the Election Code**. As explained above and in the Petition for Review, that phrase as used in the Election Code includes the Philadelphia Home Rule Charter.

Even if it were necessary to set aside the Election Code and analyze the more general question of the effect of city-county consolidation, Petitioners have already explained how, for home rule purposes, there is no longer any meaningful distinction between Philadelphia City and Philadelphia County. (Pet. ¶¶ 56-59.) Responding to this argument, the City Commissioners rest considerable weight on the title and terminology of the “First Class City Home Rule Act” of 1949. (Br. at 9-10.) When that Act was passed, the City and County were separate entities, and there were important distinctions between them. But by 1976, when 25 P.S. § 2641(c) was added to the Election Code, the City and County had long since been folded into a single entity, and the Philadelphia Home Rule Charter had long been serving as the organic law for Philadelphia in both of its capacities. As the “county Home Rule Charter” for Philadelphia, it is well within the scope of § 2641(c).

B. Even if resort to policy arguments were appropriate, § 2641(c) would still apply to Philadelphia

Because the text of the Election Code is plain, there is no need to speculate about the General Assembly’s intent. 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.”); *accord Commonwealth, Office of the Governor v. Donahue*, 98 A.3d 1223, 1237 (Pa. 2014). But even if it were

appropriate to “pursu[e] the spirit” of 25 P.S. § 2641(c), the outcome would be the same: the statute should apply to Philadelphia just as it applies to other counties.

Neither in the legislative history nor in the statute itself did the General Assembly explain its intent in adopting § 2641(c). Assuming the General Assembly was attempting to ensure that those overseeing elections do not have conflicts of interest, the Court should not accept the City Commissioners’ proposal to narrow the types of conflicts covered by the statute (Br. at 15-22).

The City Commissioners invite the Court to craft a nebulous limitation on the second sentence of § 2641(c), restricting its application to counties in which members of the board of elections “likely” have dual roles as (1) election overseers and (2) members of the county’s legislative body **or** appointees of members of the county’s legislative body. (*See* Br. 19 (“Elsewhere in Pennsylvania, county charter amendments **likely would have been** drafted by the county commissioners **or by those appointing the county commissioners . . .**” (emphases added)).) There are several reasons to decline this invitation.

First, Pennsylvania’s Statutory Construction Act requires courts to interpret ambiguous statutes by reference to “[t]he occasion and necessity for the statute,” “[t]he circumstances under which it was enacted,” “[t]he former law, if any, including other statutes upon the same or similar subjects,” “[t]he contemporaneous legislative history,” and “[l]egislative and administrative

interpretations of such statute.” 1 Pa.C.S. §§ 1921(c)(1), (2), (5), (7), and (8). Here, the City Commissioners’ novel distinction is without any basis in the statute’s text, legislative history, or decisional law.

Second, it appears that the City Commissioners would apply this invented distinction even in counties where the election overseers do not also serve in a legislative role, but are merely appointed by others who serve in that role.³ It is illogical for the City Commissioners to assert that elected county commissioners in Philadelphia lack a conflict of interest because they do not have a direct role in placing home rule charter amendments onto the ballot, but their appointed counterparts in certain other counties do have a conflict of interest even though they lack a direct role in placing home rule charter amendments onto the ballot.

Third, the conflicts of interest presented in Philadelphia are often at least as stark as those in other counties, and there is no reason to assume that “[t]he mischief to be remedied” or “[t]he object to be attained” is different for Philadelphia. 1 Pa.C.S. §§ 1921(c)(3)-(4). On numerous occasions, county home rule charter amendments outside of Philadelphia have posed no apparent conflicts of interest for the county commissioners. A 2000 ballot question in Lehigh County,

³ See, 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.”).

for example, asked voters 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), attached as Exhibit A. By contrast, and as noted in the Petition for Review, proposed amendments to the Philadelphia Home Rule Charter frequently pose stark conflicts of interest for the City Commissioners. (Pet. ¶¶ 36-39.) Examples include the May 16, 2017 ballot question, which would impact procurement processes in which the City Commissioners are involved, as well as the 2014 ballot question to repeal the “resign to run” rule, which would have allowed the City Commissioners and other elected officials to remain in office while running for other elected positions.⁴ If the “object” the General Assembly sought “to be attained,” 1 Pa.C.S. §§ 1921(c)(4), was the elimination of conflicts of interest, these are at least as present in Philadelphia as elsewhere.

At bottom, the City Commissioners’ proposed distinction would mean that Philadelphia voters would enjoy fewer safeguards against election overseers’

⁴ The City Commissioners suggest that the defeat of the latter ballot question somehow proves they can run an election impartially even when they have a conflict of interest. (Br. at 19 n.13.) That the ballot question was defeated does not prove that the City Commissioners in fact ran a fair election. More importantly, the General Assembly mandated the replacement of the City Commissioners whenever a home rule charter amendment is on the ballot so as to avoid the need for the President Judge or the City Commissioners themselves to determine which ballot questions they could administer impartially.

conflicts of interest than would voters of other counties. This is, to say the least, an unlikely account of the General Assembly's intent.⁵

C. Repeated disregard of § 2641(c) has not erased it from the Election Code

Finally, the City Commissioners suggest that persistent nonobservance of § 2641(c) in Philadelphia, without any response from the General Assembly, has liberated Philadelphia from compliance. This argument cannot be sustained.

The City Commissioners cite a pair of Commonwealth Court decisions “for the proposition that the legislature’s failure to amend a statute as interpreted by the court creates the presumption that the court’s interpretation was in accordance with the legislature’s intent.” (Br. at 23 (citing *Mosley v. W.C.A.B. (City of Pittsburgh)*, 937 A.2d 607, 609-10 (Pa. Commw. Ct. 2007) and *Sun Home Health Visiting Nurses v. Workers’ Comp. Appeal Bd. (Noguchi)*, 815 A.2d 1156 (Pa. Commw. Ct.), *appeal denied*, 837 A.2d 1179 (Pa. 2003)).) These cases do not support the City Commissioners’ argument. In *Mosley*, the Commonwealth Court cited eight

⁵ *Cf.*, 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.”).

instances over fourteen years in which appellate courts had issued decisions applying a single interpretation of the statute in question. 937 A.2d at 609-10 & n.8. Similarly in *Sun Home Health*, the Commonwealth Court noted that for eight years the General Assembly had not amended the statute at issue so as to overrule the Commonwealth Court's analysis in a published decision. 815 A.2d at 1160-61.

Here, by contrast, there have been no judicial interpretations of 25 P.S. § 2641(c) to which the General Assembly has failed to respond; this is, as far as Petitioners are aware, the first that has been sought. The President Judge and her predecessors have simply done **nothing** with regard to the second sentence of § 2641(c). If the Court of Common Pleas does nothing, and the General Assembly does nothing in response, the effect of that inaction on the interpretation of a statute is: nothing.

It also bears noting that 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. 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.”).

The City Commissioners characterize this lawsuit as threatening to “deprive the City and Commonwealth of the structure their legislators and voters have created for elections” (Br. at 22). The truth, however, is that it is Philadelphia City Council that has accelerated the use of ballot questions, and it would be within City Council’s competence to decelerate that trend. Alternatively, it would be within the General Assembly’s competence to add an exemption for Philadelphia to § 2641(c). But those are political questions to be decided by City Council or the General Assembly; this Court’s role is to apply the law as written, and that law requires the President Judge to appoint judges or electors of the County of Philadelphia to serve in the stead of the Philadelphia City Commissioners for the primary election scheduled for May 16, 2017.

CONCLUSION

Petitioners have brought this action to ensure a fair and well-run election in Philadelphia that complies with state law and that is properly overseen and administered. For all the reasons stated above and in the Petition for Review, the

Court should overrule the City Commissioners' Preliminary Objection and should issue the requested writ of mandamus.

Respectfully submitted,

/s/ Benjamin D. Geffen

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*Counsel for Petitioners Committee of Seventy,
Jordan Strauss, Brian Krisch, & Katherine Rivera*

Dated: April 7, 2017

Exhibit A to Brief

APPROVED

COUNTY OF LEHIGH, PENNSYLVANIA
COMMISSIONERS BILL 99-68
SPONSORED BY COMMISSIONERS KRAFT, DOUGHERTY, ERVIN, McHUGH,
McNAIR, AND RABER
REQUESTED DATE: OCTOBER 29, 1999
ORDINANCE 1999-NO. 169

AN ORDINANCE PROPOSING A REFERENDUM QUESTION AMENDING THE
HOME RULE CHARTER TO CHANGE THE POSITION OF CORONER TO A FULL-
TIME ELECTED POSITION

WHEREAS, §1008 of the Lehigh County Home Rule Charter and Section 1-231 et seq. of the Pennsylvania Home Rule Charter and Optional Plans Law, Act 62 of 1972, as amended 53 P.S. §1-231 et seq., provide that a referendum on the question of amendment of a Home Rule Charter may be initiated by Ordinance of the governing body, in this case, the Board; and

WHEREAS, the Board believes that the voters of Lehigh County should be given the opportunity to determine whether the elected position of Coroner should be a full-time position.

NOW, THEREFORE, IT IS HEREBY ENACTED AND ORDAINED BY THE BOARD OF COMMISSIONERS OF THE COUNTY OF LEHIGH, PENNSYLVANIA, THAT:

1. The citizens of Lehigh County shall be given the opportunity to vote at the 2000 primary election on amending Section 204(a) of the Lehigh County Home Rule Charter so as to make the elected position of Coroner a full time

position. Section 204(a) of the Charter would be amended to read as follows (bracketed language indicates deleted language, underlined language indicates amending language):

Section 204 - Requirements; Prohibition

- (a) Elected officers, except for members of the Board of Commissioners [,] and the District Attorney [and the Coroner], shall be considered full-time employees of the County and shall devote the time and effort to official County business as is required for full-time employees of the County Government generally.

2. The proper officers and other personnel of Lehigh County are hereby authorized and empowered to take all such further action and execute additional documents as they may deem appropriate to carry out the purpose of this Ordinance.

3. The County Executive shall distribute copies of this Ordinance to the proper offices and other personnel of Lehigh County whose further action is required to achieve the purpose of this Ordinance.

4. Any Ordinance or part of any Ordinance conflicting with the provision of this Ordinance is hereby repealed insofar as the same affects this Ordinance.

5. This Ordinance shall become effective in ten (10) days after passage.

ADOPTED this 8th day of December, 1999 by the following vote:

	<u>AYE</u>	<u>NAY</u>
John V. Cooney	X	
Percy H. Dougherty	X	
Jane R. Ervin	X	
Josephine D. Kraft	X	
George A. Laughlin	X	
John F. McHugh	X	
Grayson E. McNair	X	
Sterling H. Raber	X	
Linda A. Rosenfeld	X	

ATTEST: Daryl Bewick
CLERK TO THE BOARD OF COMMISSIONERS

APPROVED this 13th day of December, 1999.

Jane S. Baker
JANE S. BAKER
County Executive

ENACTED this 13th day of December, 1999.

COUNTY OF LEHIGH ORDINANCE 1999 - NO. 169

CERTIFICATION

I, DAVID BARILLA, Clerk to the Board of Commissioners of Lehigh County, do hereby certify that the attached is a true and correct copy of the ordinance adopted at a regular meeting of the Commissioners of Lehigh County held on the **8th** day of **December, 1999**, and approved on the **13th** day of **December, 1999** by the Lehigh County Executive, and effective on the **23rd** day of **December, 1999**.



DAVID BARILLA, Clerk
Board of Commissioners