

**IN THE SUPREME COURT OF PENNSYLVANIA**

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Docket No. 36-EM-2017

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**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.

V.

**THE PHILADELPHIA CITY COMMISSIONERS,  
ANTHONY CLARK, AL SCHMIDT, AND LISA DEELEY, IN THEIR  
OFFICIAL CAPACITIES ONLY,**  
Intervenors.

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

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CITY OF PHILADELPHIA LAW DEPARTMENT  
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DATED: April 5, 2017

The City Commissioners of the City of Philadelphia, Anthony Clark, Al Schmidt, and Lisa Deeley, in their official capacities (the “City Commissioners” and “Intervenors”), file this Application for Leave to Intervene as Party Respondents pursuant to Pa.R.A.P. 1531(b) and in support of this Application, state as follows:

1. On March 27, 2017, Petitioners initiated this action in mandamus to compel Respondent, President Judge Sheila A. Woods-Skipper of the Court of Common Pleas of Philadelphia, to appoint judges or electors of the county to serve in the stead of the City Commissioners for the primary election for May 16, 2017 (the “Petition”).

2. Petitioners did not name the City Commissioners as parties to the Petition.

3. The City Commissioners comprise a three-member board of elected officials responsible for administering voter registration and conducting Philadelphia elections. *See* Phila. Code § 2-112; 25 Pa. C.S. § 1203.

4. Petitioners maintain that pursuant to 25 P.S. § 2641(c) the President Judge of the Court of Common Pleas of Philadelphia must appoint judges or electors, instead of the City Commissioners, “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...”

5. The relief sought in the Petition would result in the elimination of the City Commissioners' statutory responsibility for overseeing the May 16, 2017 primary election.

6. Furthermore, as argued by Petitioners, the relief sought in the Petition would result in the elimination of the City Commissioners' statutory role in overseeing elections in Philadelphia for nearly 75% of elections.

7. If permitted to intervene, the City Commissioners will argue that the interpretation of 25 P.S. § 2641(c) advocated by Petitioners is incorrect and that the relevant provision does not require that judges or electors be appointed in place of the City Commissioners when there is an amendment to Philadelphia's Home Rule Charter on the ballot. Intervenors will argue that § 2641(c) refers only to amendments to "county" Home Rule Charters and Philadelphia's Home Rule Charter is a city charter, adopted pursuant to the First Class City Home Rule Act. The First Class City Home Rule Act, Act of April 21, 1949, P.L. 665, 53 P.S. §13101. The unambiguous terms of the statute do not include amendments to the City of Philadelphia's Home Rule Charter. Intervenors will further argue that were this Court to determine that the reference to "county charter" in § 2641(c) is ambiguous, the proper interpretation is that the legislature did not intend to include the City of Philadelphia's Home Rule Charter in that reference and the Petition should be denied.

8. The City Commissioners respectfully request the Court to grant their Application for Leave to Intervene, and accept for filing the attached Preliminary Objections to the Petition, with brief in support thereof. *See* Exhibit A.

WHEREFORE, the City Commissioners pray the Court grant them Leave to Intervene as Party Respondents and accept for filing the attached Preliminary Objections to the Petition, with brief in support thereof.

Respectfully submitted,

CITY OF PHILADELPHIA LAW DEPARTMENT  
SOZI PEDRO TULANTE, CITY SOLICITOR

*/s/ Benjamin H. Field*

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# **EXHIBIT “A”**

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**PRELIMINARY OBJECTION TO PETITION FOR REVIEW IN THE  
NATURE OF MANDAMUS**

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CITY OF PHILADELPHIA LAW DEPARTMENT  
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DATED: April 5, 2017

The City Commissioners of the City of Philadelphia, Anthony Clark, Al Schmidt, and Lisa Deeley, in their official capacities (the “City Commissioners”), file this Preliminary Objection to Petition for Review in the Nature of Mandamus pursuant to Pa.R.A.P. 1516(b) and in support, state as follows:

1. On March 27, 2017, Petitioners initiated this action in mandamus to compel Respondent, President Judge Sheila A. Woods-Skipper of the Court of Common Pleas of Philadelphia, to appoint judges or electors of the county to serve in the stead of the City Commissioners for the primary election for May 16, 2017 (the “Petition”).

2. Petitioners did not name the City Commissioners as parties to the Petition.

3. The City Commissioners comprise a three-member board of elected officials responsible for administering voter registration and conducting Philadelphia elections. *See* Phila. Code § 2-112.

4. Petitioners maintain that pursuant to 25 P.S. § 2641(c), the President Judge of the Court of Common Pleas of Philadelphia must appoint judges or electors, instead of the City Commissioners, “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...”

5. Because the relief sought in the Petition would result in the elimination of the City Commissioners' statutory responsibility for overseeing the May 16, 2017 primary election and, as Petitioners argue more generally, would result in the elimination of the City Commissioners' statutory role in overseeing elections in Philadelphia for nearly 75% of elections, the City Commissioners have applied for party status in this matter as Intervenors.

### **PRELIMINARY OBJECTION FOR LEGAL INSUFFICIENCY**

#### **(DEMURRER)**

6. The City Commissioners hereby incorporate the preceding paragraphs of this Preliminary Objection.

7. This Preliminary Objection is filed pursuant to Pa.R.A.P. 1516(b), which specifically provides for the filing of Preliminary Objections and refers to the Rules of Civil Procedure. Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure provides for the filing of a Preliminary Objection for the legal insufficiency of a pleading (demurrer).

8. A demurrer should be granted where there is no "doubt from the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief." Firing v. Kephart, 353 A.2d 833, 835 (Pa. 1976).

9. For the reasons set forth in the attached Brief in Support of Preliminary Objection to Petition for Review in the Nature of Mandamus,

Petitioners cannot prove facts sufficient to establish their right to the mandamus relief requested. Philadelphia's Home Rule Charter is a City Charter, not a county charter and the Philadelphia City Commissioners have no role in the legislative process. The language of the Election Code is unambiguous and requires that Petitioners' requested mandamus relief be denied. And, were the statute to be deemed ambiguous and the intent of the legislature is considered, the Petition must also be denied because the intent supports the President Judge's practices which the Petition seeks mandamus relief to overturn.

WHEREFORE, the City Commissioners respectfully request that the Petition be denied.

Respectfully submitted,

CITY OF PHILADELPHIA LAW DEPARTMENT  
SOZI PEDRO TULANTE, CITY SOLICITOR

*/s/ Benjamin H. Field*

---

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**BRIEF IN SUPPORT OF PRELIMINARY OBJECTION TO PETITION  
FOR REVIEW IN THE NATURE OF MANDAMUS**

---

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Intervenors, the Philadelphia City Commissioners, Anthony Clark, Al Schmidt, and Lisa Deeley in their official capacities, by and through their attorneys, hereby submit this Brief in support of their Preliminary Objection in Response to Petition For Review In The Nature of Mandamus and request that this Court deny the Petition.

## **I. INTRODUCTION**

Petitioners, the Committee of Seventy, Philadelphia 3.0, Jordan Strauss, Brian Krisch, and Katherine Rivera's Mandamus Petition raises a straightforward question: must this Court order the Honorable Sheila A. Woods-Skipper, President Judge of the Court of Common Pleas of Philadelphia, to do what neither she nor prior President Judges have ever previously done: appoint a substitute Board of Elections to serve for the May 16, 2017 primary election instead of the Philadelphia City Commissioners solely because there is a ballot question regarding an amendment to the Philadelphia Home Rule Charter.

According to the clear and unambiguous text of the Election Code, the answer is no; moreover, this conclusion is consonant with the intent and meaning of the relevant provisions were the Court to deem the provisions ambiguous and engage in statutory interpretation.

Pursuant to the Pennsylvania Election Code and The City of Philadelphia's Home Rule Charter, elections in Philadelphia are overseen by the

three City Commissioners who are independently elected officials. The City Commissioners serve as the Board of Elections, administering and certifying elections in Philadelphia, with the exception of when they are candidates themselves. In those elections only, the President Judge appoints replacements to oversee the election pursuant to a clear mandate in the Election Code. A separate provision of the Election Code provides that when a *county* charter is being amended, county commissioners similarly must be replaced. The logic behind this is clear – county commissioners generally are the county’s legislators and, therefore, would be tasked with overseeing an election regarding legislation they proposed. The provision at issue in the Mandamus Petition reflects the General Assembly’s determination that this is a conflict which requires specific remedies in the Election Code. But Philadelphia has a *city charter*, not a county charter, and the City Commissioners have no role in the legislative process. As a result, neither the text nor the intent of the Pennsylvania Election Code provision relied upon by Petitioners provides for the replacement of the City Commissioners for the upcoming primary election.

Of course the Mandamus Petition is not really about conflicts of interest. Rather, Petitioners’ goal is to “render [the Philadelphia City Commissioners] unable to do their job and oversee elections.” Petitioners think the Philadelphia City Commissioners are “obsolete” and should be replaced by

“appointed and experienced professionals to oversee, administer, and modernize Philadelphia’s elections.” [Petition at ¶5]. This Petition is an attempt to supplant the judgment of the Pennsylvania and Philadelphia legislatures – which have provided for the current structure under which Philadelphia’s elections are overseen – with the Committee of Seventy’s and Philadelphia 3.0’s determination that another system would be better. The language of the Election Code is unambiguous and the intent is consonant with the Petition being denied. This Court should not indulge Petitioners’ efforts to substitute their interpretation for the will of the Commonwealth’s and the City’s legislative bodies.

## **II. PROCEDURAL AND FACTUAL HISTORY**

This Mandamus Action was originated by Petitioners on March 27, 2017 with the filing of an Application for Leave to File Original Process, along with the Petition for Review in the Nature of Mandamus (the “Petition”). The Petition names the Honorable Sheila A. Woods-Skipper, in her official capacity as President Judge of the Court of Common Pleas of Philadelphia, as Respondent. Intervenors maintain that they have a direct interest in this Mandamus Action as it advocates for an interpretation of the Pennsylvania Election Code that would deny

Intervenors the ability to oversee nearly 75% of the elections in Philadelphia.<sup>1</sup> Indeed, because Intervenors have responsibilities pursuant to the Election Code and the City of Philadelphia’s Home Rule Charter, they contend that they are indispensable parties to this Action. On April 5, 2017, Intervenors filed an Application to Intervene, Preliminary Objection, and this Brief in Support of Preliminary Objection with this Court.

Petitioners initiated this Mandamus Action as another step in the Committee of Seventy’s nearly decade long effort to eliminate the Philadelphia City Commissioners’ positions. In 2009, the Committee of Seventy published a report, “Needless Jobs: Why Six Elected City Positions Should Die.”<sup>2</sup> In 2016, the Committee of Seventy issued a press release calling for “an end to elected City Commissioners.”<sup>3</sup> It then joined with Philly 3.0 to create a coalition calling on City Council to create a new Department of Elections.<sup>4</sup> Apparently impatient with

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<sup>1</sup> Petitioners state that amendments to Philadelphia’s Home Rule Charter have been on the ballot in “nearly 75%” of elections in the recent past. Although Intervenors’ records differ and they do not concede the exact number, for the purposes of their Preliminary Objection, Intervenors agree that such amendments have become a frequent occurrence and have been on the ballot in over 50% of recent elections.

<sup>2</sup> <https://www.seventy.org/uploads/files/624204592740589766-954823571103424434-needless-jobs-why-six-elected-city-positions-should-die-3-16-2009.pdf> (last accessed April 5, 2017).

<sup>3</sup> <https://www.seventy.org/publications/2016/01/22/committee-of-seventy-calls-for-an-end-to-elected-city-commissioners> (last accessed, April 5, 2017).

<sup>4</sup> <https://www.seventy.org/publications/2016/05/04/broad-based-coalition-calls-for-city-council-to-create-a-new-department-of-elections> (last accessed, April 5, 2017). Philly 3.0’s efforts to try and eliminate the City Commissioners’ positions through legislative reform are discussed in a

the fact that their effort to eliminate the City Commissioners' positions through legislation had gained no traction, Petitioners tried to convince Respondent that she should replace the Commissioners anytime there is an amendment to Philadelphia's Home Rule Charter on the ballot.<sup>5</sup> Subsequently, they announced that they would continue this effort through this litigation. As their petition makes clear, this litigation is part and parcel of their effort to eliminate the Commissioners' positions. See Petition at ¶ 25 (“In an effort to reform Philadelphia elections, Petitioners Seventy and Philadelphia 3.0 . . . advocat[e] for the replacement of the City Commissioners with appointed, experienced professionals to oversee, administer, and modernize Philadelphia's elections”); id. at ¶ 29 (stating that if this Mandamus Petition is successful, the City Commissioners would “be precluded from overseeing elections in Philadelphia nearly 75% of the time”).

For the purposes of Intervenor's Preliminary Objection only, Intervenor agrees with Petitioners' factual allegations necessary for this Court to resolve this matter: that an amendment to the City of Philadelphia's Home Rule

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May 2016 Philadelphia Magazine article. See [http://www.philly.com/philly/news/politics/20160509\\_Philadelphia\\_3\\_0\\_both\\_a\\_PAC\\_and\\_no\\_nprofit\\_shows\\_some\\_nimble\\_moves.html](http://www.philly.com/philly/news/politics/20160509_Philadelphia_3_0_both_a_PAC_and_no_nprofit_shows_some_nimble_moves.html) (last accessed April 5, 2017). They also sought signatures on a petition via Change.org called Roadmap to Reform that asked City Council to address this issue. See <https://www.change.org/p/darrell-clarke-abolish-the-philadelphia-city-commissioner-s-office/u/16522406> (last accessed April 5, 2017).

<sup>5</sup> See Petitioners' Application for Leave to File Original Process at ¶ 11.

Charter appears on the ballot in the upcoming May Primary election and that Respondent has not appointed substitutes for the City Commissioners to act as the Board of Elections for that election. Intervenors do not concede the remaining allegations, and specifically deny Petitioners' baseless allegations that cast aspersions at the City Commissioners and the election process in Philadelphia. As Petitioners' allegations other than the basic facts admitted above are not required for this Court's determination of the Mandamus Petition, Intervenors address such allegations herein only to the extent they are relevant to Intervenors' arguments.

### **III. ARGUMENT**

#### **A. STANDARD OF REVIEW**

This Court should grant Intervenors' Preliminary Objection in the form of demurrer where there is no "doubt from the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief." Firing v. Kephart, 353 A.2d 833, 835 (Pa. 1976). To obtain a writ of mandamus from this Court, Petitioners must be able to demonstrate that "[t]hey have a clear legal right, that the [President Judge] has a corresponding duty, and no other adequate and appropriate remedy at law exists." Fagan v. Smith, 41 A.3d 816, 818 (Pa. 2012). Because the Pennsylvania Election Code does not require the President Judge to appoint "judges or electors . . . to serve in the stead of the

commissioners,” 25 PA. STAT. ANN. § 2641(c), Petitioners can establish neither that they have a clear legal right nor that the President Judge has a duty. As a result, the Preliminary Objection should be granted and the Petition denied.<sup>6</sup>

**B. THE PETITION MUST BE DENIED BECAUSE THE STATUTORY LANGUAGE IS UNAMBIGUOUS**

The clear and unambiguous language of the Pennsylvania Election Code demonstrates that Petitioners’ assertion that the Philadelphia City Commissioners should have been prevented from overseeing numerous prior elections (but were not) and must be replaced as the Board of Elections for the upcoming primary election because there is a ballot question related to the City of Philadelphia’s Home Rule Charter is wrong. The Petition for Mandamus relies on Section 301(c) of the Election Code, 25 PA. STAT. ANN. §2641(c) (West 2016),<sup>7</sup> which states, in relevant part, that “[w]henver there appears on the ballot a

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<sup>6</sup> Intervenors note that Petitioners have only previously sought to raise this issue with the President Judge through letter requests despite the request of the President Judge’s Chambers that this be raised in a manner which would permit the President Judge to consider arguments regarding the Pennsylvania Election Code’s requirements and determine her obligations thereunder. Petitioners never petitioned the Court of Common Pleas regarding the arguments they now make. While this may not be a situation that requires rejecting the petition outright because the President Judge has not affirmatively “refus[ed] to act in the requested way” as the result of an “erroneous interpretation of the law,” Volunteer Firemen's Relief Ass'n of City of Reading v. Minehart, 203 A.2d 476, 479 (Pa. 1964), Petitioners have nonetheless deprived the President Judge of the opportunity to fully consider these arguments and this Court of a developed record.

<sup>7</sup> Although commonly referred to as “Section 301(c)” when referring to the Pennsylvania Election Code, to ensure clarity and conform to the statutory section number, references hereafter will be to Section 2641(c).

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.” Id. (emphasis added). As discussed below, the City of Philadelphia’s Home Rule Charter is not a “county Home Rule Charter” and, therefore, the statute does not require the President Judge to appoint a substitute Board of Elections for the May primary. This Court need look no further than the clear and unambiguous language of the statute to decide this matter.

1. The City of Philadelphia’s Home Rule Charter Is Not a County Home Rule Charter.

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Petitioners argue that the statutory language “Home Rule Charter for the *county* or amendments to an existing *county* Home Rule Charter” refers to county Charters and the City of Philadelphia’s Charter because, in their view, the City of Philadelphia’s Home Rule Charter “is a ‘county’ home rule charter.” Petition at ¶ 55. But as the statutory authority for, and history of, the City of Philadelphia’s Home Rule Charter make clear, it is a *city charter*. Petitioners’ rhetorical gloss that for the purposes of the Election Code, “the City of Philadelphia and the County of Philadelphia are now a hair that cannot be split,” Petition at ¶ 57, cannot change this obvious conclusion.

Intervenors agree with Petitioners that prior to 1951, Philadelphia’s City and County governments operated independently as separate governmental entities. Petition at ¶ 56b.; see generally, Carrow v. City of Philadelphia, 89 A.2d 496, 498 (Pa. 1952) (discussing the impact of the “new City Charter under the comprehensive authority granted to the City by the First Class City Home Rule Act” on county employees); Lennox v. Clark, 93 A.2d 834, 838 (Pa. 1953) (discussing the cessation of county government functions through the City-County Consolidation Amendment). The determinative fact for consideration of the Petition, however, is the adoption of the Philadelphia Home Rule Charter and whether it is a “city” charter or a “county” charter.

The Philadelphia Home Rule Charter was adopted pursuant to the “First Class City Home Rule Act,” 53 P.S. § 13101, *et seq.*, which allows “[a]ny *city* of the first class to “adopt a charter for its own government.” First Class City Home Rule Act, Act of April 21, 1949, P.S. 665, 53 P.S. § 13101 (emphasis added) (the “Home Rule Act”).<sup>8</sup> The electors of Philadelphia approved a Home Rule Charter on April 17, 1951, effective January 7, 1952. Clarke v. Meade, 104 A.2d 465 (Pa. 1954). The Philadelphia Home Rule Charter makes clear that it is a *city* charter governing the powers and authority of the City of Philadelphia. See

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<sup>8</sup> A separate statute provides the mechanism by which counties and municipalities other than “cities of the first class and counties of the first class” may adopt home rule charters. See 53 PA. CONS. STAT. ANN. § 2901 *et. seq.* (West 2016).

Philadelphia Home Rule Charter Section 1-100, 351 Pa. Code §1.1-100 (“The City’s Powers Defined . . . Pursuant to [the First Class City Home Rule Act], the City of Philadelphia (hereinafter in this charter called ‘the City’) shall have and may exercise all powers and authority of local self-government. . . .”).

To address issues presented by the overlap of City and County offices and functions, on November 6, 1951, a constitutional amendment known as the City-County Consolidation Amendment was adopted. This abolished County government in Philadelphia. Pa. Const. Art. IX, § 13 (formerly Art. 14, § 8) provides *inter alia*, that “(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”; “(c) All laws applicable to the county of Philadelphia shall apply to the city of Philadelphia”; and “(f) Upon adoption of this amendment all county officers shall become officers of the city of Philadelphia \* \* \*.” Id. As courts have noted in various circumstances, this abolishment did not destabilize the City of Philadelphia’s status as an autonomous entity governed by a *city charter*. See, e.g., Carrow, 89 A.2d at 498 (referring to “the new City Charter [established] under the comprehensive authority granted to the city by the First Class City Home Rule Act”); Lennox, 93 A.2d 834 (“It will be further noted that all the functions of county government, that is to say, all the activities or duties theretofore performed

by the county officers, are *thenceforth* to be performed by the city; the city is to take over *then and there*, as part of its own government, the performance of the functions of the county government.”) (italics in original); *id.* at 840-41 (opining that former county officers performing some duties for the Commonwealth and “to that extent . . . acting in the capacity of an officer, agent or employee of the State,” did not “conflict with their general status as *city* officers”) (italics in original).

In short, the Philadelphia Home Rule Charter is a City Charter and there has never been a charter for the county of Philadelphia.

2. This Court Must Follow The Letter of § 2641(c) of the Election Code Which Only Refers To County Home Rule Charters.

Under Pennsylvania law, “[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. CONS. STAT. ANN. § 1921(b) (West 2016). Section 2641(c) is not ambiguous, this provision and the plain language of the statute control, and no other canon of statutory construction need be applied.

Section 2641(c) of the Pennsylvania Election Code addresses what happens when “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.” 25 PA. STAT. ANN. § 2641(c), (emphasis added). And “county” is a defined term: “[t]he word “county” shall mean any county of this

Commonwealth.” 25 PA. STAT. ANN. § 2602(b) (West 2012). The General Assembly also added a specific definition for “municipality” in 1998. Id. § 2602(z.4). As the plain language of the statute makes clear, for the relevant part of 2641(c) to require the President Judge to appoint substitutes to act in place of county commissioners, there must be an amendment to a *county charter*. There is not; the Petition concerns a ballot question related to the City Charter.

The mandate that courts may not disregard unambiguous statutory language is clear and oft-stated. See, e.g., Warrantech Cons. Products Svcs, Inc. v. Reliance Ins., 96 A.3d 346, 354 (Pa. 2014) (“Only when the words of the statute are not explicit may a court resort to the rules of statutory construction, including those provided in 1 Pa.C.S. § 1921(c).”); Hunt v. Pennsylvania State Police of Com., 983 A.2d 627, 631–32 (Pa. 2009) (noting that “our Court has found that the best indication of the General Assembly’s intent is the plain language of the statute,” and that when the words of a statute are clear and unambiguous, there is no need to look beyond the plain meaning of the statute “under the pretext of pursuing its spirit”) (citations omitted). Ambiguity can only be said to exist “when language is subject to two or more reasonable interpretations and not merely because two conflicting interpretations may be suggested.” Com. v. Rieck Inv. Corp., 213 A.2d 277, 282 (Pa. 1965); see also New Castle County v. Hartford Accident & Indem. Co., 970 F.2d 1267 (3d Cir.1992). As a matter of statutory

interpretation, in addition to focusing on what a statute says, “[o]ne must also listen attentively to what it does not say.” Kmonk–Sullivan v. State Farm Mut. Auto. Ins. Co., 788 A.2d 955, 962 (2001). Finally, even where a court agrees that a statute should be read to imply the meaning requested, it may not take such liberties where the statutory language is clear. “If the plain language of the statute provides no such restriction, it is not for the courts to add such a restriction but a matter for legislative action.” Rieck, 213 A.2d at 282 (noting that this Court has held “it is not for us to legislate or by interpretation to add to legislation, matters which the legislature saw fit not to include”) (citation omitted).

There is no ambiguity to the reference to “county Home Rule Charter.” “County” means just that and the 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 – it is the charter for the government of the City of Philadelphia. This Court’s analysis may start and stop here. Had the General Assembly intended to include amendments to the City of Philadelphia’s Home Rule Charter in § 2641(c) (or, for that matter, any amendment to any other municipally created Home Rule Charter), it could have so provided. It did not. The text of the Election Code and the choice not to refer to a “city” charter are unambiguous and the plain language controls. As such, even if this Court were to agree with the intent behind Petitioners’ interpretation (it should not), this Court

may not substitute its interpretation for matters which the legislature did not include in Section 2641(c). Accordingly, the Petition for Mandamus must be denied.

C. EVEN IF § 2641(c) WERE AMBIGUOUS, THIS COURT SHOULD DENY THE PETITION TO PRESERVE THE INTENT OF THE LEGISLATURE

Petitioners' implicit argument is that the reference to "county Home Rule Charter" in Section 2641(c) is ambiguous and that this Court, employing the canons of statutory interpretation, should determine that the intent of the legislature was to sweep the City of Philadelphia's Home Rule Charter up into the reference to "county" and, therefore, that the President Judge must appoint substitutes for the City Commissioners anytime there is an amendment to the City Charter on the ballot.

Were there an actual ambiguity, this Court would be required to consider the factors set forth in 1 PA. CONS. STAT. ANN. § 1921(c), including "(1) The occasion and necessity for the statute; . . . (3) The mischief to be remedied; (4) The object to be attained; and (6) The consequences of a particular interpretation." As discussed below, even if Section 2641(c) were ambiguous (it is not), statutory interpretation would require that the Petition for Mandamus be denied.

1. The Relevant Provision of § 2641(c) Is Intended To Prevent A Legislative Body From Overseeing An Election Approving Legislation It Drafted

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As the Petition for Mandamus makes clear, President Judges in Philadelphia have never replaced the City Commissioners when an amendment to the City of Philadelphia Home Rule Charter is on the ballot.<sup>9</sup> Setting aside that the statutory language is unambiguous, this also makes sense given the clear intent of Section 2641(c). The first portion of Section 2641(c) requires the replacement of “county commissioners” when they are “a candidate for nomination or election to public office.” As Petitioners document, and Intervenors do not dispute, the President Judge has invoked this provision to replace the City Commissioners when they are on the ballot.<sup>10</sup> See Petition at ¶¶ 27, 51. The conflict a candidate

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<sup>9</sup> Indeed, the Petition identifies no such instance of the City Commissioners being replaced despite the fact that, by Petitioners’ count and under their argument, the President Judge would have to do so nearly 75% of the time. Petition at ¶ 29.

<sup>10</sup> Petitioners attempt to depict a tension between the President Judge historically relying on the first portion of Section 2641(c) but not invoking the second portion of this section for the May Primary election. There is none. Intervenors agree that for the purposes of the Election Code, a reference to “county commissioners” includes in its meaning the City Commissioners. See 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.”) As a result, when the City Commissioners are up for election, they must be replaced pursuant to the first portion of Section 2641(c). There is no tension between the City Commissioners being expressly included in the definition of “county commissioners” for the purposes of the Pennsylvania Election Code, while the term “county charter” means just that and does not include the City of Philadelphia’s Home Rule Charter. It bears note that while the inclusion of “City Commissioners” within references to “county commissioners” has been expressly addressed, Intervenors are aware of no similar provision that

for office would face in administering and certifying an election for that very same office is clear and squarely addressed by this provision. The second provision of Section 2641(c) mirrors this by addressing a similar conflict – where the same individuals who legislate an amendment to a charter (i.e. the legislative body) also would be responsible for supervising the vote on the legislation they drafted (and voted on already). And the inclusion and limitation of this second section of Section 2641(c) to “county” makes perfect sense because in counties, commissioners are generally tasked with the legislative function.<sup>11</sup>

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would compel the inclusion of the City of Philadelphia’s Home Rule Charter within a reference to “county charters.”

<sup>11</sup> See 25 PA. STAT. ANN. § 2641(b) (“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. . . .”). Petitioners argue that the inclusion of counties of the first class in this provision mandates that Philadelphia’s City Home Rule Charter be impliedly included in the reference to “county Home Rule Charter” in § 2641(c) because the reference in (b) “gives Philadelphia unique treatment.” See Petition at ¶ 53. It does no such thing. All (b) does is make clear that except for Philadelphia and any other county that has specifically provided for the appointment of the board of elections, the board of elections shall consist of county legislators. Similarly, subpart (c) does not single out Philadelphia, but rather sets a rule for all amendments to *county* charters. This makes sense as the general structure is that the amendments would be drafted by the county commissioners.

Petitioners’ argument that the fact that (c) was added in 1976, while (b) was amended in 1978, does not change the plain language of (c) nor does it indicate anything other than the legislative choice not to change (c) to include Philadelphia. First, Petitioners note that the Election Code continues to be amended. For example, the definition of “municipality” was amended in 1998. See 25 PA. STAT. ANN. §2602(z-4). But the General Assembly has not opted to amend the statute to include the Philadelphia City Home Rule Charter in § 2641(c). And second, that choice not to alter (c) may reflect a legislative determination that an appointed county election board could not be trusted to be impartial with respect to proposals that might be made by their appointing authorities (as distinct from Philadelphia where the City Commissioners are independently elected officials).

2. The Philadelphia City Commissioners Serve No Legislative Role And Are Not Conflicted By Amendments To The City Charter.

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Pursuant to the First Class City Home Rule Act, changes to the City's Charter must be approved by City Council. Home Rule Act, § 13106. The City Commissioners are elected officials that are entirely independent from City Council and have nothing to do with the legislative process for Charter changes;<sup>12</sup> rather, they oversee elections in which such changes represent a small part of the ballot.

Notably, after City-County consolidation abolished County government in Philadelphia, the General Assembly provided that, subject to the provisions of the City's Home Rule Charter, City Council has "full power to legislate with respect to the election, appointment, compensation, organization, abolition, merger, consolidation, powers, functions and duties of the . . . City Commissioners [and the] Registration Commission." Act of August 13, 1963 (P.L. 795, § 1), 53 PA. STAT. ANN. § 13132(c) (commonly known as the "City-County Consolidation Law") (West 2016). That Act further requires that the Philadelphia electorate approve such legislation for it to be effective. *Id.*; § 13132(d).

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<sup>12</sup> Section 1-101 of the City's Home Rule Charter makes clear that "[t]he legislative power of the City. . . shall be exclusively vested in and exercised by a Council," to be elected, organized and function as provided in the Charter. That Council is Philadelphia's City Council, not the City Commissioners.

Accordingly, the City-County Consolidation Law authorized the City to transfer functions performed by the City Commissioners and the Registration Commission to other City agencies, and to abolish those entities. But although the Registration Commission was abolished and its duties transferred to the City Commissioners, City Council reaffirmed the power and the structure of the City Commissioners. Phila. Code § 2-112(4) codifies the transfer and abolition of the Registration Commission while simultaneously providing that “[a]ll 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.” *Id.* Council duly submitted this proposal to the electorate (see Ordinance approved March 12, 1965, 1965 Ordinances p. 212), and the voters approved the proposal at the primary election held on May 18, 1965. In other words, both the legislative body in Philadelphia and its voters affirmed the intent that the City Commissioners remain a wholly independent body of elected officials who are not involved in the legislative process.

Perhaps recognizing that they cannot demonstrate the type of conflict clearly intended to be avoided by the relevant provision of Section 2641(c), Petitioners attempt to argue that specific types of amendments pose a conflict for the City Commissioners and should require that they be replaced to effectuate the intent of the Election Code. For instance, they argue that an amendment to the

City's general procurement practices permitting the award of contracts based on best value to the City poses a conflict for the City Commissioners because they are subject to the City's procurement practices. This argument lacks any support or merit. The Election Code does not set forth any standards for determining when a theoretical conflict rises to this level of requiring that the City Commissioners be replaced, indeed it makes no reference to this type of conflict at all (nor, for that matter, to the possibility that appointed replacements may be subject to the same attenuated conflicts). This silence reflects the plain language of the statute and intent of the legislature to ensure that county commissioners who are involved in the legislative process do not oversee public votes on legislative issues. Proposed amendments are drafted by City Council and are not the product of the City Commissioners. Elsewhere in Pennsylvania, county charter amendments likely would have been drafted by the county commissioners or by those appointing the county commissioners and, pursuant to the Election Code, those county commissioners would be conflicted out of overseeing the vote on the legislation.<sup>13</sup>

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<sup>13</sup> The second conflict which Petitioners reference – the ballot question seeking to get rid of “resign to run” -- was defeated. Petition at ¶ 38. In theory, the City Commissioners might have wanted this to pass, further undermining Petitioners' suggestion that they could or would have done something wrong. Rather, the City Commissioners did just what they were elected to do – ran the election irrespective of any individual preferences they may have had as voters.

3. The Statutory Intent And Implication of Petitioners' Request Require That the Petition Be Denied.

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Intervenors maintain that this Court need not consider the intent of the legislature. See 1 PA. CONS. STAT. ANN. § 1921(b). However, were this Court to determine it must interpret the statute, it would be required to consider the factors set forth in 1 PA. CONS. STAT. ANN. § 1921(c), including “(1) The occasion and necessity for the statute; . . . (3) The mischief to be remedied; (4) The object to be attained; and (6) The consequences of a particular interpretation.” As discussed below, even if Section 2641(c) were ambiguous (it is not), statutory interpretation would require that the Petition for Mandamus be denied.

This Court has described the occasion and necessity of the Election Code: “[t]he Pennsylvania Election Code was enacted to regulate the electoral process so that it is both orderly and fair.” Com. v. Wadzinski, 422 A.2d 124, 127 (Pa. 1980). And the necessity of Section 2641(c) is clear: it addresses two clear instances where members of a board of elections have a direct conflict between their other responsibilities and their ability to oversee a fair election. First, it prevents a commissioner from overseeing an election in which they are also a candidate on the ballot and, second, it prevents a commissioner from overseeing an election regarding legislation they drafted and/or approved.

The statute also requires that the Court consider “the mischief to be remedied.” See 1 PA. CONS. STAT. ANN. § 1921(c)(3). Petitioners argue that the Commissioners cannot be fair because there is an amendment on the ballot related to the City’s general procurement practices. As argued above, this poses no conflict as the City Commissioners had no involvement in the legislative process and certainly does not pose the type of conflict the Election Code sought to address. More generally, the “mischief” Petitioners believe they must remedy is the structure set in place through the Election Code and Philadelphia’s Home Rule Charter for the administration of elections in Philadelphia. They disagree with this structure and seek a broad rule – that the City Commissioners be replaced anytime there is an amendment on the ballot, irrespective of the content of that amendment. Their goal is to eliminate the City Commissioners, not to address conflicts that concerned the legislature. In other words, the “object” Petitioners seek to “attain,” 1 PA. CONS. STAT. ANN. § 1921(c)(4), is not the elimination of a conflict of interest, but rather the elimination of the Commissioners altogether.<sup>14</sup>

Petitioners’ avowed goals highlight that their requested interpretation would contravene the will of legislatures and voters and undermine the statutorily prescribed election processes in Philadelphia. See 1 PA. CONS. STAT. ANN. § 1921(c)(6) (setting forth as a factor for consideration the “consequences of a

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<sup>14</sup> See supra p. 4, and fn. 2, 3, 4.

particular interpretation”). According to Petitioners, were their interpretation endorsed by this Court, the City Commissioners would be substituted in nearly 75% of the elections in Philadelphia. The resultant substitute Election Boards appointed by the President Judge could undermine the orderliness of the election process and could raise further questions of fairness. Wadziniski, 422 A.2d at 127. Petitioners’ interpretation would also deprive the City and Commonwealth of the structure their legislatures and voters have created for elections. In other words, the Court would be interpreting one provision in the statute to address an alleged and attenuated conflict in a manner that undermines the most basic purpose of the Election Code. It should do no such thing. See Lehigh Valley Co-op. Farmers v. Com., Bureau of Employment Sec. Dep’t of Labor & Indus., 447 A.2d 948, 950 (Pa. 1982) (“Another required rule of statutory construction provides that in ascertaining legislative intent, the practical results of a particular interpretation may be considered. Also, the legislature cannot be presumed to intend an absurd or unreasonable result to follow from its enactments.”) (internal citations omitted).

4. The Legislature's Actions Demonstrate That The President Judge's Actions Reflect The Correct Interpretation of §2641(c)

As Petitioners argue, for at least fifteen years, neither Respondent nor any prior President Judge of the Philadelphia Court of Common Pleas has appointed a substitute Board of Elections when there is an amendment to the City of Philadelphia's Home Rule Charter on the ballot. See Petition at ¶28. Despite this, the General Assembly has not amended §2641(c) to cure what Petitioners see as an ambiguous – and misapplied – reference to “county”. The acceptance of the practice of the President Judges of the Court of Common Pleas undermines Petitioners' claim that the legislature intended the reference to a “county charter” to include the City of Philadelphia's Home Rule Charter and this Court should deny the Petition. See Mosley v. W.C.A.B. (City of Pittsburgh), 937 A.2d 607, 609–10 (Pa. Commw. Ct. 2007) (discussing the import of legislative inaction after judicial interpretations and citing Sun Home Health Visiting Nurses v. Workers' Compensation Appeal Board (Noguchi), 815 A.2d 1156 (Pa.Cmwlt. 2003), appeal denied, 837 A.2d 1179 (2003), 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).

#### IV. CONCLUSION

For all the reasons set forth above, Intervenors, the Philadelphia City Commissioners, request that this Court grant Intervenors' Preliminary Objection and deny the Petition for Review in the Nature of Mandamus.

Respectfully submitted,

CITY OF PHILADELPHIA LAW DEPARTMENT  
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