Exhibit 1

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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2 EAP 2023, 3 EAP 2023, 4 EAP 2023

LARRY KRASNER, in his official capacity as the District Attorney of Philadelphia;

Appellant,

v.

SENATOR KIM WARD, in her official capacity as Interim President Pro Tempore of the Senate; REPRESENTATIVE TIMOTHY R. BONNER, in his official capacity as an impeachment manager; REPRESENTATIVE CRAIG WILLIAMS, in his official capacity as an impeachment manager; REPRESENTATIVE JARED SOLOMON, in his official capacity as an impeachment manager; and JOHN DOES, in their official capacities as members of the SENATE IMPEACHMENT COMMITTEE;

Appellees.

BRIEF FOR APPELLEES REPRESENTATIVES TIMOTHY R. BONNER AND CRAIG WILLIAMS

Appeal from the Order of December 30, 2022
of the Commonwealth Court at No. 563 MD 2022

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I. COUNTERSTATEMENT OF JURISDICTION

This Court has exclusive jurisdiction over appealable orders of the Commonwealth Court in matters commenced in that court's original jurisdiction. 42 Pa. C.S.A § 723(a).

Although this case was filed in the Commonwealth Court's original jurisdiction, Appellees herein—Representatives Timothy R. Bonner and Craig Williams ("Impeachment Managers")—dispute that the courts have jurisdiction to decide the matters in this appeal. *See In re Investigation by Dauphin Cnty. Grand Jury, Sept., 1938*, 2 A.2d 802, 803 (Pa. 1938).[1] This Court, of course, has jurisdiction to review the lower court's order and decide if it acted within its jurisdiction.

II. COUNTERSTATEMENT OF THE ORDER IN QUESTION[2]

The Commonwealth Court's Order states:

> AND NOW, this **30th** day of **December, 2022**, upon consideration of the Preliminary Objections of Respondent Representative Timothy R. Bonner, in his official capacity as an impeachment manager, and Respondent Representative Craig

[1] Unless otherwise noted, all citations in this brief omit citations to other authority and footnotes, and all quotations omit internal quotations.

[2] Although Pa.R.A.P. 2115(a) provides that the "text of the order...from which an appeal has been taken...shall be set forth verbatim immediately following the statement of jurisdiction," D.A. Krasner's brief only sets forth part of the order.

Williams, in his official capacity as an impeachment manager (collectively Impeachment Managers), the Application for Summary Relief filed by Petitioner Larry Krasner, in his official capacity as the District Attorney of Philadelphia (District Attorney), the Cross-Application for Summary Relief (Cross-Application) filed by Respondent Senator Kim Ward, in her official capacity as Interim President Pro Tempore of the Senate (Interim President), and the Application for Leave to Intervene (Intervention Application) filed by Proposed Intervenor Senator Jay Costa, in his official capacity (Proposed Intervenor), and the responses thereto, it is hereby ORDERED:

1. Interim President's Cross-Application is DENIED regarding the claim that the Pennsylvania Senate and the Senate Impeachment Committee are indispensable parties to this matter, as Interim President's interest in this matter is indistinguishable from that of the Senate as a whole, and of the Committee, and her involvement here has positioned her to adequately defend and protect those parties' interests. *See City of Philadelphia v. Com.*, 838 A.2d 566, 581-85 (Pa. 2003).

2. Respondents John Does, in their official capacities as members of the Senate Impeachment Committee, are dismissed as parties to this action. *See* Pa. R.Civ.P. 2005(g).

3. Impeachment Managers' preliminary objection as to the justiciability of the claims made by District Attorney in his Petition for Review (PFR) is OVERRULED, as District Attorney raises constitutional challenges to the impeachment process that are fully justiciable by this Court. *See Sweeney v. Tucker*, 375 A.2d 698, 711 (Pa. 1977); *In re Investigation by Dauphin Cnty. Grand Jury, Sept., 1938*, 2 A.2d 802, 803 (Pa. 1938); *cf.* 42 Pa. C.S. § 7541(a).

4. Impeachment Managers' preliminary objection as to District Attorney's standing is OVERRULED, as District Attorney is an aggrieved party at this stage. *See Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 488-89 (Pa. 2021); *Americans for Fair Treatment, Inc. v. Philadelphia Fed'n of Teachers*, 150 A.3d 528, 533 (Pa. Cmwlth. 2016).

5. Impeachment Managers' preliminary objection as to the ripeness of District Attorney's claims is OVERRULED, as District Attorney's claims raise legal and constitutional issues that do not require further development of the factual record. *See Robinson Twp., Washington Cnty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013).

6. Interim President's Cross-Application is DENIED regarding the ripeness of District Attorney's claims. *See id.*

7. District Attorney's Application for Summary Relief is DENIED, and Interim President's Cross-Application is GRANTED, regarding Count I of the PFR, as the General Assembly's power to impeach and try a public official is judicial in nature and, thus, is not affected by the adjournment of the General Assembly or the two-year span of each General Assembly iteration's legislative authority. *See Ferguson v. Maddox*, 263 S.W. 888, 890 (Tex. 1924); *Com. ex rel. Att'y Gen. v. Griest*, 46 A. 505, 506 (Pa. 1900); *In re Opinion of Justs.*, 14 Fla. 289, 297-98 (1872); *accord Mellow v. Pizzingrilli*, 800 A.2d 350, 359 (Pa. Cmwlth. 2002).

8. District Attorney's Application for Summary Relief is DENIED, and Interim President's Cross-Application is GRANTED, regarding Count II of the PFR, as, in keeping with our extant corpus of case law, all public officials throughout the Commonwealth are subject to impeachment and trial by the General Assembly, regardless of whether they are local or state officials. *See Burger v. Sch. Bd. of McGuffey Sch. Dist.*, 923 A.2d 1155, 1162-64 (Pa. 2007); *id.* at 1162 n.6; *S. Newton Twp. Electors v. S. Newton Twp. Sup'r, Bouch*, 838 A.2d 643 (Pa. 2003); *Allegheny Inst. Taxpayers Coal. v. Allegheny Reg'l Asset Dist.*, 727 A.2d 113 (Pa. 1999); *In re Petition to Recall Reese*, 665 A.2d 1162 (Pa. 1995); *Com. ex rel. Specter v. Martin*, 232 A.2d 729, 733-39 (Pa. 1967); (plurality opinion); *id.* at 743-44 (Eagen, J., concurring in part); *id.* at 753-55 (Musmanno, J., separate opinion); *Houseman v. Com. ex rel. Tener*, 100 Pa. 222, 230-31 (1882).

9. District Attorney's Application for Summary Relief is GRANTED, and Interim President's Cross-Application is DENIED, regarding Count III of the PFR, as none of the Amended Articles of Impeachment satisfy the requirement imposed by Article VI, Section 6 of the Pennsylvania Constitution that impeachment charges against a public official must allege conduct that constitutes what would amount to the common law crime of "misbehavior in office," *i.e.*, failure to perform a positive ministerial duty or performance of a discretionary duty with an improper or corrupt motive, as well as because Article I and VII improperly challenge District Attorney's discretionary authority, and Articles III, IV, and V unconstitutionally intrude upon the Supreme Court's exclusive authority to govern the conduct of all attorneys in this Commonwealth, including the District Attorney. *See Com. v. Clancy*, 192 A.3d 44, 53 (Pa. 2018); *Com. v. Brown*, 708 A.2d 81, 84 (Pa. 1998); *Com. v. Stern*, 701 A.2d 568, 571 (Pa. 1997); *In re Braig*, 590 A.2d 284, 286-88 (Pa. 1991); *Com. v. Sutley*, 378 A.2d 780, 783 (Pa. 1977); *Com. ex rel. Specter v. Bauer*, 261 A.2d 573, 576 (Pa. 1970); *Martin*, 232 A.2d at 736; *Com. v. Hubbs*, 8 A.2d 618, 620-21 (Pa. Super. 1939); 16 P.S. § 1401(o).

10. Proposed Intervenor's Intervention Application is GRANTED. *See* Pa. R.Civ.P. 2327(4); *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs.*, 225 A.3d 902, 911 (Pa. Cmwlth. 2020).

Opinion to follow.

(Appendix A) (emphases in original).

On January 12, 2023, the Commonwealth Court issued an unreported Memorandum Opinion in support of its Order (the "lead opinion"), and Concurring and Dissenting Opinions were issued the same

day (collectively attached as Appendix B). *See also Krasner v. Ward*, No. 563 M.D. 2022, 2023 WL 164777 (Pa. Cmwlth. Jan. 12, 2023).

III. Counterstatement of the Scope and Standard of Review

Impeachment Managers challenge those aspects of the Commonwealth Court's Order of December 30, 2022 that (1) denied their preliminary objections to Counts I through III of D.A. Krasner's petition for review ("PFR") on grounds of nonjusticiability and lack of ripeness (paragraphs 3 and 5 in the Order) and (2) granted his application for summary relief ("ASR") on Count III (paragraph 9 in the Order). Impeachment Managers also oppose D.A. Krasner's appeal denying his ASR on Counts I and II of his PFR (paragraphs 7 and 8 in the Order).

"Justiciability questions"—including whether a case raises nonjusticiable political questions or is ripe for decision—"are issues of law, over which...[this Court's] standard of review [on preliminary objections] is *de novo* and the scope of review is plenary." *Robinson Twp., Washington Cnty. v. Com.*, 83 A.3d 901, 916-17 (Pa. 2013). On review of a decision overruling preliminary objections to a petition for review, this Court must accept as true all well-pleaded material facts set forth therein, as well as all inferences fairly deducible from those facts. *Id.* at 917.

As this Court has described the scope and standard of its review of an application for summary relief:

> [A]n application for summary relief may be granted if a party's right to judgment is clear and no material issues of fact are in dispute….Thus, in evaluating the Commonwealth Court's decision to grant summary relief, we examine whether there is any genuine issue of material fact and whether the moving party is entitled to relief as a matter of law. In doing so, we must view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.…Where there is no dispute as to any material issues of fact, we must determine whether the lower court committed an error of law in granting summary relief….As with all questions of law, our scope of review is plenary.

Pennsylvania Med. Soc. v. Dep't of Pub. Welfare of Com., 39 A.3d 267, 276-77 (Pa. 2012).

IV. Counterstatement of the Questions Involved

A. Do the Articles of Impeachment carry over from the 206th General Assembly to the 207th General Assembly?

The Commonwealth Court agreed.

B. Is D.A. Krasner subject to impeachment by the General Assembly as a civil officer under Article VI, § 6 of the Constitution?

The Commonwealth Court agreed.

C. Did the Commonwealth Court err in overruling Impeachment Managers' preliminary objection that Count III of the PFR raises nonjusticiable political questions inappropriate for judicial review?

The Commonwealth Court disagreed.

D. Did the Commonwealth Court err in overruling Impeachment Managers' preliminary objection that Count III of the PFR raises questions that are not ripe for judicial review?

The Commonwealth Court disagreed.

E. Did the Commonwealth Court err in granting the ASR on Count III on the basis that none of the Articles allege conduct that constitutes what would amount to the common law crime of misbehavior in office?

The Commonwealth Court disagreed.

F. Did the Commonwealth Court err in granting the ASR on Count III on the basis that Articles III, IV, and V unconstitutionally intrude upon this Court's exclusive authority to govern the conduct of all attorneys in this Commonwealth?

The Commonwealth Court disagreed.

G. Did the Commonwealth Court err in granting the ASR on Count III on the basis that Article I and VII improperly challenge District Attorney's discretionary authority?

The Commonwealth Court disagreed.

V. COUNTERSTATEMENT OF THE CASE

Despite that "[t]he statement of the case shall not contain any argument" and that "[i]t is the responsibility of appellant to present in the statement of the case a balanced presentation of the history of the proceedings and the respective contentions of the parties," Pa.R.A.P. 2117(b), D.A. Krasner's statement of the case inappropriately asserts legal argument as fact[3] and relies on documents outside the record.[4]

A. Form of Action

This is a civil action for declaratory relief that D.A. Krasner filed in the original jurisdiction of the Commonwealth Court to stop an impeachment trial from proceeding against him in the Pennsylvania Senate after he had been impeached by the House of Representatives.

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[3] *See, e.g.,* D.A.'s Brief at 11 ("[Impeachment] Article VI is conclusory and vague."); 15 ("Section 6's plain text and legislative history of the constitutional provisions demonstrate that Article VI does not apply to local officials."), 17 n.3 ("The Commonwealth Court's December 30 Order correctly decided the other issues before the Court[.]").

[4] *See, e.g.,* D.A.'s Brief at 9 n.1 (asserting that "[t]he Select Committee issued three reports" and, characterizing the reports for purposes of advocacy, stating "none recommended District Attorney Krasner's impeachment," even though none of the reports are in the record).

B. Brief Counterstatement of Procedural History

On December 2, 2022, D.A. Krasner filed both a PFR (R. 1a-165a) and an ASR and supporting brief (R. 166a-222a) seeking declaratory relief effectively to stop impeachment proceedings that had been initiated against him by the House from continuing in the Senate. D.A. Krasner sought relief against Impeachment Managers, Senator Ward, Representative Jared Solomon (a third impeachment manager), and "John Does" in their official capacities as members of the Senate Impeachment Committee. In both his PFR and his ASR, D.A. Krasner asserted three claims: (1) that the Articles did not survive the adjournment *sine die* of the 206th General Assembly's legislative term ("Count I"); (2) that he is not a "civil officer" subject to impeachment by the General Assembly ("Count II"); and (3) that the Articles fail to allege conduct that constitutes "any misbehavior in office" ("Count III"). (R. 18a-33a, R. 172a, R. 189a-220a)

On December 12, 2022, Impeachment Managers filed preliminary objections to the PFR, asserting, *inter alia*, that Counts I and III raised nonjusticiable political questions and Counts II and III were not ripe for judicial review. (R. 242a-308a) On December 16, 2022, Impeachment Managers filed their opposition to the ASR, incorporating by reference their jurisdictional arguments and addressing the merits. (R. 309a-356a)

Senator Ward filed an answer to the PFR on December 12, 2022 (R. 223a-241a) and a response to the ASR and a cross-ASR on December 16, 2022. (R. 357a-570a)

On December 21, 2022, D.A. Krasner filed his responses to Impeachment Managers' preliminary objections and Senator Ward's cross-ASR. (R. 571a-676a)

C. Determination of the Commonwealth Court and Related Opinions

In its December 30, 2022 Order, the Commonwealth Court denied all the preliminary objections; denied D.A. Krasner's ASR and granted Senator Ward's cross-ASR on Counts I and II; and granted D.A. Krasner's ASR and denied Senator Ward's cross-ASR on Count III. (Appendix A).

The Order was signed by Judge Ellen Ceisler and further noted, "**Opinion to follow.**" (Appendix A at 5) (emphases in original). The Order did not identify which of the other judges deciding the case (President Judge Renée Cohn Jubelirer and Judges Patricia A. McCullough and Michael H. Wojcik) joined in the Order; nor did it note any dissents.

On January 12, 2023, the Commonwealth Court issued an unreported "Memorandum Opinion" authored by Judge Ceisler, again without identifying which other judges joined the opinion. (Appendix B at 1-45). Judge Wojcik issued a separate "Concurring Opinion," effectively

reconsidering his earlier conclusion on part of Count III. (Appendix B at MHW-1-6). Judge Wojcik stated that, "upon further reflection," Impeachment Articles I, II, VI, and VII "present nonjudicial political questions that must ultimately be resolved by the General Assembly pursuant to its constitutional authority" and that he would have sustained Impeachment Managers' preliminary objections with respect to those Articles. (Appendix B at MHW-5-6). Judge Wojcik remained in "complete agreement with the Majority's disposition of all remaining claims and issues." (Appendix B at MHW-6).

Finally, Judge McCullough issued a "Dissenting Opinion" (Appendix B at PAM-1-10), concluding that the Commonwealth Court was "without subject matter jurisdiction to decide any of the claims asserted in the PFR" for failure to join indispensable parties, but that even if jurisdiction existed, Count III involved a nonjusticiable political question:

> [T]he Majority's decision nevertheless has hurriedly and needlessly plunged [the Commonwealth] Court into a wash of nonjusticiable political questions over which we currently have no decision-making authority. In so doing, the Majority transgresses longstanding separation of powers principles.

(Appendix B at PAM-2). Thus, the dissent would have sustained (in part) Impeachment Managers' preliminary objections and "dismiss[ed] as nonjusticiable and unripe Krasner's third claim regarding whether the

Amended Articles sufficiently allege impeachable 'misbehavior in office.'" (Appendix B at PAM-9). It would have ruled with the majority, however, on the merits of Counts I and II. (Appendix B at PAM-5 n.3).

On January 26, 2023, Impeachment Managers filed a Notice of Appeal and Jurisdictional Statement. *See* 2 EAP 2023. On February 8, 2023, D.A. Krasner filed a notice of cross-appeal and jurisdictional statement, and on February 9, 2023, Senator Ward filed a notice of cross-appeal and jurisdictional statement. *See* 3 EAP 2023 and 4 EAP 2023, respectively.

On March 7, 2023, this Court issued Orders noting probable jurisdiction in the appeal and cross-appeals. By order of April 20, 2023, the Court consolidated the appeal and cross-appeals, designated D.A. Krasner as appellant, and directed the Prothonotary to issue a briefing schedule. D.A. Krasner filed his initial brief on May 22, 2023, as did Intervenor Senator Jay Costa (limited to Count I). This brief for Impeachment Managers responds to the briefs of D.A. Krasner and Senator Costa and addresses the issues raised by Impeachment Managers in their Notice of Appeal.[5]

[5] For efficiency, this brief will refrain from repeatedly referring to Senator Costa's arguments, as they are largely identical to D.A. Krasner's arguments with respect to Count I.

D. Counterstatement of Facts

On November 16, 2022, the House of Representatives exercised its constitutional authority and passed House Resolution 240 ("HR 240"), impeaching D.A. Krasner via seven Articles of Impeachment determining that he engaged in conduct constituting misbehavior in office. (R. 14a, 80a-129a)

HR 240 contains the facts underlying the Articles. Generally, D.A. Krasner is charged with: being "derelict in his obligations to the victims of crime, the people of the city of Philadelphia and of this Commonwealth;" "fail[ing] to uphold his oath of office;" failing to comport with the Commonwealth's Rules of Professional Conduct ("R.P.C.") and Code of Judicial Conduct ("C.J.C."); and "exhibiting unethical conduct" in multiple incidents by "lacking candor to the courts of this Commonwealth" in the nature of violations of R.P.C. 3.3, "committing professional misconduct" in the nature of violations of R.P.C. 8.4, and "engaging in impropriety and[/]or appearances of impropriety" in the nature of violations of Canon 2 of the C.J.C. (R. 103a) Specifically, the Articles include, *inter alia*, the following charges against D.A. Krasner:

- Article I: implementing blanket directives not to charge certain classes of crimes. (R. 106a)

- Article II: refusing to search for or produce nonprivileged documents subpoenaed by a House Select Committee, refusing to testify in an executive session of that Committee, instead demanding a public hearing, and then publishing a misleading press release that mischaracterized the invitation to testify. (R. 115a-116a)[6]

- Article III: engaging on conduct warranting admonishment and sanctions by a federal judge in a habeas corpus proceeding (*Wharton v. Vaughn*) arising from the murder of the parents of a seven-month-old victim

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[6] Whereas D.A. Krasner asserts that the subpoena "sought...privileged materials that if produced could have subjected the District Attorney to criminal penalties" (D.A.'s Brief at 10-11), Impeachment Article II notes that the subpoena specifically sought "nonprivileged records" (*see* R. 114a), as was repeatedly explained to D.A. Krasner, along with the opportunity for him to identify privileged information in a privilege log. (*See* R. 115a) Additionally, because the subpoena is not part of the record, D.A. Krasner cannot provide an appropriate citation to it. *See* Pa.R.A.P. 2117(a)(4).

D.A. Krasner also asserts that he was deprived of "an opportunity to be heard" (D.A.'s Brief at 12), yet cites no authority suggesting he was entitled to a pre-impeachment hearing before the House. Further, as set forth in Article II, he *was* given—but declined—that opportunity, instead insisting that he would offer testimony only on his own terms. Further, Senate Resolution 386 (referenced below) provided him with the opportunity to be heard before the Senate (*see* R. 138a-140a), as would Senate Resolution 16 (adopted January 11, 2023 and containing identical procedural provisions as its predecessor). *See* https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2023&sessInd=0&billBody=S&billTyp=R&billNbr=0016&pn=0027.

who had been left to freeze to death. (R. 117a) Article III notes that the Office of the Attorney General determined that D.A. Krasner's office, in filing a concession that it would not seek a new death penalty sentence, failed to contact members of the victims' family (including the infant, now an adult), who were opposed to the concession, and failed to disclose facts about the murderer's misconduct in prison and attempted escapes. (R. 117a-118a) It notes that the aforementioned federal judge held that D.A. Krasner's office had failed to advise the court of significant anti-mitigation evidence (including the murderer's escape attempt at a court appearance); that two of the office's supervisors had violated Fed. R. Civ. P. 11(b)(3) by making representations to the court that lacked evidentiary support and were not based on a reasonable inquiry; that representations to the court about communications with the victims' family had been "misleading," "false," and similarly not based on a reasonable inquiry; and that the Law Division Supervisor, Assistant Supervisor, and D.A. Krasner's office had violated Fed. R. Civ. P. 11(b)(1) in a manner that was "sufficiently egregious and exceptional" to warrant sanctions. (R. 118a-119a) Based on testimony that D.A. Krasner "approved and implemented internal procedures that created the need for [those] sanction[s]" and "had the sole, ultimate authority to direct that the misleading notice of concession be

filed," the court ordered D.A. Krasner to personally apologize to each victim in writing. (R. 119a) Given D.A. Krasner's sole authority to approve court filings on behalf of his office, Article III also notes that his directing, approving and/or permitting of court filings containing materially false and/or misleading statements and purposeful omissions of fact were in the nature of violations of R.P.C. 3.3, R.P.C. 8.4, and Canon 2 of the C.J.C. (R. 119a-120a)

- Article IV: engaging in conduct that led the Honorable Kevin M. Dougherty[7] to author a special concurrence in *Com. v. Pownall,* 278 A.3d 885 (Pa. 2022), raising concerns about possible prosecutorial misconduct by D.A. Krasner and his office in an effort "to deprive certain defendants"—and specifically, Officer Pownall—"of a fair and speedy trial." (R. 120a) The concurrence cited "potential abuse" of the grand jury process, described the presentment in the case as a "foul blow" and "gratuitous narrative," and found "troubling" efforts by the D.A.'s office to ensure that a preliminary hearing would not occur, despite Officer Pownall's entitlement to one. (R. 121a) The concurrence found that such conduct would be "worrisome coming from any litigant," but was "even more concerning"

[7] Justice Dougherty recused himself from these appeals by order dated April 14, 2023.

coming from a prosecutor and cited to R.P.C. 3.3 regarding candor to the tribunal. (R. 121a-122a) It also noted that the prosecution appeared to have been "driven by a win-at-all-cost office culture" that treats police officers differently than other defendants and that "[t]his is the antithesis of what the law expects of a prosecutor." (R. 122a-123a)

As Article IV further explains, on remand, the trial court dismissed all charges against Officer Pownall because there were "so many things wrong" with the prosecution's instructions to the investigating grand jury, including the failure to provide certain relevant instructions and "intentional, deliberate choice not to inform the grand jurors about the justification defense" available to Officer Pownall, despite being aware of it. (R. 123a) The trial court also found that the D.A.'s office "demonstrated a lack of candor to the Court by misstating the law and providing [it] with incorrect case law" and was "disingenuous with the Court when it asserted [for various reasons] that it had good cause to bypass the preliminary hearing," resulting in prejudice to Officer Pownall and the violation of his due process rights. (R. 123a-124a) In addition, Article IV notes that the D.A.'s office withheld from Officer Pownall its own expert report concluding that his use of deadly force was justified. (R. 124a)

- Article V: omitting material facts in sworn testimony to a special master of this Court in connection with D.A. Krasner's prior representation of an activist who advocated in favor of a defendant, Mumia Abu-Jamal, who had been convicted of first-degree murder of a police officer. (R. 124a-126a)

- Article VI: violating federal and state victims' rights acts in failing to timely contact victims, deliberately misleading them, disregarding victim input, and treating victims with contempt and disrespect (R. 126a-127a), conduct also referenced in Article III.

- Article VII: implementing blanket policies of refusing to prosecute certain crimes and thereby rendering them *de facto* legal in contravention of the authority of the legislature. (R. 127a-128a)

On November 18, 2022, the Speaker of the House of Representatives appointed Representatives Bonner, Williams, and Solomon to the committee responsible for managing the Senate impeachment trial. (R. 186a, ¶ 9)

On November 29, 2022, the Pennsylvania Senate adopted Resolution 386 ("SR 386") establishing rules of practice and procedure for impeachment trials (R. 131a-145a) and Resolution 387 providing for the

House floor managers to exhibit the Articles to the Senate the following day. (R. 147a)

On November 30, 2022, the Senate adopted Resolution 388, directing that a Writ of Impeachment Summons be issued and served on D.A. Krasner by December 7, 2022 (if possible), commanding that D.A. Krasner file an Answer to the Articles by December 21, 2022 and appear before the Senate on January 18, 2023 to answer to the Articles. (R. 149a-151a)

On December 2, 2022, D.A. Krasner initiated this action.

E. Brief Counterstatement of the Order or Other Determination Under Review

In this appeal, Impeachment Managers respond to D.A. Krasner's issues on appeal, which challenge the Commonwealth Court's rulings of December 30, 2022 denying him relief on the merits of Counts I and II of his ASR. In so responding, Impeachment Managers challenge the Commonwealth Court's decision to overrule certain of their preliminary objections on Counts I and II of the PFR and authority to decide Counts I and II on the merits, but—to the extent that this Court opines that it was appropriate for the lower court to reach the merits—Impeachment Managers seek affirmances. With respect to Count I, Impeachment Managers respond, as well, to Senator Costa's initial brief.

Impeachment Managers also challenge, in their own appeal, the Commonwealth Court's overruling certain of their preliminary objections to the PFR on Count III and granting D.A. Krasner's ASR on Count III.

VI. SUMMARY OF ARGUMENT

Impeachment is a matter exclusively for the General Assembly—a political proceeding from which courts, for sound reasons, have historically been cautioned to stay away. Indeed, until the Commonwealth Court issued its December 30, 2022 Order, no court in Pennsylvania had ever intervened *ex ante* in impeachment proceedings. And rightly so, as throughout our nation's history courts have recognized the inherently political nature of impeachments, including what constitutes impeachable conduct, and that our constitutional structure assigns such political exercises to political bodies—the legislature. As U.S. Supreme Court Justice Joseph Story observed in reviewing the historical nature of offenses giving rise to impeachments—often offenses "not easily definable by law" and of "purely political character:"

> One cannot but be struck…with the utter unfitness of the common tribunals of justice to take cognizance of such offences; and with the entire propriety of confiding the jurisdiction over them to a tribunal capable of understanding, and reforming, and scrutinizing the polity of the state, and of sufficient

> dignity to maintain the independence and reputation of worthy public officers.

2 Joseph Story, *Commentaries on the Constitution of the United States* § 798 (1833).[8]

Failing to recognize that our Constitution confers impeachment exclusively on the legislature, the Commonwealth Court incorrectly denied Impeachment Managers' objections to Counts I through III of the PFR, which presented nonjusticiable political questions in Counts I and III and, at a minimum, failed in Counts II and III to raise any issue ripe for judicial review. In so ruling, the lower court improperly allowed D.A. Krasner to use the judicial process to circumvent the constitutional one, and to avoid trial in the Senate, where the evidence underlying the serious allegations of misconduct charged in the Articles of Impeachment would have been presented. While that misconduct need not arise to criminal behavior for purposes of impeachment, much of it (if proven) could. To be clear, this is not a matter of mere disagreement with policies.

While Impeachment Managers dispute that the Commonwealth Court should have reached the merits on any of D.A. Krasner's claims, if this

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[8] *See* https://www.google.com/books/edition/Commentaries_on_the_Constitution_of_the/Nz0vAAAAYAAJ?hl=en&gbpv=1&bsq=joseph%20story%20commentaries%20on%20the%20constitution%201833.

Court disagrees, it should affirm the Commonwealth Court's decisions on the merits of Counts I and II, as *sine die* adjournment has no effect on the Senate's continuation of impeachment proceedings from one General Assembly to the next, and D.A. Krasner is undoubtedly a civil officer subject to impeachment under our Constitution.

By contrast, on the merits of Count III, the Commonwealth Court inappropriately decided how the term "any misbehavior in office" should be defined for purposes of impeachment under Article VI, § 6 of the Constitution—usurping the authority of the General Assembly and assigning a definition that lacks any supporting precedent in the unique context of impeachment.

Compounding these errors, the Commonwealth Court incorrectly determined, absent a developed record, (1) that none of the Articles of Impeachment rise to that court's newly announced standard for "misbehavior in office," (2) that Articles III, IV, and V unconstitutionally intrude on this Court's authority to govern the conduct of attorneys in the Commonwealth, and (3) that Articles I and VII improperly challenge D.A. Krasner's discretionary authority. The lead opinion offered a judicially unmanageable analytical model for assessing misbehavior in office, and its analysis of the Articles was flawed even under its own poorly developed

model. Thus, to the extent that it reaches the merits, this Court should reverse the Commonwealth Court's rulings related to Count III, and the impeachment trial should be permitted to move forward in the Senate, consistent with the clear mandate of our Constitution.[9]

VII. ARGUMENT

A. Count I: *Sine Die* Adjournment

The Commonwealth Court erred when it overruled Impeachment Managers' preliminary objection that Count I of the PFR raises nonjusticiable political questions. Although the Commonwealth Court properly determined that *sine die* adjournment does not prevent the Senate from holding an impeachment trial in a successive legislative term, it should not have reached the merits of that issue at all. How the General Assembly conducts impeachment proceedings is a political matter constitutionally committed to its discretion and not appropriate for court intervention. If,

[9] Although the Commonwealth Court's Order granting D.A. Krasner declaratory relief on Count III did not enjoin the impeachment trial, it effectively did so, as was D.A. Krasner's intended result. (*See* Appendix B at 13 n.7). Following the Commonwealth Court's decision, on January 11, 2023, the Senate voted to postpone the impeachment trial indefinitely.

however, this Court disagrees and reaches the merits, it should affirm the Commonwealth Court's ruling.

1. The Commonwealth Court erred in overruling Impeachment Managers' preliminary objection that Count I raises nonjusticiable political questions inappropriate for judicial review.

a. The political question doctrine.

The political question doctrine implicates the issue of justiciability, which is a "threshold matter" to be "resolved before addressing the merits" of any dispute. *Robinson Twp.,* 83 A.3d at 917. Accordingly, while "it may be the special duty of [the] courts to say what the law is,...sometimes the law is that it is improper for a court to decide the merits of a particular constitutional issue." Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 Duke L.J. 231, 246 (1994).

"The political question doctrine derives from the principle of separation of powers which...is implied by the specific constitutional grants of power to, and limitations upon, each co-equal branch of the Commonwealth's government." *Robinson Twp.,* 83 A.3d at 926-27. The separation of powers "is essential to our tripart[it]e governmental framework," as it "prevents one branch of government from exercising, infringing upon, or usurping the powers of the other two branches." *Renner*

v. Ct. of Common Pleas of Lehigh Cnty., 234 A.3d 411, 419 (Pa. 2020). *See also Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977) ("no branch should exercise the functions exclusively committed to another branch"). When a party presents "a challenge to legislative power that the Constitution commits exclusively to the legislature," the matter constitutes a "non-justiciable political question" not properly before a court. *Blackwell v. City of Philadelphia,* 684 A.2d 1068, 1071 (Pa. 1996).

Although "nonjusticiable cases do not come already labeled with a 'Keep Off' sign to keep the courts at a distance," *Larsen v. Senate of Pennsylvania,* 646 A.2d 694, 700 (Pa. Cmwlth. 1994), this Court has described the "well settled" standard for determining whether a claim is justiciable, namely, "where the determination whether the action taken is within the power granted by the Constitution has been entrusted exclusively and finally to the political branches of government for self-monitoring." *Robinson Twp*., 83 A.3d at 928. Additionally, this Court has embraced the factors cited in *Baker v. Carr,* 369 U.S. 186 (1962) for identifying political question cases, namely, where:

(1) there is a textually demonstrable constitutional commitment of the disputed issue to a coordinate political department;

(2) there is a lack of judicially discoverable and manageable standards for resolving the disputed issue;

(3) the issue cannot be decided without an initial policy determination of a kind clearly for non-judicial discretion;

(4) a court cannot undertake independent resolution without expressing lack of the respect due coordinate branches of government;

(5) there is an unusual need for unquestioning adherence to a political decision already made; and/or

(6) there is potential for embarrassment from multifarious pronouncements by various departments on one question.

See Robinson Twp., 83 A.3d at 928 (listing factors in *Baker,* 369 U.S. at 217).

The presence of any one *Baker* factor warrants judicial abstention. *Blackwell*, 684 A.2d at 1071; *Zemprelli v. Daniels*, 436 A.2d 1165, 1169 (Pa. 1981). In addition, because "prudential" concerns inform Pennsylvania law on the political question doctrine, each case must be considered on its own particulars. *William Penn Sch. Dist. v. Pennsylvania Dep't of Educ*., 170 A.3d 414, 463 (Pa. 2017).

b. Pennsylvania's Constitution unequivocally confers impeachment exclusively to the General Assembly.

In unequivocal language, the Pennsylvania Constitution confers impeachment matters exclusively to the General Assembly. Specifically, the House of Representatives has "**the sole power of impeachment**," Pa. Const. art. VI, § 4 (emphasis added), and "**[a]ll impeachments shall** be

tried by the Senate." *Id.* § 5 (emphasis added). Use of the words "sole," "all impeachments," and "shall" convey that those powers are to be exercised exclusively by the House and the Senate, respectively. They are clear, "textually demonstrable constitutional commitment[s]" of impeachment matters exclusively to the General Assembly. *See Robinson Twp.,* 83 A.3d at 928. Indeed, it is difficult to conceive of a clearer example than impeachment where the Constitution grants a single branch exclusive authority. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 8 (1959) (discussing the political question doctrine and providing in the comparable federal context: "Who, for example, would contend that the civil courts may properly review a judgment of impeachment when [the Constitution] declares that the "sole Power to try" is in the Senate? That any proper trial of an impeachment may present issues of the most important constitutional dimension...is simply immaterial in this connection.").

Our Constitution also grants both the House and the Senate the "power to determine the rules of its proceedings." Pa. Const. art. II, § 11. Since impeachment is clearly the domain of the General Assembly, as is the power to govern its own proceedings, it is within the rulemaking power of the House and Senate to prescribe how such proceedings are to be

carried out. Deciding whether a person may be impeached by the House in one legislative term and tried by the Senate in the next is a basic housekeeping matter for the General Assembly.[10]

Decades ago, this Court expressly recognized that "**the courts have no jurisdiction in impeachment proceedings, and no control over their conduct**[.]...The courts cannot stay the legislature[.]" *In re Investigation by Dauphin Cnty. Grand Jury, Sept., 1938*, 2 A.2d 802, 803 (Pa. 1938) (emphasis added).[11]

The U.S. Supreme Court has likewise recognized that courts should not interfere in political questions raised by impeachment proceedings. In *Nixon v. U.S.*, 506 U.S. 224 (1993), involving the federal Constitution's analogous assignment of impeachment powers to Congress, it ruled that a

[10] Even under DA Krasner's logic, Article II grants the legislature the power to determine the rules of its proceedings. Thus, reading impeachment proceedings as granting the legislature power to prescribe how proceedings in each chamber will be carried out is consistent with, not contrary to, Article II.

[11] Although the Court used the phrase "within constitutional lines" in its 1938 decision, that language was not determinative in *Dauphin County Grand Jury* and—until this case—no Pennsylvania court had ever found impeachment proceedings to violate so-called "constitutional lines." Fairly viewed, "within constitutional lines" may be considered *dicta*, but even if it were not, the impeachment proceedings against D.A. Krasner *were* advancing "within constitutional lines."

challenge to a federal impeachment trial constituted a nonjusticiable question. *See id.* at 228-238 (declining to review challenge to impeachment proceeding where evidence was received by committee, then reported to full Senate). The *Nixon* court found no "evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers." *Id.* at 233. *See also id.* at 234 ("[T]he Judiciary, and the Supreme Court in particular, were not chosen [by the Framers] to have any role in impeachments.").[12]

Subsequently, the Commonwealth Court relied on both *Dauphin County Grand Jury* and *Nixon* to support its ruling in *Larsen* that it is "within the exclusive power of the Senate to conduct impeachment trial proceedings," and that impeachment procedures employed by the Senate

[12] *Nixon* was broad, clear, and not welcomed by all, including some jurists, but nevertheless accepted as the law of the land. *See, e.g., Hastings v. United States*, 837 F. Supp. 3, 5 (D.D.C. 1993) (disapproving Senate's chosen impeachment procedure but concluding court was "powerless to afford...any relief," as *Nixon* compelled dismissal). *See also* Gerhardt, *Rediscovering Nonjusticiability*, 44 Duke L.J. at 249-250, 276 (observing that *Nixon* reveals that the political question doctrine calls on courts to "stand by silently" in impeachment matters, even when courts might perceive that "the Senate exercises very poor judgment," and that, while "[t]his prospect unsettles many people, who trust largely, if not exclusively, in the Court to make constitutional law[,]...*Nixon* tells us that Congress too may make constitutional law").

"cannot be invaded by the courts." 646 A.2d at 703-04. *See also id*. at 703 (noting Pennsylvania and federal constitutional impeachment provisions are "nearly identical"). Thus, under *Dauphin County Grand Jury*, as well as *Nixon* and its own decision in *Larsen*, the Commonwealth Court should have abstained from opining on whether an impeachment trial may be held in a legislative term following *sine die* adjournment, because when to conduct an impeachment trial constitutes a political question textually committed to the Senate.

2. If this Court nonetheless reaches the merits of Count I, it should affirm the decision of the Commonwealth Court.

Alternatively, if this Court disagrees and reaches the merits, the Commonwealth Court's ruling that impeachment powers are judicial in nature, and therefore not subject to the Pennsylvania Constitution's restrictions on legislative powers, should be affirmed.

First, the General Assembly's legislative and impeachment functions derive from two distinct articles of the Constitution, Articles II and VI, respectively. As this Court recognized in *Com. ex rel. Att'y Gen. v. Griest*, 46 A. 505, 506 (Pa. 1900), when a separate and independent article of the Constitution stands alone, with no other provision necessary to its execution, "[i]t is a system entirely complete in itself; requiring no

extraneous aid, either in matters of detail or of general scope, to its effectual execution." (*See* Appendix B at 21). D.A. Krasner's proffered "plain reading" interpretation ignores this premise.

As the Commonwealth Court properly recognized, "the General Assembly's *impeachment* powers are not the same as its *legislative* powers," and "[t]he restrictions imposed by the Pennsylvania Constitution upon the General Assembly's legislative powers therefore do not apply to its judicial powers of impeachment, trial, and removal." (Appendix B at 21-22) (emphasis in original). *See also id.* at 22 (quoting *Ferguson v. Maddox*, 263 S.W. 888, 890 (Tex. 1924) for the premise that the legislature's power of impeachment "does not, in the remotest degree, involve any legislative function," and noting that it is instead a judicial power unencumbered by any time limitations that apply to legislative actions); *id.* at 23-24 (quoting *In re Opinion of Justs.*, 14 Fla. 289, 297-98 (1872) for the point that impeachments, in which the Senate sits as a court, survive adjournments). Consequently, any temporal limits on the General Assembly's legislative powers simply do not apply to impeachment.[13]

[13] The case law that D.A. Krasner cites is inapposite, as it deals exclusively with *legislative* action, not impeachment proceedings. *See, e.g., Brown v. Brancato,* 184 A. 89, 93 (Pa. 1936); *Frame v. Sutherland,* 327 A.2d 623, 627 n.9 (Pa. 1974).

Second, considerable persuasive authority also supports treating the General Assembly's legislative and impeachment functions separately, as the Commonwealth Court properly recognized (*see* Appendix B at 22, citing Impeachment Managers' brief opposing D.A. Krasner's ASR at 9-15 and then-Interim President Ward's brief at 25-33), including:

- Jefferson's Manual, which unequivocally provides that "impeachment proceedings are *not discontinued* by a recess" (*i.e.,* adjournment, as referenced in the title of § 620 of the manual and evident from the examples that it cites). Jefferson's Manual, § 620 (emphasis added) (R. 273a-274a).[14]

- Precedent in the federal and Pennsylvania contexts,

[14] Pennsylvania House Rule 78 explicitly endorses Jefferson's Manual. *See* https://www.house.state.pa.us/rules.cfm.

Section 620 is eminently clear and makes sense, whereas a rule arbitrarily stopping impeachment proceedings simply because a General Assembly term ended would not. In the latter scenario, impeachments could become a matter of "beating the clock" and impeached individuals would have the power to avoid their trials by employing delay tactics, including litigation. That makes no sense from a perspective of policy or anything else. In a glaring omission, D.A. Krasner does not even acknowledge § 620 in his brief and instead makes the unfounded assertion (at page 14) that the "General Assembly Rules...provide that matters pending before the General Assembly do not carry over from one General Assembly to the next." The latter is also one of many examples of D.A. Krasner both asserting argument and making an unbalanced presentation in his statement of the case, in contradiction of Pa.R.A.P. 2117(b).

demonstrating that impeachments have often carried over from one Congress or one General Assembly term to the next, including five federal impeachments[15] and five Pennsylvania impeachments.[16]

- *Umbel's Case*, 41 Pa.CC. 414 (Pa. Att'y Gen. June 26, 1913), in which the Pennsylvania Attorney General, on an inquiry from the chairman of a House committee investigating the impeachment of certain judges, opined that "the power of your committee…will not cease by reason of the adjournment of the general assembly." *Id.* at 417. The opinion distinguished *Com. v. Costello,* 21 Pa. D. 232, No. 315, 1912 WL 3913 (Pa. Quar. Sess. Phila. 1912), on which D.A. Krasner relies, emphasizing the difference between legislative functions, which terminate by adjournment *sine die,* and impeachment functions, which do not. *Umbel's Case,* 41 Pa.C.C. at 415-417. As the opinion noted, "the institution of proceedings for the impeachment of a civil officer, is not a joint power or duty, nor is it a

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[15] *See* Jefferson's Manual § 620 (R. 273a-274a) (identifying impeachments of President Clinton and U.S. District Court Judges Pickering, Louderback, Hastings, and Porteous). (*See also* R. 328a-330a for additional details and citations) Although these were federal impeachments, Jefferson's Manual is relevant to state impeachment proceedings under House Rule 78.

[16] (*See* R. 330a-332a, discussing the impeachments of Judges Addison and Chapman and, collectively, Justices Shippen, Yeates, and Smith; R. 377a-384a, discussing those impeachments, plus those of Comptroller General Nicholson and Judge Porter)

legislative function within the ordinary acceptation of that word[,] [and] [e]ach branch of the legislature has a separate and distinct function to perform in such proceedings." *Id.* at 417.

- The fact that courts in at least four other states have expressly recognized that adjournment *sine die* does not disrupt impeachments. *See Ferguson v. Maddox*, 263 S.W. 888, 891 (Tex. 1924); *People ex rel. Robin v. Hayes*, 143 N.Y.S. 325, 327, 329 (N.Y. Sup. Ct. 1913); *In re Opinion of Justs.*, 14 Fla. 289, 298 (1872); *State ex rel. Adams v. Hillyer*, 2 Kan. 17, 32 (1863).

As the lead opinion below concluded, "[a]ll of [this] historical, judicial, and traditional authority firmly supports a conclusion that the Pennsylvania Constitution does not require the impeachment and trial of a public official to be completed by the same iteration of the General Assembly." (Appendix B at 22-23).

Third, D.A. Krasner fails to marshal applicable authority to support his novel reading that House and Senate impeachment proceedings must both conclude within a single legislative term, and he likewise fails to explain why the Commonwealth Court's constitutional interpretation, historical practice, and consensus of persuasive authority should be ignored. While D.A. Krasner is critical of this persuasive authority (*see, e.g.,* D.A.'s Brief at

37-38)—seemingly because some of it is "old" or, in some cases, from other jurisdictions—both history and the practices of other jurisdictions are often useful guides, not things to be ignored or derided. *See Com. v. Edmunds,* 586 A.2d 887, 895 (Pa. 1991) (case law from other states is relevant to constitutional interpretation). Moreover, D.A. Krasner himself relies on historical, non-precedential case law. *See* D.A.'s Brief at 28-30, 36 (citing and discussing *Com. v. Costello*, 21 Pa. D. 232, No. 315, 1912 WL 3913, (Pa. Quar. Sess. 1912)).

D.A. Krasner's repeated assertions about the "will of the electorate" and statewide nullification of local choices (*see, e.g.,* D.A.'s Brief at 1, 3-5, 22, 35, 53-54) are insupportable. Members of the House and Senate are also *elected* officials chosen by the will of the voters. Moreover, *most* impeachments involve elected officials, and our Constitution specifically provides for their impeachment. Being elected is not and never has been a defense against impeachment.

In addition, the fact that "legislators elected in two different elections at two different times" may address the same impeachment business is not "impermissible" (*see* D.A.'s Brief at 21-22), but a function of our government as established by our Constitution. Preliminarily, D.A. Krasner's framing of this issue is simply incorrect, as the *House* voted to

impeach him in the 206th General Assembly and the *Senate* (but for the Commonwealth Court's decision) would have taken up his trial in the 207th General Assembly. The bodies of the General Assembly are not the same and they have unique functions in the impeachment context.

D.A. Krasner's argument would mean that anytime a House or Senate seat were to become vacant during an impeachment a special election would be required, and impeachment proceedings would have to begin anew to ensure that an identical body of legislators was seated for 100% of the proceedings. Neither the text of the Constitution nor logic support such an unmanageable rule in any facet of the General Assembly's operations, including impeachments. Absences and special elections happen regularly without the need to upend the business of the General Assembly.[17]

Beyond that, allowing the continuation of impeachment proceedings between General Assemblies ensures that the will of the electorate at any given time is being served. If the composition of the Senate changes between the time of impeachment by the House and the impeachment trial, so be it. Whatever the votes may be, they will better reflect the

[17] There have been six special elections in Pennsylvania thus far in 2023 alone.

contemporary views of the voters who elected the most recent body of Senators. There would be nothing illegitimate about those Senators' votes, nor is there anything about impeachment proceedings that should bind a new group of Senators to what a previous group might have done, and there is certainly nothing that binds them to the House's prior decision to impeach. There is no sound basis for the kind of artificial rule that D.A. Krasner proposes.

In sum, the plain text and structure of Pennsylvania's Constitution establish that the General Assembly's legislative and impeachment functions are separate. Furthermore, historical practice and a consensus of persuasive authority support that an impeachment proceeding may necessarily carry over from one General Assembly to the next, which D.A. Krasner has failed to meaningfully rebut. Accordingly, if this Court addresses the merits of Count I, it should affirm the decision of the Commonwealth Court.

B. Count II: Civil Officer

The Commonwealth Court also erred when it overruled Impeachment Managers' preliminary objection that Count II of the PFR, seeking a determination of "civil officer," is not ripe for judicial review. D.A. Krasner should not be permitted to use a declaratory judgment to adjudicate a

dispute that should first be raised in the Senate. Alternatively, if this Court reaches the merits, it should affirm the Commonwealth Court's ruling that D.A. Krasner is a "civil officer" subject to Article VI, § 6 of the Constitution.

1. The Commonwealth Court erred in overruling Impeachment Managers' preliminary objection that Count II raises issues unripe for judicial review.

D.A. Krasner should not be permitted to obtain a declaratory judgment dictating the meaning of "civil officer" when the proper tribunal (the Senate) has not yet had the opportunity to consider the argument. "A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic." *Gulnac v. S. Butler Cnty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991). *See also Cherry v. City of Philadelphia*, 692 A.2d 1082, 1085 (Pa. 1997) ("Where no actual controversy exists, a claim is not justiciable and a declaratory judgment action cannot be maintained.").

Here, the Commonwealth Court erred and failed to apply those principles when, for the first time in Pennsylvania history, it intervened in an ongoing impeachment proceeding to rule preemptively on questions that the Senate had not yet adjudicated. Instead, the Commonwealth Court

should have declined to do so, in accordance with its prior decision in *Larsen.* In *Larsen*, the Commonwealth Court addressed "a first-impression question as to whether there can be judicial intervention in advance, to bar the state Senate from proceeding with the impeachment trial on the basis that violations of constitutional rights are threatened" and declined to intervene. 646 A.2d at 695, 705. In so holding, the *Larsen* court explained that impeachment "is committed by the Constitution to the Senate of Pennsylvania to an extent which clearly bars the courts from intervening with prior restraint." *Id.* at 705. The court recognized that while impeachment is an "adjudicative process," it is distinct from adjudications by the judicial branch, and a process in which "the courts clearly have no power to intervene by injunction in advance of legislative action, any more than a court would have any power to enjoin, in advance, the enactment of a law appearing (to the courts) to be constitutionally invalid." *Id.* at 705.

Notably, the *Larsen* court distinguished prior cases where courts had permissibly intervened in legislative matters already completed from the unprecedented situation before it, where the plaintiff sought judicial intervention *ex ante* to rule on impeachment matters that the Senate had not had the opportunity to adjudicate. *Id.* at 700. It reasoned, "where the courts have undertaken to examine legislative actions as justiciable

questions, the Pennsylvania Supreme Court and this court were *reviewing actions already theretofore taken* by the processes of the legislative body." *Id.* (emphasis in original).

Here, as in *Larsen*, D.A. Krasner's Senate impeachment trial was set to begin when he sought judicial intervention, and any legal arguments about whether he, as the District Attorney of Philadelphia, is a "civil officer" subject to impeachment under Article VI, § 6 should have first been determined by the Senate in the course of its impeachment proceedings. To be clear, D.A. Krasner would have had ample opportunity to make his arguments in that forum. SR 386 afforded him the opportunities, *inter alia*, to appear and be heard; to be represented by counsel of his choosing; to seek and obtain rulings on procedural and trial-related matters; to make opening and closing statements; and to examine and cross-examine witnesses. (R. 138a-140a)[18]

The Commonwealth Court erred in declining to follow its own precedent in *Larsen, see Thomas Jefferson Univ. Hosps., Inc. v. Pennsylvania Dep't of Lab. & Indus.,* 162 A.3d 384, 394 (Pa. 2017), and should not have intervened *ex ante* to decide Count II on the merits.

[18] SR 16 would do the same.

Instead, it should have granted Impeachment Managers' preliminary objection and determined that this issue was unripe for judicial review.

2. If this Court nonetheless reaches the merits of Count II, it should affirm the Commonwealth Court's decision that D.A. Krasner is a "civil officer" subject to impeachment.

Even if this Court disagrees and reaches the merits of Count II, it should nonetheless affirm the Commonwealth Court's ruling, as it properly concluded that D.A. Krasner is a "civil officer" subject to impeachment.

As a threshold matter, D.A. Krasner is subject to impeachment under the plain language of the Pennsylvania Constitution. Article VI, § 6 of the Constitution provides, in no uncertain terms, that "[t]he Governor and *all other civil officers* shall be liable to impeachment." Pa. Const. art. VI, § 6 (emphasis added). The term "civil officers" is not qualified; § 6 contains neither any exemption for "local" officers nor any limitation requiring that "civil officers" be holders of "statewide" offices.

The words of § 6 should be interpreted in accordance with their plain meaning. *Scarnati v. Wolf*, 173 A.3d 1110, 1118 (Pa. 2017) ("We are not to interpret the Constitution in a technical or strained manner, but are to interpret its words in their popular, natural and ordinary meaning."); *Com. v. McNeil*, 808 A.2d 950, 954 n.2 (Pa. 2002) (While the "general principles governing the construction of statutes apply also to the interpretation of

constitutions," courts "need not resort to the rules of construction…[when] the plain meaning of the constitution is clear.").[19] Indeed, the impeachment provision of our Constitution has always been understood to apply to state, county, and municipal officers. *See* Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 342 (1907) (use of the term "civil officers" was meant to distinguish between state, county, and municipal officers, who are subject to impeachment, and military or naval officers, who are not).[20]

Thus, the Commonwealth Court properly construed § 6, ruling that "all public officials throughout the Commonwealth are subject to impeachment and trial by the General Assembly, regardless of whether they are local or state officials." (Appendix A at 3). Prior opinions of this Court, on which the Commonwealth Court properly relied, support that conclusion. (Appendix A at 3-4). Most recently, in *Burger v. Sch. Bd. of McGuffey Sch. Dist.*, 923 A.2d 1155 (Pa. 2007), this Court found "no

[19] While D.A. Krasner purports to advocate a different "plain meaning" interpretation of Article VI, § 6, he is actually straining to encumber the term "civil officers" with restrictions that simply do not exist.

[20] *See* https://books.google.com/books/about/Commentaries_on_the_Constitution_of_Penn.html?id=zSFAAAAAYAAJ.

dispute" that a school superintendent (clearly a local officer) is a "civil officer" within the meaning of Article VI, § 7. *See id.* at 1161.[21] Notably, a majority of this Court in *Burger* considered and *rejected* the "novel theory" proposed in then-Justice Saylor's concurrence—and advanced by D.A.

[21] Although *Burger* arose under Article VI, § 7, providing for removal rather than impeachment (which arises under Article VI, § 6), there is no meaningful difference between the term "civil officers" as used in these provisions—*compare* Pa. Const. art. VI, § 6 (referring to "[t]he Governor and all other civil officers"), *with* Pa. Const. art. VI, § 7 (pertaining to "[a]ll civil officers")—and there is no reason to interpret that term differently in one section than the other. The lead opinion for the Commonwealth Court expressly acknowledged this, noting the absence of any "principled basis" on which to conclude that "the nearly identical language" in § 6 and § 7 should be treated differently. (Appendix B at 30). As D.A. Krasner acknowledges, "the same words used in different parts of the Constitution…must be afforded the same meaning." (D.A.'s Brief at 51 n.21) (citing *Board of Revision of Taxes, City of Philadelphia v. City of Philadelphia,* 4 A.3d 610, 622 (Pa. 2010)).

The full text of § 7 demonstrates the inclusiveness of "all other civil officers" in § 6, by showing that the Constitution expressly *excludes* certain civil officers where it intends to do so. Whereas the first sentence of § 7 refers and thus applies to "[a]ll civil officers," the last sentence expressly excludes from that group the Governor, Lieutenant Governor, members of the General Assembly, and judges of the courts of record. Moreover, "all civil officers" must apply to a much broader group of individuals or no officers would be left after removal of those specific individuals.

As discussed below, however, other aspects of § 6 and § 7 are not the same and should not be interpreted interchangeably, particularly with respect to the fact that impeachment—which may be had for *any* misbehavior in office and does not require a conviction or even a crime—is a wholly distinct process from removal, which is *automatic* on "*conviction* of misbehavior in office."

Krasner here—that the superintendent was not a civil officer "because he was not a statewide officer." *See id.* at 1161 n.6. The majority noted that the view offered in the concurring opinion was, at a minimum, in "facial tension with prior decisions" of the Court, including *Com. ex rel. Schofield v. Lindsay,* 198 A. 635 (Pa. 1938)—which quoted *In re Georges Twp. Sch. Dirs.,* 133 A. 223, 225 (Pa. 1926), for the proposition that the removal provisions in Article VI apply to appointed officers "whether the[ir] employment be by the state, a county, or municipality"—and *Finley v. McNair,* 176 A. 10, 11 & n.1 (Pa. 1935), which observed that holders of county and municipal offices were held to be "officers" in prior cases.

As the *Burger* majority noted (and Justice Saylor admitted), the Court had previously applied Article VI, § 7 to the holders of other non-statewide offices. *See Burger,* 923 A.2d at 1611 n.6. (citing *S. Newton Twp. Electors v. S. Newton Twp. Sup'r, Bouch,* 838 A.2d 643 (Pa. 2003) (township supervisor); *In re Petition to Recall Reese*, 665 A.2d 1162 (Pa. 1995) (municipal mayor); *Allegheny Inst. Taxpayers Coal. v. Allegheny Reg'l Asset Dist.,* 727 A.2d 113, 118 (Pa. 1999) (board members of a regional asset district)); *Burger,* 923 A.2d at 1167 (Saylor, J., concurring). Each of the latter cases was also cited by the Commonwealth Court in the proceedings below. (Appendix A at 3-4).

Even D.A. Krasner recognizes that he is swimming against the tide of *Burger* and the decisions it cites. Despite admitting that "the Court's Section 7 removal provisions [sic] have affirmed the removal of local officers," he asks this Court to "revise constitutional precedent" by overruling all of those decisions, yet cites no compelling reasons to support that extraordinary request. (*See* D.A.'s Brief at 51-53).

The Commonwealth Court properly rejected D.A. Krasner's argument that a "local officer" cannot be a civil officer under Article VI, § 6 because judgment under § 6 only extends to "removal from office and disqualification to hold any office of trust or profit under this Commonwealth." Pa. Const. art. VI, § 6. As the lead opinion below noted, D.A. Krasner's "proposed reading" of Article VI, § 6 "conflicts with the general tenor of relevant case law" interpreting Article VI to apply "to local officials as well as state-level officials."[22] (Appendix B at 27). Further, whatever offices D.A. Krasner might be disqualified from holding in the

[22] Moreover, the cases that D.A. Krasner cites are inapposite. *Com. ex rel. Woodruff v. Joyce*, 139 A. 742 (Pa. 1927), interpreted a statute, not the Constitution, and *Emhardt v. Wilson*, 20 Pa. D. & C. 608 (Phila. Cnty. C.C.P. 1934)—a common pleas decision from nearly a century ago—is not only not binding on this Court, but also involved the interpretation of Article II, not Article VI.

future need not be decided now and is irrelevant to whether he is subject to impeachment in the first instance.

The Commonwealth Court also took guidance from *Houseman v. Com. ex rel. Tener*, 100 Pa. 222 (1882) (*see* Appendix A at 4), in which this Court considered and rejected the assertion that a previous but substantially similar version of the Constitution's removal clause did not apply to municipal officeholders, noting that such a result could "only be reached by restricting the plain words of the constitution." *Houseman*, 100 Pa. at 229. The Court explained:

> In their literal sense it cannot be doubted that the words descriptive of the officials subject to removal, make no distinction between state, county and municipal officers, and do include them all....The whole language of the section is very general. We see nothing in it which authorizes a distinction between state, county and municipal officers.

Id. at 229-30.

"Even more injurious" to D.A. Krasner's argument, the Commonwealth Court properly cited *Com. ex rel. Specter v. Martin*, 232 A.2d 729 (Pa. 1967), "a 5-1 majority, sprinkled across three separate opinions…concluding that the district attorney of Philadelphia is subject to the Pennsylvania Constitution's removal provisions, due to the usage in article VI, section 7 of the phrase '[a]ll civil officers[.]'" (Appendix B at 29-

30) (modification in Appendix B) (citing *Martin*, 232 A.2d at 733-39 (plurality opinion); *id.* at 743-44 (Eagen, J., concurring in part); *id.* at 753-55 (Musmanno, J., separate opinion)). (*See also* Appendix A at 4). Based on that precedent, the lead opinion properly found "no principled basis…to conclude that the nearly identical language in article VI, section 6 should be treated differently" and concluded "that the General Assembly *does* have such power to impeach and try local officials under article VI, section 6." (Appendix B at 30) (emphasis in original).

Other cases and supporting authorities exist, as well. *See, e.g., In re Kline Twp. Sch. Directors,* 44 A.2d 377, 379 (Pa. 1945) (constitutional removal applies to school directors and "other public officers"); *Com. ex rel. Benjamin v. Likeley,* 110 A. 167, 168 (Pa. 1920) (quoting *Houseman, supra*); White, *Commentaries* at 344 (the Constitution's removal provision is "sufficiently broad to include officers of any kind, whether they are state, county or borough officers").

For all of these reasons, D.A. Krasner's attempt to distinguish himself as a "local officer" immune from impeachment under Article VI, § 6 must fail

and, to the extent this Court reaches the merits of Count II, it should affirm the decision of the Commonwealth Court.[23]

C. Count III: Misbehavior in Office

The Commonwealth Court erred in overruling Impeachment Managers' preliminary objection that Count III of the PFR raises a nonjusticiable political question challenging the meaning of "misbehavior in office." What constitutes "misbehavior in office" is a political question textually committed to the General Assembly. Additionally, this question was, at a minimum, not ripe for review. Finally, the Commonwealth Court's judicially imposed interpretation of what constitutes impeachable "misbehavior in office" is unmanageable, and in a misguided effort to apply

[23] The Commonwealth Court also properly rejected D.A. Krasner's secondary argument on this issue—*i.e.,* that by operation of Article IX, § 13 of the Constitution and the Act of June 25, 1919, P.L. 581, No. 274 (the Charter Act), he is a "City officer" subject to impeachment only through § 9 of the Charter Act. As the lead opinion explained, "[a]s District Attorney is a 'civil officer' for purposes of article VI, section 6 of the Pennsylvania Constitution, Section 9 of the Charter Act at most *complements*, but does not *supplant*, the General Assembly's power to impeach him." (Appendix B at 31) (emphasis in original). D.A. Krasner does little to advance this argument in this Court (merely referencing it in a footnote on page 55 of his brief) and can cite no authority to support his position. Accordingly, if this Court addresses Count II on the merits, the Commonwealth Court's conclusion that D.A. Krasner is a civil officer subject to impeachment under the Constitution should be affirmed for this reason, as well.

it, the court failed to adequately consider the serious allegations of misconduct set forth in the Articles of Impeachment—including allegations that need not, but in many cases do, arguably describe criminal conduct.

1. The Commonwealth Court erred in overruling Impeachment Managers' preliminary objections that Count III raises nonjusticiable political questions and, at a minimum, was unripe for judicial review.

a. Our Constitution commits impeachment exclusively to the General Assembly.

Until the Commonwealth Court issued its Order of December 30, 2022, no Pennsylvania court had ever determined what does (or does not) constitute "misbehavior in office" under Article VI, § 6, and for good reason: what rises to the level of an impeachable offense is not a matter for the judiciary to decide, but a political question entrusted to the General Assembly. The Pennsylvania Constitution delegates to the General Assembly the exclusive authority to determine whether to impeach and convict a civil officer, including a district attorney, for "any misbehavior in office." *See* Pa. Const. art. VI, §§ 4-6. Implicit in the Constitution's grant of impeachment authority to the General Assembly is the political question of whether a civil officer's conduct rises to the level warranting impeachment under the Constitution—*i.e.*, "any misbehavior in office." Pa. Const. art. VI, § 6. What constitutes "misbehavior in office" is a question for the General

Assembly alone and not appropriate for judicial interpretation. *See* Pa. Const. art. VI, §§ 4-5. (*See also* Appendix B at PAM-7 (McCullough, J., dissenting) ("[T]here is a 'textually demonstrable constitutional commitment' to the Senate of the question of whether the Amended Articles set forth sufficient allegations of 'misbehavior in office.'")).

As Judge McCullough accurately described, in deciding Count III, "the Majority invalidly appropriates to itself decision-making authority over questions reserved in the first instance for a coordinate branch of our Commonwealth government"—*i.e.,* the legislature. (Appendix B at PAM-5). That decision, she noted, "hurriedly and needlessly plunged [the Commonwealth] Court into a wash of nonjusticiable political questions over which we currently have no decision-making authority[,]…transgress[ing] longstanding separation of powers principles." (Appendix B at PAM-2). *See Dauphin Cnty. Grand Jury,* 2 A.2d at 803 ("the courts have no jurisdiction in impeachment proceedings, and no control over their conduct"). On further reflection, and despite having earlier joined the position of the lead opinion on Count III, Judge Wojcik agreed with Judge McCullough as to a subset of the Articles of Impeachment (*i.e.,* I, II, VI, and VII) that D.A. Krasner had "present[ed] nonjusticiable political questions

that must ultimately be resolved by the General Assembly pursuant to its constitutional authority." (Appendix B at MHW-4-5).

Accordingly, any arguments that D.A. Krasner had on the sufficiency or form of the Articles of Impeachment should have been presented to and resolved by the Senate, which could craft a proper remedy if the Articles were indeed deficient. *See* SR 386, Sect. 15 (R. 138a) (establishing the special rules of practice in the Senate for impeachment trials, including allowing motions on evidence and other trial issues).

Inexplicably, the lead opinion below "largely sidestepped" its own self-binding decision in *Larsen* and the implicit recognition in that case that there is a textually demonstrable constitutional commitment to the Senate whether articles of impeachment sufficiently allege misbehavior in office. (*See* Appendix B at PAM-7). Given the similarities between *Larsen* and this case, the dearth of Pennsylvania case law in this area, and the fact that *Larsen* was decided by the Commonwealth Court and thus precedential in that court, the lead opinion's failure to thoroughly address it is both curious and troubling.

For the same reasons set forth above as to why the Commonwealth Court should not have reached the merits of Count I, it also should not

have reached the merits of Count III. In the interest of efficiency, those same arguments are incorporated by reference herein.

b. Determining what conduct constitutes "any misbehavior in office" lacks judicially manageable standards.

Beyond the "textually demonstrable constitutional commitment" of impeachment proceedings to the General Assembly, determining what conduct rises to the level of "any misbehavior in office" warranting impeachment is also a policy question that courts are ill-equipped to define. *See Robinson Twp.*, 83 A.3d at 928 (noting that political question factors include, *inter alia,* a lack of judicially manageable standards for resolution and the need to make policy decisions requiring non-judicial discretion).

As the *Nixon* court observed, "the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Nixon,* 506 U.S. at 228–29. The *Nixon* court held that even defining the word "try" in the federal impeachment clause—a word undeniably central to judicial practice—lacks judicially manageable standards. *Id.* at 230. If anything, the term "any misbehavior in office," which is not defined by Pennsylvania's Constitution, is far more nebulous and unwieldy. *See* Gerhardt, *Rediscovering Nonjusticiability*, 44 Duke L.J. at 250-251 (observing, in the

federal context, that "it is difficult to settle on judicially manageable standards" for defining impeachable offenses "because the existence of an impeachable offense depends inexorably on Congress's political judgment and on the particular circumstances of the alleged impeachable offense involved"); *id.* at 257 ("[T]here are no reliable or clear standards against which a federal court can measure the propriety of Congress's judgment on whether certain misconduct constitutes an impeachable political crime.").

Indeed, what constitutes an impeachable offense is widely regarded as a political question reserved for the legislature. Nearly two centuries ago, Justice Story observed in the federal context that "the offences, to which the remedy of impeachment has been, and will continue to be principally applied, are of a political nature," thus prompting the Framers' conclusion that it would "be peculiarly unfit and inexpedient" for courts of law to determine the grounds on which a civil officer may be convicted in an impeachment trial, and that the Senate, "a political body," is "far better qualified" to make such determinations. Story, *Commentaries on the Constitution* §§ 783-784. *See also* Gerhardt, *Rediscovering Nonjusticiability*, 44 Duke L.J. at 256 (observing in the federal context that "what constitutes an impeachable offense" is an issue "incompatible with judicial review" and one on which "the House and the Senate eventually

must agree, usually independently of each other"); Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 Minn. L. Rev. 631, 671 n. 207 (1997) (citing *Nixon* for the premise that "Congress's definition of impeachable offenses is probably unreviewable"); Randall K. Miller, *The Collateral Matter Doctrine: The Justiciability of Cases Regarding the Impeachment Process*, 22 Ohio N.U. L. Rev. 777, 805 (1996) ("Defining an impeachable offense is a political determination and as such…courts lack both the competence and authority to participate in that enterprise[.]").

For this additional reason, the Commonwealth Court erred in reaching the merits of Count III, and its decision to do so should be reversed.

c. At a minimum, Count III raises questions that are not ripe for judicial review.

While Impeachment Managers dispute that D.A. Krasner could ever raise a justiciable challenge as to whether his conduct rises to "misbehavior in office," at a minimum, he has no claim at this stage that is ripe for judicial review. As set forth above, declaratory judgments are not an appropriate means to determine rights in anticipation of events that might never occur, *Gulnac*, 587 A.2d at 701, or in the absence of an actual controversy. *Cherry*, 692 A.2d at 1085. Even if this Court were inclined, as was the

Commonwealth Court, to consider the scope of the phrase "any misbehavior in office" in Article VI, § 6, and even if it were not a nonjusticiable political question, that issue is not ripe for resolution.

As the dissent accurately observed, in deciding Count III on its merits, "the Majority decides, in advance, an unripe political question that at this point is constitutionally reserved for the Senate's determination." (Appendix B at PAM-5). D.A. Krasner's request that the Commonwealth Court "evaluate the substance of legislative action that has not yet occurred" put before that court an "unripe" question and, in answering it, noted the dissent, "the Majority shirks the more prudential course of exercising judicial restraint." (Appendix B at PAM-9). The dissent further noted that

> whether, to what extent, and in what format this Court may review the constitutionality of completed impeachment proceedings is not clear...[but] [i]n whatever form that review would take, it should happen on a developed record after the Senate, as constitutionally mandated, has had the opportunity to adjudicate the Amended Articles by trial, summary dismissal, or otherwise.

(Appendix B at PAM-5-6 n.3).

The same reasons that are set forth above as to why Count II was unripe for judicial review are equally applicable to Count III and, in the interest of efficiency, are incorporated by reference herein.

2. Even if the Commonwealth Court were empowered to define "misbehavior in office" in Article V, § 6, the court improperly defined that term, the analytical model outlined in the lead opinion is unmanageable, and the court applied it to an undeveloped and incomplete record, while failing to acknowledge the substance of the allegations.

Even if it were appropriate for the courts to determine the meaning of "misbehavior in office," the Commonwealth Court improperly defined that term. As the lead opinion noted, before the Commonwealth Court decided to do so, there were no prior cases "that [had] interpreted what [that] phrase means in the context of impeachment[.]" (Appendix B at 31). At D.A. Krasner's urging, the Commonwealth Court looked to *In re Braig*, 590 A.2d 284 (Pa. 1991), which defined "misbehavior in office" according to the then-abolished "common law crime consisting of the failure to perform a positive ministerial duty of the office or the performance of a discretionary duty with an improper or corrupt motive." *Id*. at 286-287.

Braig, however, is readily distinguishable. Critically, *Braig* involved an *automatic* judicial forfeiture provision that necessarily turned on a judge being "convicted of misbehavior in office by a court." *See id.* at 286.[24]

[24] The judicial forfeiture provision was then in Article V, § 18(*l*) of our Constitution. A substantially similar provision now appears in Article V, § 18(d)(3).

Impeachment, by contrast, is a process committed exclusively to the General Assembly, *see* Pa. Const. art. VI, §§ 4-5, warrants no court involvement, *see Dauphin Cnty. Grand Jury,* 2 A.2d at 803, and may be based on "**any** misbehavior in office," regardless of whether the officer has even been accused, let alone convicted in a court, of a criminal offense. Pa. Const. art. VI, § 6 (emphasis added). *Braig* also turned largely on earlier cases involving the constitutional provision for removal of civil officers, Article VI, § 7, 590 A.2d at 287, but that provision similarly requires a conviction in a court of law. *See* Pa. Const. art. VI, § 7.[25]

Notably, in *Larsen,* the petitioner urged the Commonwealth Court to read "any misbehavior in office" in Article VI, § 6 as "referring only to the common law crime of misconduct in office[.]" 646 A.2d at 702. The *Larsen* court declined to do so, explaining that such a definition "finds **no support**

[25] Curiously, *Braig* nowhere mentioned *Com. ex rel. Duff v. Keenan*, 33 A.2d 244, 249 n.4 (Pa. 1943), which discussed (albeit in *dicta*) the phrase "misbehavior in office" found in the then-extant removal clause (then Article VI, § 4 of the Constitution) and observed that the phrase "does not necessarily involve an act or acts of a criminal character" and is sufficiently broad "to include any willful malfeasance, misfeasance or nonfeasance in office," and that "[t]he official doing of a wrongful act or official neglect to do an act which ought to have been done, will constitute the offence of misconduct in office, although there was no corrupt or malicious motive."

in judicial precedents." *Id.* (emphasis added).[26] The court made no mention whatsoever of *Braig*, which had been decided three years earlier, presumably because it did not find that *Braig,* a judicial forfeiture case, had any relevance in the wholly distinct context of impeachment. Why the Commonwealth Court found *Braig* applicable here, nearly thirty years post-*Larsen* in a case so similar to *Larsen*, is unclear, but *Braig* remains just as inapposite in the impeachment context now as it was when the Commonwealth Court decided *Larsen*.[27]

The Commonwealth Court also erred in its interpretation of Article VI, § 6 by reading the word "any" out of the constitutional text. If impeachment were narrowly reserved only to the common law crime of misbehavior in office, as the lower court held, then use of the qualifier "any" would be redundant; the text would have stated "…civil officers shall be liable to impeachment for ~~any~~ misbehavior in office." But those are not the words in the Constitution, and the lower court violated core principles of constitutional interpretation by failing to observe the plain text of Article VI,

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[26] D.A. Krasner conceded this point in his PFR. (R. 26a n.6)

[27] While the lead opinion notes that the *Larsen* court "went on to address and apply" the common law definition of misbehavior in office to the merits of *Larsen's* claims (Appendix B at 36), the *Larsen* court never undertook to decide the correct definition.

§ 6, which allows for the impeachment of civil officers for *any* misbehavior in office, not just for violations of common law crimes. *See Washington v. Department of Public Welfare of Com.*, 188 A.3d 1135, 1145 (Pa. 2018) ("our ultimate touchstone is the actual language of the Constitution itself").

The Commonwealth Court's definition is also inconsistent with Pennsylvania's history of impeachments, which have involved political (not necessarily criminal) misconduct entailing abuses of office, *i.e.,* "any misbehavior in office." In 1802-1803, for example, Judge Alexander Addison was impeached and convicted for refusing to permit another jurist to address a grand jury, although Addison himself regularly engaged in the practice. *See* Ron Schuler, *Early Pittsburgh Lawyers and the Frontiers of Argument and Dissent*, 73 U. Pitt. L. Rev. 657, 667-69 (2012). Addison's impeachment has been extensively described as political in nature and not deriving from any crime. *See* Patrick J. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison*, 58 Clev. St. L. Rev. 529, 531-32 (2010) (Addison's impeachment was "not the result of 'high crimes or misdemeanors[,]'" but was instead "extremely political in nature and the result of the Jeffersonian Republican administration's sweeping victory at the local and national level"); Walter Nelles, *The First American Labor*

Case, 41 Yale L.J. 165, 171 (1931) (Addison was impeached "nominally for a clear instance of arbitrary conduct into which he had been trapped, [but] actually for the Federalist stump speeches which he had delivered as charges to grand juries"); Edward Channing, *The Jeffersonian System, 1801-1811* 113-14 (1906)[28] (Addison's impeachment was an example of political opponents "us[ing] the process of impeachment to get rid of obnoxious judges against whom nothing criminal could be proved"). D.A. Krasner is simply incorrect in his assertion (D.A.'s Brief at 4) that "[h]istorically, impeachments have been limited to officials who have committed crimes[.]"

Impeachment has always been understood as a political exercise, and constitutions therefore were structured to account for and protect against the risk that legislators may abuse their impeachment powers. As one scholar on the Pennsylvania Constitution noted, "[t]he offenses for which officers are impeached are, as a rule, offenses of a political nature," and it is for this reason that our Constitution contains procedural protections, such as the two-thirds vote requirement for conviction by the Senate (set forth in what is now Article VI, § 5). White, *Commentaries* at

[28] *See* https://books.google.com/books?vid=PSU:000028934189.

342. Other constitutional protections include the division of impeachment power between the House and the Senate and the limitations on punishment (*i.e.,* "removal from office and disqualification to hold any office of trust or profit under this Commonwealth"). *See* Pa. Const., art. VI, §§ 4-6. *Cf. Nixon,* 506 U.S. at 235-36 (observing that similar safeguards in the federal Constitution "keep the Senate in check" and prevent it from "usurp[ing] judicial power").

In the federal context, it has been similarly and repeatedly observed that impeachable offenses have often been political in nature and not limited to indictable (or once-indictable) offenses. Alexander Hamilton, writing in The Federalist, observed that impeachable offenses "are those offenses which proceed from the misconduct of public men, or, in other words from the abuse or violation of some public trust" and "are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself." The FEDERALIST No. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (capitalization in original). Justice Story explained:

> The offences, to which the power of impeachment has been, and is ordinarily applied, as a remedy, are of a political character….it has a more enlarged operation, and reaches, what are aptly termed, political offences, growing out of personal misconduct, or gross neglect, or usurpation, or

> habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty.

Story, *Commentaries on the Constitution* § 762. *See also* Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 Tex. L. Rev. 1, 83 (1989) ("[A]ttempts to limit the scope of impeachable offenses have rarely proposed limiting impeachable offenses only to indictable offenses. Rather, the major disagreement among commentators has been over the range of nonindictable offenses for which someone may be impeached.").

Compounding the Commonwealth Court's errors, the lead opinion below—without citing any legal authority—then compared the Articles of Impeachment to a criminal indictment without reference to an evidentiary burden or cognizable legal standard:

> Ultimately, however, the Amended Articles, and indeed the whole process itself, are constitutionally sound only in the event that the substance of the House's "charges" are akin to a criminal indictment of District Attorney for misbehavior in office. Each of the Amended Articles must therefore be scrutinized, in order to determine whether they satisfy this standard. In other words, each of the Amended Articles meets constitutional muster only if the assertions made there would support a conclusion

> that District Attorney failed to perform a positive ministerial duty or performed a discretionary duty with an improper or corrupt motive.

(Appendix B at 38). The opinion thus equated "misbehavior in office" under Article VI, § 6 with a crime and required that the Articles of Impeachment meet the standard for a criminal indictment—a rarely used charging tool under Pennsylvania law that offers little to no useful frame of reference. *See* Pa. Const. art. I, § 10 (governing initiation of criminal proceedings); Pa.R.Crim.P. 560(A) (procedure required after indictment); Pa.R.Crim.P. 556 (indicting grand juries allowed); Pa.R.Crim.P. 556.11(C) (contents of indictment). Again, however, unlike the processes for removal of judges and civil officers on conviction, there is nothing in Article VI, § 6 that requires an allegation of a crime, let alone a conviction. Despite this, as detailed below, much of the conduct charged in the Articles of Impeachment could readily have been framed as criminal violations.

If anything, this attempt to fashion a standard with which to analyze the sufficiency of the allegations in the Articles of Impeachment only serves to illustrate the "lack of judicially discoverable and manageable standards for resolving the disputed issue" and the fact that D.A. Krasner's arguments raise political questions not properly reviewable by the courts. *Robinson Twp*., 83 A.3d at 928.

As a preliminary matter, by virtue of the Commonwealth Court's unprecedented ruling, the record is woefully undeveloped as to whether each of the Articles on which D.A. Krasner was impeached could support a finding by the Senate of "misbehavior in office," as the Commonwealth Court chose to define it. Impeachment Managers had neither any reason to develop such a record in the court below nor an opportunity to do so, given that the Commonwealth Court granted summary relief based solely on the four corners of the Articles of Impeachment. For this reason alone, the lower court's ruling should be reversed, and the impeachment trial be allowed to proceed in the Senate.

Further, while Impeachment Managers dispute that they are even required to justify the sufficiency of each Article of Impeachment in a court of law, closer consideration of the lead opinion's discussion with respect to several of the Articles serves to highlight the inconsistency and flaws in its analysis.

a. Article VI.

Despite purporting to focus on the "substance" of the Articles to determine whether they were akin to a criminal indictment (Appendix B at 38), the lead opinion at times seems to elevate form over substance. For instance, the lead opinion recognizes that the allegations in Article VI that

D.A. Krasner violated the Crimes Victims Act appeared to sufficiently allege a failure to perform a positive ministerial duty and thus meet the Court's definition of misbehavior in office but faulted Article VI for not providing specific examples of the alleged conduct, as if this were a requirement for an article of impeachment. (Appendix B at 43). The lead opinion did not mention what degree of specificity was required to survive its scrutiny or provide any cognizable framework in support of its finding. Regardless, whatever level of specificity it demanded did not conform with the lead opinion's underlying premise that the Articles had to meet the requirements of an indictment, because indictments need not reference overt acts or specific instances of criminal conduct.[29]

In its most recent pronouncement on the form of an indictment, a rarely used charging instrument in Pennsylvania that offers a minimal frame of reference, this Court directed that "[i]n cases in which the grand jury votes to indict, an indictment shall be prepared setting forth the offenses on which the grand jury has voted to indict." Pa.R.Crim.P. 556.11(C). This rule does not require a recitation of the facts underlying the offenses

[29] Specific allegations of misconduct under Article VI can be provided to D.A. Krasner prior to trial, along with other evidence, under the Senate rules governing the impeachment proceedings. *See* SR 386, Sect. 15., SR 16, Sect. 15.

supporting indictment. Thus, despite invoking indictments as a frame of reference in finding Article VI insufficiently alleged misbehavior in office, the lead opinion does not accurately reflect what is required of an indictment, and its analysis with respect to Article VI was incorrect even under its own poorly defined standard of review.

In addition, the lead opinion's treatment of Article VI underscores the error in the Commonwealth Court resolving D.A. Krasner's claims without Impeachment Managers ever having an opportunity to present evidence in support of the Articles. Our Constitution designates the Senate as the forum to present and weigh the adequacy of evidence in support of an impeachment charge, Pa. Const., art. VI, § 5, and the Senate is entitled to hear of D.A. Krasner's "repeated[]," "deliberate[]," and "contempt[uous]" violations of the rights of crime victims, as the House charged. (R. 127a)

b. Articles III through V.

For Articles III through V, the lead opinion[30] *ignored* the substantive allegations entirely, and its findings are incorrect even within the parameters of its loosely defined analytical model. The lead opinion stated that "the House claims that District Attorney violated the Rules of

[30] Judge Wojcik joined this part of the lead opinion thus making it the opinion of a majority of the judges who decided the question. (Appendix B at MHW-2-3).

Professional Conduct and the Code of Judicial Conduct by virtue of his and his office's handling of three different criminal cases," and then found that "[t]hese articles fail…as a matter of law" because this Court has exclusive jurisdiction under the Constitution to determine whether such violations have occurred. (Appendix B at 41-43). These Articles, however, do not purport to place the legislature in the shoes of this Court to adjudicate violations of ethics rules applicable to attorneys, as the text and substance of the Articles show.

Only this Court has the authority to regulate the professional conduct of attorneys in the Commonwealth, including prosecutors generally and D.A. Krasner specifically. *See Off. of Disciplinary Counsel v. Jepsen*, 787 A.2d 420, 421 (Pa. 2002).[31] That impeachment Articles III through V

[31] Article V, § 10(c) assigns to this Court the power to regulate and supervise the practice of law in Pennsylvania, although it does not say that this power is "exclusive" to the Court. Pa. Const. art. V, § 10(c). The Court nevertheless has declared that it possesses such exclusive power from Article V, § 10(c). *See*, *e.g.*, *Jepsen,* 787 A.2d at 421 ("Article V, Section 10(c) of the Pennsylvania Constitution…grants our Court the *exclusive* power to supervise the conduct of attorneys.") (emphasis added); Pa. R.D.E. 103 ("The Supreme Court declares that it has inherent and *exclusive* power to supervise the conduct of attorneys who are its officers (which power is reasserted in Section 10(c) of Article V of the Constitution of Pennsylvania) and in furtherance thereof promulgates these rules.") (emphasis added). By comparison, the Constitution assigns the "*sole* power of impeachment" to the House, Pa. Const. art. VI, § 4 (emphasis added), and states that "*[a]ll* impeachments *shall* be tried in the Senate." Pa. Const. art. VI, § 5 (emphasis added). What this Court has said in

charge D.A. Krasner with misbehavior in office "in the nature of" violations of the R.P.C., C.J.C., and Canons of Judicial Conduct does not mean, however, they intrude on the disciplinary power of this Court.

First, the references to the R.P.C., C.J.C., and Canons are akin to references to violations of statutes, regulations, industry standards, and the like, which are common in civil litigation, whether to establish the standard of care or as some evidence of negligence. Especially relevant here, in *Rizzo v. Haines*, 555 A.2d 58 (Pa. 1989), this Court held that evidence of violations of the R.P.C. is relevant to establish the standard of care in a legal malpractice action. *Id.* at 67 ("expert testimony was not needed to detail the fiduciary obligations of an attorney who engages in financial transactions with his client, since these obligations are established by law, the Code of Professional Responsibility, and the Model Rules of Professional Conduct"). After all, as this Court has noted, "the disciplinary rules derive from the lawyer's common law duties, not the other way around." *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1285 (Pa. 1992).

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describing its power under Article V, § 10(c) applies equally to the General Assembly's "exclusive" impeachment power.

It makes little sense to prohibit reference to such rules in a non-disciplinary context arising from the same conduct and focusing on the same duties, though the consequences of the proceedings may differ. The rules simply state the duties in a clear and succinct way, rather than in the more complex context of a judicial opinion. Where, as here, a district attorney has been impeached for certain conduct, aspects of which are alleged to have violated his professional, ethical obligations as a lawyer, prohibiting reference to those obligations is not only unwarranted, but also senseless. It is entirely appropriate for the General Assembly to consider such violations in the impeachment context.

That Articles III through V each use the term "in the nature of" (R. 117a, 120a, 125a) demonstrates that the intent is to show how conduct that could evidence a violation of the R.P.C., C.J.C., and Canons might also be relevant to whether D.A. Krasner's conduct arises to misbehavior in office. For example, Impeachment Article III asserts, *inter alia,* that D.A. Krasner "directed, approved and[/]or permitted the filing of a 'Notice of Concession' and presentation of other pleadings and statements in Federal court which contained materially false and[/]or misleading affirmative statements and purposeful omissions of fact." (R. 119a) These allegations easily satisfy the definition of misbehavior in office invoked by the Commonwealth Court,

and that court did not rule otherwise, but rather avoided the issue by ignoring the substance of the Articles themselves.[32]

The nature of the misconduct described in Article III could have been captured in the Articles in a number of ways, including by reference to violation of the R.P.C., as happened here, or to Crimes Code offenses, which overlap. For example, Pennsylvania's statute prohibiting the obstruction of the administration of law or other governmental function, 18 Pa.C.S. § 5101, makes it a crime if a person "intentionally obstructs, impairs or perverts the administration of law or other government function by…breach of official duty."[33] R.P.C. 3.3, cited in Article III, in turn, requires that a lawyer not knowingly "make a false statement of material fact or law to a tribunal." Pa. R.P.C. 3.3(a)(1). R.P.C. 8.4, also cited in Article III, governing "misconduct," prohibits lawyers from committing criminal acts

[32] Further demonstrating the error of exercising judicial review of the Articles in the first place, the lower court's rulings with respect to each of the Articles could be corrected by simply rewriting them to account for the novel drafting requirements the court imposed. A court micromanaging the technical adequacy of the drafting of articles of impeachment, while disregarding the substantive allegations in the articles themselves, cannot be reconciled with the separation of powers between coordinate branches of government or our Constitution's vesting the sole power of impeachment in the House. *See* Pa. Const. art. VI, § 4.

[33] Even if one accepts the Commonwealth Court's definition of misbehavior in office, a violation of 18 Pa.C.S. § 5101 would satisfy that definition.

that reflect adversely on the lawyer's honesty and trustworthiness, and from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation" or that is "prejudicial to the administration of justice." Pa. R.P.C. 8.4(b)-(d).

With respect to D.A. Krasner's responsibility for the misconduct of subordinate prosecutors in his office, Rule 8.4 also prohibits assisting or inducing another to violate the R.P.C. or violating the rules through the acts of another. *Id.* at 8.4(a). Similarly, under the Crimes Code, one can be held responsible for the alleged crimes of others by "promoting," "facilitating," "encouraging," or "requesting" that they engage in criminal acts, 18 Pa.C.S. § 902 (solicitation), or by entering an agreement with others to commit a crime which is then carried out by overt acts of a coconspirator. 18 Pa.C.S. § 903 (conspiracy).

Indeed, there is no logic to the premise that the Articles of Impeachment improperly referenced the R.P.C., C.J.C., and Canons—under the premise that the General Assembly lacks the authority to discipline attorneys under those provisions—but had to reference crimes, as the General Assembly has no authority to prosecute anyone under the Crimes Code either. *See Dauphin Cnty. Grand Jury,* 2 A.2d at 803 ("the legislature has no power to indict, try, judge and punish according to law").

The House simply referenced the R.P.C., C.J.C., and Canons in describing the conduct at issue, just as it could have cited to the Crimes Code, without (in either case) intruding on the authority of the courts or prosecutors.

To be clear, while the misconduct charged in the Articles, if proven, could constitute violations of several criminal statutes, Article VI, § 6 does not require proof of a crime, whether under Title 18 or the common law crime of misbehavior in office. Rather, whether the conduct for which D.A. Krasner has been impeached in Article III—*i.e.,* making materially false and/or misleading affirmative statements and purposeful omissions of fact to a tribunal (R. 119a)—constitutes misbehavior in office may be informed by evidence that D.A. Krasner acted "*in the nature of violations*" of R.P.C. 3.3 and 8.4, just as it could have been informed by reference to Crimes Code offenses or some other drafting approach the House could have taken. *See Larsen*, 646 A.2d at 702 (rejecting the notion that an impeachment requires proof of the common law crime of misconduct in office but concluding that the impeachment charges, which included criminal violations of prescription drug laws, clearly constituted impeachable offenses). Regardless, it was improper for the Commonwealth Court to intervene and obstruct the impeachment over the manner in which the House chose to write the Articles while ignoring the

substantive allegations appearing in Article III, which clearly meet the threshold for impeachable conduct.

These same principles apply to Articles IV and V. As alleged in Article IV, D.A. Krasner deliberately abused grand jury and judicial processes in the investigation and criminal prosecution of former Philadelphia Police Officer Ryan Pownall and, in doing so, intentionally deprived Officer Pownall of his constitutional rights. Article IV describes the conduct underlying these impeachment charges largely by quoting Justice Dougherty's special concurrence in *Com. v. Pownall*, 278 A.3d 885, 908-19 (Pa. 2022) (Dougherty, J., concurring), in which he addressed what appeared to be multiple instances of serious prosecutorial misconduct by D.A. Krasner and his office, and the trial court's subsequent findings confirming that the suspected misconduct in fact occurred. (R. 120a-124a)

As set forth in Article IV, on remand, the trial court dismissed all charges against Officer Pownall because there were "so many things wrong" with the instructions to the investigating grand jury, including that the prosecution failed to provide the legal instruction for homicide and "made an intentional, deliberate choice not to inform the grand jurors about the justification defense" available to Officer Pownall, despite being aware of it. (R. 123a) The trial court also found, *inter alia*, that the district

attorney's office "demonstrated a lack of candor to the Court by misstating the law and providing [it] with incorrect case law" and was "disingenuous with the Court when it asserted [for various reasons] that it had good cause to bypass the preliminary hearing," resulting in prejudice to Officer Pownall and the violation of his due process rights. (R. 123a-124a) In addition, Article IV notes that the District Attorney's Office withheld from Officer Pownall its own expert report concluding that Officer Pownall's use of deadly force was justified. (R. 124a)

The allegations in Article IV describe an abuse of power by D.A. Krasner that resulted in the repeated and deliberate deprivation of Officer Pownall's constitutional rights. Thus, even if one accepts the Commonwealth Court's definition of "misbehavior in office," the charges in Article IV easily constitute the performance of a discretionary duty with an improper or corrupt motive. *See Larsen,* 646 A.2d at 702 (finding that making false statements to a grand jury was an impeachable offense and would suffice to allege the common law crime of misconduct in office, even if that were the standard). *See also Com. v. Clancy,* 192 A.3d 44, 52 (Pa. 2018); *Com. v. Cosby*, 252 A.3d 1092, 1131 (Pa. 2021); *Com. v. Toth*, 314 A.2d 275, 278 (Pa. 1974) (discussing prosecutors' duty to seek equal and impartial justice).

Indeed, the substance of Article IV amounts to an allegation that D.A. Krasner may have violated Pennsylvania's official oppression statute, 18 Pa.C.S. § 5301, which broadly criminalizes a public official's knowing and intentional deprivation of another's legal rights. *See D'Errico v. DeFazio,* 763 A.2d 424, 430 (Pa. Super. 2000) ("the statute is intended to protect the public from an abuse of power by public officials, and to punish those officials for such abuse"). In addition, as with Article III, the conduct in Article IV rises to arguable violations of other Title 18 crimes, including obstructing administration of law or other governmental function, solicitation, and conspiracy. 18 Pa.C.S. §§ 5101, 902, 903.

The allegations in Article IV, whether framed by reference to violations of the Crimes Code or not, overlap with the misconduct at issue in the R.P.C. cited in the Article, *i.e.,* making false statements, committing crimes involving dishonesty, engaging in deceptive and dishonest acts, prejudicing the administration of justice, and aiding or causing others to engage in such conduct. *See* Pa. R.P.C. 3.3, 8.4. By neglecting to consider the substance of Article IV, the Commonwealth Court again erred and abused the discretion prescribed by its analysis.

Article V accuses D.A. Krasner of omitting material information in a deposition overseen by a special master appointed by this Court to

investigate whether his office had a conflict of interest in *Com. v. Wesley Cook, a/k/a Mumia Abu Jamal*. (R. 124a-126a) Again, the Commonwealth Court ignored the allegations of misbehavior in office presented in this Article. Lying by omission in a deposition, particularly one involving an investigation overseen by this Court, could potentially be a crime, including perjury, false swearing, or obstructing administration of law or other governmental function, 18 Pa.C.S. §§ 4902, 4903, 5101; a violation of R.P.C. 3.3 or 8.4; or characterized as the failure to perform a positive ministerial duty or performance of a discretionary duty with an improper or corrupt motive. Again, a crime need not be proven to impeach under Article VI, § 6, but despite incorrectly imposing that requirement here, the Commonwealth Court further erred by failing to recognize that the allegations appearing in Impeachment Article V, along with Articles III and IV, meet this threshold. *See Larsen,* 646 A.2d at 702 (finding that making false statements under oath was an impeachable offense and would suffice to allege the common law crime of misconduct in office, even if that were the standard).

Second, and closely related to the first point, it is D.A. Krasner's alleged *conduct* that is at issue, as described in Articles III through V (and as would be further demonstrated by evidence in an impeachment trial). If

one were to eliminate all references to the R.P.C., C.J.C., and Canons, that conduct remains, and the same conduct can be relevant in various contexts. *See In re Larsen,* 812 A.2d 640, 649 (Pa. Spec. Trib. 2002) (former Justice Larsen could be subject to criminal prosecution, judicial discipline, and impeachment for the same conduct); 16 P.S. § 1401(o) (statutory provision applicable to all district attorneys requiring that they abide by the R.P.C. and Canons and acknowledging that a district attorney may be subject to both disciplinary action by the Supreme Court and impeachment).[34] But the Commonwealth Court completely ignored the substance of the allegations of misconduct appearing in Articles III through V, constituting abuse of power and the repeated corrupt exercise of discretionary and nondiscretionary prosecutorial authority.

Third, the General Assembly is entirely without power to discipline a district attorney in many of the ways in which this Court is empowered to act, just as it is without power to prosecute crimes and seek a criminal conviction and punishment. Article VI, § 6 of our Constitution provides that judgment in an impeachment case "shall not extend further than to removal

[34] *See also* Pa. Const. art. VI, § 6 (a civil officer may be both impeached and criminally prosecuted for the same conduct); *Dauphin Cnty. Grand Jury,* 2 A.2d at 803 (same); *Larsen,* 646 A.2d at 701 (same). *Cf. Maritrans*, 602 A.2d at 1285 (conduct that constitutes a disciplinary violation may also give rise to an action in tort).

from office and disqualification to hold any office of trust or profit under this Commonwealth." Pa. Const. art. VI, § 6. Accordingly, "[t]he legislature can **only** remove from office and disqualify from holding office[.]" *Dauphin Cnty. Grand Jury*, 2 A.2d at 803 (emphasis added).

By contrast, this Court has the power to impose many additional kinds of sanctions in an attorney disciplinary proceeding, ranging from reprimand through disbarment. Pa. R.D.E. 204. There is no confusion that the General Assembly lacks the authority to impose those measures, and—even if there were—the General Assembly would be powerless to act, as this is a constitutional obligation committed clearly to this Court by Article V, § 10(c). The legislature cannot usurp this attorney disciplinary authority any more than a court may intrude on the legislature's constitutional impeachment authority.

Fourth, there is precedent in Pennsylvania for referencing the Canons of Judicial Conduct in articles of impeachment. In the impeachment of former Justice Larsen, Article VII cited six instances in which Justice Larsen had "undermine[d] confidence in the integrity and impartiality of the judiciary" in violation of his duties to "uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to perform the duties of his office impartially." *See Larsen v. Senate of the Com. of Pa*.,

955 F. Supp. 1549, 1555 & n.2 (M.D. Pa. 1997).[35] While Article VII did not cite the Canons by name or quote them in full, its charges were clearly based on them, as can be seen from the text of Canons 1 and 2. Canon 1 provides: "A judge shall uphold and promote the independence, **integrity, and impartiality of the judiciary**, and shall **avoid impropriety and the appearance of impropriety**." (Emphasis added).[36] Canon 2 provides: "A judge shall perform the duties of judicial office **impartially**, competently, and diligently." (Emphasis added).[37]

For all of these reasons, the argument that Articles III, IV, and V unconstitutionally intrude on this Court's exclusive authority to govern attorneys is a red herring. It elevates form over substance and attempts to create a conflict where none actually exists.

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[35] Though seven articles of impeachment were adopted by the House against Justice Larsen, he was not convicted on the article that was based on his criminal court conviction. *See Larsen v. Senate of the Com. of Pa.,* 152 F.3d 240, 243-44 (3d Cir. 1998).

[36] *See also* Pa. C.J.C. Rule 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.").

[37] *See also* Pa. C.J.C. Rule 2.2 ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.").

c. Articles I and VII.

The Commonwealth Court also erred in finding that Articles I and VII fail to allege misbehavior in office because the conduct involved concerns D.A. Krasner's exercise of prosecutorial discretion. (Appendix B at 38-40, 43-44). Impeachment Managers do not dispute that district attorneys are afforded substantial discretion. *See Com. ex rel. Spector v. Bauer*, 261 A.2d 573, 576 (Pa. 1970). They disagree, however, that it is merely permissible discretionary authority that is challenged in Articles I and VII.

Though entrusted with prosecutorial discretion, which "is 'at the heart of the State's criminal justice system,' prosecutors' 'power to be lenient [also] is the power to discriminate," often "at the expense of victims and the public." Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. Pa. L. Rev. 959, 961-62 (2009) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 297, 312 (1987)). The power of impeachment is a critical and necessary check against a district attorney's abuse of discretionary power. *See In re Bruno*, 101 A.3d 635, 660 (Pa. 2014) ("[O]ur charter…provides essential checks and balances whose complexity is to be neither undervalued nor disregarded.").

Both Article I and Article VII charge D.A. Krasner with, *inter alia,* unilaterally determining, on a wholesale basis, that certain classes of

crimes prohibited by state law (*e.g.,* theft, drug-related offenses, prostitution) simply will not be prosecuted. (R. 106a, R. 127a-128a) The discretion afforded to prosecutors, while broad, is not unbounded. It is to be judiciously exercised on an individual, case-by-case basis, for sound reasons, and not because the district attorney (an executive) fundamentally disagrees with the legislature as to the kinds of conduct that should give rise to criminal liability (*i.e.,* what the law should be).

That is not prosecutorial discretion; it is *de facto* nullification of the law and a violation of the separation of powers doctrine. *See Ayala v. Scott,* 224 So. 3d 755, 758 (Fla. 2017) (in implementing a blanket policy not to pursue the death penalty, "as opposed to making case-specific determinations as to whether the facts of each death-penalty eligible case justify seeking the death penalty," a state attorney "exercised no discretion at all"); *Johnson v. Pataki,* 691 N.E.2d 1002, 1007 (N.Y. 1997) (adoption of a "blanket policy" against the death penalty was "in effect refusing to exercise discretion" and served to inappropriately "functionally veto" a state statute authorizing prosecutors to pursue the death penalty in appropriate cases). *See also* Thomas Andrew Koenig, *Make Politics Local Again: The Case for Pro-Localization State Constitutional Reform*, 73 Rutgers U.L. Rev. 1059, 1088 (2021) ("Non-legislators—including executive officers like

district attorneys—do not have the power to give blanket pronouncements regarding what constitutes a criminal, chargeable offense. The prosecutor has broad discretion within the confines of individual cases, but he does not have the power to effectively legislate."); W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. Rev. 173, 208 (2021) ("Potential critiques [of unilateral prosecutorial nullification of state law] are not wanting, whether one roots them in the separation of powers, the rule of law, some sort of local infringement on state sovereignty, or just a rough understanding that voters who elect prosecutors are doing just that: electing a prosecutor, not an emperor, and certainly not one empowered to make decisions that might spill over onto people who didn't even get to vote on them."); Logan Sawyer, *Reform Prosecutors and Separation of Powers,* 72 Okla. L. Rev. 603, 618 (2020) ("When prosecutors make informed, reasoned decisions on the basis of individual facts, they fulfill their sworn obligation to uphold the law. But when they make generally applicable, prospective rules, they arguably change the law and thus encroach on the authority of the legislature."); Note, *The Paradox of "Progressive Prosecution,"* 132 Harv. L. Rev. 748, 753 (2018) (prosecutors who set blanket nonenforcement policies "have been criticized for blatantly neglecting their duties and violating separation of powers doctrine").

Again, while Impeachment Managers disagree with the Commonwealth Court's definition of "misbehavior on office" and dispute its authority to define that term, even accepting the court's definition, a blanket refusal to uphold the law sufficiently alleges "the failure to perform a positive ministerial duty of the office" of the district attorney. *See Bauer*, 261 A.2d at 575 ("[D]istrict attorneys in this Commonwealth have the power—and the duty—to represent the Commonwealth's interests in the enforcement of its criminal laws."); 16 P.S. § 1402 (the duties of the district attorney include carrying out criminal prosecutions in the name of the Commonwealth). *See also Com. v. Brown,* 669 A.2d 984, 995 (Pa. Super. 1995) (Saylor, J., dissenting) (citing numerous cases for the point that "prosecutors may transgress the bounds of their discretionary authority by engaging in a pattern of discriminatory, retaliatory or arbitrary prosecutions, *or refusing to prosecute certain classes of people or crimes*") (emphasis added); *Com. v. Metzker,* 658 A.2d 800, 801 (Pa. Super. 1995) (Hoffman, J., concurring) ("A district attorney cannot…steadfastly refuse to prosecute certain classes of people or crimes."). More importantly, as with all aspects of impeachment, the proper forum in which to debate and resolve whether the conduct alleged in Articles I and VII constitutes "misbehavior in office" is the Pennsylvania Senate, not the courts. Pa. Const., art. VI, § 5.

For these reasons, the Commonwealth Court was incorrect in holding that Articles I and VII merely criticize conduct within the proper discretion of a district attorney, and its decision should be reversed.

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For all of these reasons, even if were appropriate for the courts to determine the meaning of "misbehavior in office," the Commonwealth Court improperly defined that term, failed to provide a workable standard, and failed to grapple with the substance of the Articles of Impeachment, and this Court should reverse its holding on the merits of Count III.

VIII. CONCLUSION

For the reasons above, this Court should reverse the Commonwealth Court's denial of Impeachment Managers' preliminary objections on Counts I through III, thereby allowing the Senate to take up D.A. Krasner's impeachment trial in accordance with its constitutional mandate to do so.

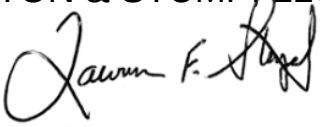
In the alternative, to the extent that this Court believes that it is appropriate to rule on the merits of Counts I through III, it should affirm the order of the Commonwealth Court on the first two—holding that impeachment proceedings do not cease with adjournment *sine die* and that D.A. Krasner is a civil officer subject to impeachment under Article VI, § 6—

and reverse on the third by holding that the Articles of Impeachment sufficiently allege conduct arising to "any misbehavior in office" for purposes of Article VI, § 6.

Respectfully submitted,

SAXTON & STUMP, LLC

Dated: July 25, 2023

By: 

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PUBLIC ACCESS POLICY CERTIFICATION

I, Lawrence F. Stengel, hereby certify that the foregoing Brief for Appellees complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that requires the filing of confidential information and documents to be performed differently than nonconfidential information and documents and Pa.R.A.P. 127.

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