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IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 2, 3 & 4 EAP 2023 (CASES CONSOLIDATED)

LARRY KRASNER, IN HIS OFFICIAL CAPACITY AS THE DISTRICT ATTORNEY OF PHILADELPHIA,
Designated Appellant,

v.

SENATOR KIM WARD, IN HER OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE SENATE, ET AL.,
Designated Appellees.

BRIEF FOR DESIGNATED APPELLEE SENATOR KIM WARD

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

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I. INTRODUCTION

The Commonwealth Court correctly concluded that impeachments across multiple sessions are ordinary and in no way prohibited, and that the District Attorney of Philadelphia is a "civil officer" subject to impeachment. Designated Appellant District Attorney Larry Krasner and Intervenor Senator Jay Costa have not offered a cogent argument to undercut either holding. Instead, they offer exceptionally strong language to demand they are correct (without any support to back up those assertions) and they interject inapposite policy references. But this approach to argument does not help DA Krasner or Senator Costa overcome the plain language, history, prior interpretations, and persuasive authority related to the constitutional provisions the Commonwealth Court determined were controlling. This Court should therefore affirm the Commonwealth Court's conclusions that impeachments can span across legislative sessions and that DA Krasner is a civil officer subject to impeachment.

The Commonwealth Court erred however, when it interpreted the phrase "any misbehavior in office" as used in Article VI, Section 6. Properly understood, "any misbehavior in office" is broader than the

common law definition of "misbehavior in office." The Constitution's text and history, as well as this Court's caselaw, aptly support this conclusion. This Court must correct the Commonwealth Court's interpretation error.

II. ORDER IN QUESTION

This appeal arises out of the December 30, 2022 Order issued by a four-judge *en banc* panel of the Commonwealth Court. A copy of the entire Order is attached to DA Krasner's Brief as Appendix A. Senator Ward appeals the following portion of the Order:

> 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).

Id. at ¶ 9.

III. COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Where the Senate's constitutional impeachment duty is outlined separately from its lawmaking power, and where history reflects a long-standing practice of survival of impeachment across legislative sessions, is impeachment across successive legislative sessions proper?

Commonwealth Court Answer: Yes.
Suggested Answer: Yes.

2. Is DA Krasner a "civil officer" subject to impeachment under Article VI?

Commonwealth Court Answer: Yes.
Suggested Answer: Yes.

3. Does the phrase "any misbehavior in office" in Article VI, Section 6 include conduct beyond the common law definition of "misbehavior in office"?

Commonwealth Court Answer: No.
Suggested Answer: Yes.

IV. COUNTER-STATEMENT OF THE CASE[1]

A. Factual Background

DA Krasner is the District Attorney of Philadelphia County. On October 26, 2022, the House introduced House Resolution 240, entitled, "Impeaching Lawrence Samuel Krasner, District Attorney of Philadelphia for misbehavior in office; and providing for the appointment of trial managers." (R. 039a-060a.) On November 16, 2022, HR 240 was amended and passed by the House. (R. 080a-129a.) Two days later, in accordance with HR 240, Speaker of the House Representative Bryan Cutler announced a committee to exhibit the Articles of Impeachment to the Senate and conduct a trial.

On November 29, 2022, the Senate adopted two resolutions to set rules for conducting impeachment trials, Senate Resolution 386, and to invite the House of Representatives to exhibit the Articles of Impeachment on November 30, 2022, Senate Resolution 387. (R. 131a-147a.)

The House exhibited the Articles as instructed, following which the Senate adopted Senate Resolution 388, directing the issuance of a

[1] DA Krasner's Statement of the Case is rife with argument contrary to Pa.R.A.P. 2117(b) ("The statement of the case shall not contain any argument.").

Writ of Impeachment Summons to DA Krasner. (R. 149a-151a.) The Writ was served on DA Krasner on December 1, 2022. (R. 153a-165a.) The 206th General Assembly ended on November 30, 2022.

Following the Commonwealth Court's decision below, the Senate postponed the impeachment trial indefinitely.

B. Procedural History

On December 2, 2022, DA Krasner filed his Petition for Review in the Nature of a Complaint for Declaratory Judgment, alleging three counts for relief. Specifically, DA Krasner sought a declaration that the Articles of Impeachment became null and void on the adjournment *sine die* of the 206th General Assembly; Article VI, Section 6 of the Pennsylvania Constitution does not authorize impeachment of DA Krasner; the Articles of Impeachment do not allege conduct within the meaning of Article VI, Section 6; Appellees do not have authority to take up the Articles of Impeachment and any efforts to do so would be unlawful; and any effort by Appellees and/or the General Assembly to take up the Articles of Impeachment or related legislation is unlawful. (R. 034a-035a.)

On the same day DA Krasner filed the Petition for Review, he simultaneously filed an Application for Summary Relief and sought expedited briefing. The Commonwealth Court granted the application in part on December 6, 2022, issuing a schedule for expedited briefing, petitions for intervention, answers or preliminary objections to the Petition for Review, and cross-applications for summary relief.

Thereafter, Designated Appellees Representatives Bonner and Williams filed Preliminary Objections to the Petition for Review and a brief in support thereof. (R. 245a-356a.) DA Krasner filed a Brief in Opposition to the Preliminary Objections. (R. 571a-613a.)

Senator Ward filed an Answer and New Matter to the Petition for Review. Among other things, Senator Ward averred in New Matter that the Petition for Review should be dismissed for lack of subject matter jurisdiction due to failure to join indispensable parties and because the claims are legally insufficient. (R. 239a at ¶¶ 80-83.) Senator Ward also filed an Answer to the Application for Summary Relief and a Cross-Application for Summary Relief, (R. 357a-260a), as well as a Brief in Opposition to Appellant's Application for Summary Relief and in Support of Senator Ward's Cross-Application for Summary Relief.

(R. 361a-570a.) DA Krasner then filed a Brief in Opposition to Senator Ward's Cross-Application for Summary Relief and Reply in Support of Appellant's Application for Summary Relief. (R. 614a-676a.)

On December 30, 2022, one day after oral argument before a four-judge *en banc* panel, the Commonwealth Court issued an Order, *inter alia*: overruling Representative Bonner's and Williams's Preliminary Objections; denying DA Krasner's Application for Summary Relief (while simultaneously granting Senator Ward's Application) with respect to Counts I-II of the Petition for Review; granting DA Krasner's Application for Summary Relief (while simultaneously denying Senator Ward's Application) with respect to Count III of the Petition for Review. Order at ¶¶ 3-5; 7-9.[2]

On January 12, 2023, the Commonwealth Court issued an opinion in support of the Order. Judge Ceisler, writing for the majority, further elaborated on the Court's rationale. Notably, Judge Wojcik filed a concurring opinion wherein he stated "upon further reflection" he would conclude that DA Krasner's claims with respect to Articles I, II, VI, and

[2] Also in this Order, the Commonwealth Court granted Designated Appellant Senator Jay Costa's Application for Intervention. Order at ¶ 10. Senator Costa filed a Brief opposing Appellees' responsive pleadings and Senator Ward's Cross-Application for Summary Relief. (R. 694a-713a.)

VII are nonjusticiable political questions. Opinion at 3-4 (Wojcik, J., concurring). Judge Wojcik joined the majority opinion in all other respects. Judge McCullough filed a dissenting opinion wherein she concluded the Court lacked subject matter jurisdiction because DA Krasner failed to join two indispensable parties: the Senate of Pennsylvania and the Senate Impeachment Committee. Opinion at 1-2 (McCullough, J., dissenting). Alternatively, Judge McCullough, would have concluded that the case presents nonjusticiable political questions. *Id.*

On January 26, 2023, Representatives Bonner and Williams filed a notice of appeal, docketed at 2 EAP 2023. On February 9, 2023, DA Krasner filed a cross-notice of appeal with regard to the panel's disposition of Counts I and II of the Petition, docketed at 3 EAP 2023. On February 9, 2023, Senator Ward filed a cross-notice of appeal with regard to the panel's disposition of Count III of the Petition, docketed at 4 EAP 2023.[3]

[3] By Order dated April 20, 2023, this Court designated DA Krasner as Appellant.

C. Historical impeachments

Impeachments in Pennsylvania are not well cataloged in any single source. But research reveals at least nine impeachments since 1780, covering some twelve different persons (including one impeached twice), where the proceedings advanced to a verdict:

(1) Judge Francis Hopkinson (acquitted, 1780);[4]

(2) Comptroller General John Nicholson (acquitted, 1794);[5]

(3) Judge Alexander Addison (convicted, 1803);[6]

(4) Chief Justice Edward Shippen, Justice Jasper Yeates, and Justice Thomas Smith (acquitted, 1805);[7]

(5) Judge Walter Franklin, Judge Jacob Hibshman, and Judge Thomas Clark (acquitted, 1817);[8]

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[4] *See The Pennsylvania Senate Trials: Containing the Impeachment, Trial, and Acquittal of Francis Hopkinson and John Nicholson, Esquires*, at 3, 62 (1794), *available at* https://archive.org/details/pennsylvaniastat00hoga/page/n5/mode/2up; *see also* Frank M. Eastman, *Courts and Lawyers of Pennsylvania: A History 1623-1923*, vol. II, at 343 (1922), *available at* https://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t0qr53419&view=1up&seq=9.

[5] *See The Pennsylvania Senate Trials*, at 67, 762.

[6] *See Trial of Alexander Addison, On an Impeachment Before the Senate of the Commonwealth of Pennsylvania, in January 1803* (1803), *available at* https://babel.hathitrust.org/cgi/pt?id=mdp.35112204856779&view=1up&seq=9&skin=2021; *see also* Eastman, *Courts*, at 345.

[7] *See Report of the Trial and Acquittal of Edward Shippen, Esquire, Chief Justice and Jasper Yeates and Thomas Smith, Esquires, Assistant Justices, of the Supreme Court of Pennsylvania on an Impeachment Before the Senate of Pennsylvania of the Commonwealth, January 1805* (1805), *available at* https://babel.hathitrust.org/cgi/pt?id=hvd.hxh38z&view=1up&seq=5&skin=2021; *see also* Eastman, *Courts*, at 349.

[8] *See Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 27, appendix (1816) (appendix entitled: *Journal of the Proceedings of the Senate of*

(6) Judge Walter Franklin (second impeachment; acquitted, 1825);[9]

(7) Judge Robert Porter (acquitted, 1825);[10]

(8) Judge Seth Chapman (acquitted, 1826);[11] and

(9) Justice Rolf Larsen (convicted, 1994).[12] [13]

Pennsylvania, Sitting as the High Court of Impeachment on the Trial of an Article of Accusation and Impeachment Preferred by the House of Representatives, Against Walter Franklin, President, and Jacob Hibshman and Thomas Clark, Associate Judges of the Court of Common Pleas of Lancaster County), *available at* https://babel.hathitrust.org/cgi/pt?id=chi.74677493&view=1up&seq=471&skin=2021; *see also* Eastman, *Courts*, at 351.

[9] *See Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 35, at 821 (1824) (section titled: *Journal of the Court of Impeachment, for the Trial of Walter Franklin, Esquire, President Judge of the second judicial district of Pennsylvania, for Misdemeanors in Office, Before the Senate of the Commonwealth of Pennsylvania*), *available at* https://babel.hathitrust.org/cgi/pt?id=chi.74677859&view=1up&seq=821.

[10] *See Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 36, appendix (1825) (appendix entitled: *Journal of the Court of Impeachment for the Trial of Robert Porter, Esquire, President Judge of The Third Judicial District of Pennsylvania, Before the Senate of the Commonwealth of Pennsylvania*); *see also Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 35, at 769 (presentment in Senate of articles of impeachment against Judge Porter); Eastman, *Courts*, at 352.

[11] *See Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 36, appendix (1825) (appendix entitled: *Journal of the Court of Impeachment for the Trial of Seth Chapman, Esquire, President Judge of the Eighth Judicial District of Pennsylvania for Misdemeanors in office, Before the Senate of the Commonwealth of Pennsylvania*); *see also Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 35, at 760 (presentment in Senate of articles of impeachment against Judge Chapman); Eastman, *Courts*, at 352.

[12] *See In re Larsen*, 812 A.2d 640, 646 (Pa. Spec. Trib. 2002).

[13] Other impeachments have been introduced but failed in the House without triggering Senate action. *See generally* Robert B. Woodside, *Pennsylvania Constitutional Law*, at 364-67 (1985); Eastman, *Courts*, at 352.

Of the foregoing cases, five impeachments warrant further discussion because they spanned two sessions of the General Assembly, as does the present impeachment of DA Krasner.

1. Impeachment of Comptroller General Nicholson

At the time of Comptroller General Nicholson's impeachment in 1793 and trial in 1794, sessions of the General Assembly were just one year, since representatives stood for election annually under the Constitution of 1790. *See* Pa. Const. of 1790 art. II, § 2 ("The Representatives shall be chosen, annually, by the citizens of the city of Philadelphia, and of each county, respectively, on the second Tuesday of October."). This continued until the Constitution of 1874, when representatives stood for election every two years. *See* Pa. Const. of 1874 art. II, § 3. Sessions of the General Assembly under the Constitution of 1790 began on the first Tuesday of December every year. Pa. Const. of 1790 art. II, § 10.

The articles of impeachment against Nicholson were first approved by the House of Representatives on April 10, 1793, and amended and adopted on September 3, 1793, during the legislative session beginning on December 4, 1792 (session 17). *See The*

Pennsylvania Senate Trials, at 107, 188; *see also* Dep't of Gen. Services, *The Pennsylvania Manual*, vol. 125, at 3-289 (2021).[14] They were presented in the Senate on September 3, 1793, and the Senate adjourned *sine die* on September 5. *See The Pennsylvania Senate Trials*, at 191, 193. However, the impeachment was not tried in the Senate until January 9, 1794, with a verdict on April 11, 1794. *See id.* at 195, 762. Thus, the trial was during the next legislative session (session 18), which began on December 3, 1793, *see Pennsylvania Manual*, at 3-289, after the one in which the articles were presented (session 17).

2. Impeachment of Judge Addison

The articles of impeachment against Judge Addison were approved by the House of Representatives on March 11, 1802, during the 26th legislative session, which began on December 1, 1801. *See Trial of Alexander Addison*, at 7; *see also The Pennsylvania Manual*, at 3-289. The articles were presented to the Senate on March 23, 1802. *See Trial of Alexander Addison*, at 9. The Senate then adjourned *sine die* on April 6, 1802. *See Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 12, at 404 (1801) (R. 459a-461a). However, the

[14] *Available at* https://www.dgs.pa.gov/publications/Documents/ThePennsylvaniaManual_vol125_web.pdf.

impeachment was not tried to a verdict until January 1803. *See Trial of Alexander Addison*, at 21, 151-152. Thus, the trial was during the next legislative session (session 27), beginning on December 7, 1802, *see Pennsylvania Manual*, at 3-289, after the one in which the articles were presented (session 26).

3. Impeachment of Justices Shippen, Yeates, and Smith

On March 23, 1804, the House adopted articles of impeachment against Justices Shippen, Yeates, and Smith during the 28th legislative session, which began on December 6, 1803. *See Report of the Trial and Acquittal of Edward Shippen*, at 22; *see also Pennsylvania Manual*, at 3-289. They were presented to the Senate on March 24, 1804, which voted on March 27 to try the impeachment in January 1805. *See Report of the Trial and Acquittal of Edward Shippen*, at 22, 25-26. The Senate adjourned *sine die* on April 3, 1804. *See Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 14, at 404 (1803) (R. 463a-492a).

The impeachment was tried to a verdict in January 1805. *See Report of the Trial and Acquittal of Edward Shippen*, at 33, 491; *see also* Eastman, *Courts*, at 351. Thus, the trial was during the next legislative session (session 29), which began on December 4, 1804, *see*

Pennsylvania Manual, at 3-289; *see also Report of the Trial and Acquittal of Edward Shippen*, at 27, after the one in which the articles were presented (session 28).

4. Impeachment of Judge Porter

Articles of impeachment were exhibited in the Senate on April 11, 1825 against Judge Porter, which the Senate voted to try in December 1825. *See Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 35, at 769, 777, 784. This occurred during legislative session 49, which began on December 7, 1824. *See Pennsylvania Manual*, at 3-289. On April 12, 1825, the Senate adjourned *sine die*. *See Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 35, at 800, 818. The impeachment was not tried until December 1825. *See Journal of the Court of Impeachment for the Trial of Robert Porter, Esquire, President Judge of The Third Judicial District of Pennsylvania, Before the Senate of the Commonwealth of Pennsylvania*, at 3, 59-62 (1825) (R. 494a-554a); *see also* Eastman, *Courts*, at 352. Thus, the trial was during the next legislative session (session 50), beginning on December 6, 1825, *see Pennsylvania Manual*, at 3-289, after the one in which the articles were presented (session 49).

5. Impeachment of Judge Chapman

Also on April 11, 1825, articles of impeachment were presented to the Senate against Judge Chapman. *See Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 35, at 760, 777. The same day, the Senate voted to try this impeachment in February 1826. *See Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 35, at 784. The vote occurred during legislative session 49, which began on December 7, 1824. *See Pennsylvania Manual*, at 3-289. The Senate adjourned *sine die* on April 12, 1825. *See Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 35, at 800, 818. Trial took place in February 1826.[15] *See Journal of the Court of Impeachment for the Trial of Seth Chapman, Esquire, President Judge of the Eighth Judicial District of Pennsylvania for Misdemeanors in office, Before the Senate of the Commonwealth of Pennsylvania*, at 3, 28-30 (1826) (R. 556a-570a). Trial was therefore during the next legislative session (session 50), beginning on December

[15] On January 16, 1826, just before the impeachment trial of Judge Chapman was to begin, the House withdrew and replaced the original articles of impeachment adopted during the prior legislative session. *See Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 36, at 175-76 (1825). If the original articles had ceased to have effect as DA Krasner suggests in his matter, there would have been nothing for the House to "withdraw" in 1826.

6, 1825, *see Pennsylvania Manual*, at 3-289, after the one in which the articles were presented (session 49).

V. SUMMARY OF ARGUMENT

DA Krasner's assertion that adjournment *sine die* expires articles of impeachment adopted in a prior legislative session is textually and historically infirm. This is evidenced by long-standing practice of the Pennsylvania Senate on impeachments, an Opinion of the Attorney General, and authority from Pennsylvania's sister jurisdictions, all of which are properly considered and relied on in the Commonwealth Court's analysis.

Next, DA Krasner holds an office of public trust, representing and exercising the power of the Commonwealth within Philadelphia. The nature and duties attendant to the office of district attorney, the history of the Constitution, and the prior application of Article VI removal procedures to local officials compel the determination that DA Krasner is a civil officer. He is, therefore, subject to impeachment under Article VI of the Constitution.

Finally, the Commonwealth Court's reasoning regarding the definition of "misbehavior in office" is flawed for two reasons. One, it relies on a Pennsylvania Supreme Court decision interpreting a different constitutional provision. Two, it ignores the text of Article VI,

Section 6—specifically, the term "any"—and adopted a definition of "misbehavior in office" that contradicts: (i) the plain language; (ii) other related constitutional provisions; and (iii) Section 6's own amendment history. This Court should reject the Commonwealth Court's attempt to narrow the definition of "misbehavior in office" and thereby narrow the legislature's constitutional authority to remove civil officers who misbehave. Instead, this Court should hold that Section 6's definition of "any misbehavior in office" is broader than the common law definition.

VI. ARGUMENT

Sections A and B address the issues raised in the appeal of DA Krasner (concerning *sine die* and the impeachability of all public officials) while Section C address the only issue raised in the appeal of Senator Ward (concerning the definition of "any misbehavior in office").

A. The Commonwealth Court's determination that *sine die* does not encompass impeachment proceedings is consistent with the Constitution and interpretive framework.

While it is axiomatic that all legislative matters pending before the preceding session of the General Assembly are terminated upon adjournment *sine die* and cannot "'carry over' from one General Assembly to the next[,]" DA Krasner's attempts to bring impeachment proceedings within the ambit of this principle are unavailing. Characterizing the Commonwealth Court's Opinion as creating a "judicial business exception" to the *sine die* principle, DA Krasner urges this Court to expand *sine die* to encompass actions that it simply does not. The Commonwealth Court did not create an exception but, instead, recognized that impeachment never fell within the ambit of the *sine die* principle in the first place. This is consistent with the text of the Constitution, settled historic practices, and authorities from other

jurisdictions, all of which are properly relied upon in constitutional interpretation.

1. The text and structure of the Pennsylvania Constitution reflect a deliberate intent to ensure that the Senate's impeachment function exists independent of its legislative powers.

As DA Krasner agrees, the starting point is the plain language of the relevant provision. Krasner Br. at 24. A review of the pertinent constitutional provisions—and in particular the structure and placement of Articles II and VI of the State Constitution—confirm the Senate's impeachment power is not legislative power and, thus, is not impaired by adjournment *sine die*.

When interpreting constitutional provisions, courts must "first look to their placement in the larger charter." *Com. v. Molina*, 104 A.3d 430, 442 (Pa. 2014). It is therefore useful to first examine the structure of the State Constitution with an eye toward the source of the two constitutional precepts principally at issue—namely: (1) *sine die* adjournment of a legislative session; and (2) the Senate's duties relative to an impeachment trial.[16]

[16] *Accord Com. v. Smith*, 186 A.3d 397, 402 (Pa. 2018) (explaining that courts do "not read words in isolation, but with reference to the context in which they appear"); *Com. v. Humphrey*, 283 A.3d 275, 289 (Pa. 2022) ("When considering the

Asserting that adjournment *sine die* extinguished the pending articles of impeachment, DA Krasner relies first and foremost on the text of Article II. But a careful survey of Article II, which governs the length of legislative sessions and their adjournment, demonstrates that, by its very terms, it is confined to the subject of *legislative* power. Specifically, not only is the Article entitled "The Legislature," but its introductory section also provides that "[t]he *legislative* power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." Pa. Const. art. II, § 1 (emphasis added). The three ensuing sections—which together form the predicate for the principle that adjournment *sine die* terminates all pending legislative business—relate to the election of Senators and Representatives in the General Assembly, *see id.* at § 2, their terms of office, *see id.* at § 3, and the length of legislative sessions. *See id.* at § 4.

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plain language, we examine the text of the statute in context and give the words and phrases their 'common and approved usage.'"); *see also King v. Burwell*, 576 U.S. 473, 486 (2015) ("If the statutory language is plain, we must enforce it according to its terms. But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme." (internal quotation marks and citations omitted)).

Equally important, nowhere in Article II can any reference be found to impeachment, nor, for that matter, is any mention of this power made in Article III,[17] titled "Legislation." Instead, the subject of impeachment is covered in Article VI, titled "Public Officers."

Merely because Article VI grants impeachment powers to the Senate and the House, and the House and Senate "are the legislative bodies described in Article II," DA Krasner asserts that Article VI impeachment business is limited by Article II authority. Krasner Br. at 26. Just as Article II does not speak to the power of impeachment, none of the relevant Article VI provisions makes any reference to the exercise of legislative power. As relevant here, Article VI, Section 4 provides that "the sole power of impeachment" is vested in the House of Representatives. Pa. Const. art. VI, § 4. In turn, under Section 5, the Senate is vested with the responsibility of trying impeached officers and "[w]hen sitting for that purpose the Senators shall be upon oath or affirmation." Pa. Const. art. VI, § 5. Finally, Section 6, which is discussed at length below provides, among other things, that "[t]he Governor and all other civil officers shall be liable to impeachment for

[17] While Article II addresses procedural and structural matters affecting the legislative power, Article III deals with the substantive limitations and requirements of legislation.

any misbehavior in office[.]" Pa. Const. art. VI, § 6. In fact, the terms "General Assembly" or "Legislature" are nowhere to be found in the sections concerning impeachment.

Against this textual backdrop, this Court should not countenance DA Krasner's invitation to engraft Article II's limitations on legislative authority onto the impeachment provisions of Article VI. Specifically, as noted above, the overarching principle animating DA Krasner's argument in this respect—*i.e.*, that adjournment *sine die* concludes all pending legislative matters—is expressly derived from Article II, which relates to the exercise of *legislative* authority. Legislative power, in turn, is the power to "make, alter, and repeal laws." *Blackwell v. Com., State Ethics Comm'n*, 567 A.2d 630, 636 (Pa. 1989); *accord O'Neil v. Am. Fire Ins. Co.*, 30 A. 943, 944 (Pa. 1895). Stated differently, the authority to make law is the ability to prescribe "a rule of civil conduct[.]" *Belitskus v. Stratton*, 830 A.2d 610, 615 (Pa. Cmwlth. 2003) (internal quotation marks omitted)); *see also In re Baldwin Township Allegheny County Annexation*, 158 A. 272, 272-73 (Pa. 1931) (explaining that "[t]he word 'law' has a fixed and definite meaning[,]" which "[i]n its general

sense … imports 'a rule of action[,]" (internal quotation marks omitted)).

But under the above definitional guidelines, the conduct of an impeachment trial—which is more accurately characterized as a "duty" enjoined upon the Senate, rather than a power granted to it—is not a "legislative" undertaking. Most fundamentally, the ultimate resolution of an impeachment trial does not result in a "rule of action," *Baldwin Township*, 158 A. at 272, or a "rule of civil conduct." *Belitskus*, 830 A.2d at 615. Moreover, unlike an exercise of lawmaking under Article II, the Senate's impeachment verdict does not require concurrence from the House. *See Brown v. Brancato*, 184 A. 89, 93 (Pa. 1936) ("The Constitution contemplates the exercise of legislative power by concurrence of both House and Senate."). Indeed, the Constitution expressly imposes vastly different powers and duties on each chamber, with the House prosecuting, and the Senate adjudicating.

While the distinction between the power to impeach and the power to legislate is apparent from the plain language and structure of the State Constitution, to the extent there is any doubt in this regard, this Court's seminal decision in *Commonwealth ex rel. Att'y Gen. v.*

Griest, 46 A. 505 (Pa. 1900), on which the Commonwealth Court relied, further bolsters the conclusion that limitations on the exercise of legislative power are applicable only to actions taken by the General Assembly in its *lawmaking* capacity.

In *Griest*, this Court held that resolutions adopted pursuant to the General Assembly's power to propose constitutional amendments under Article XI were not subject to the procedural requirements governing the exercise of legislative power.[18] In so holding, this Court first examined the structure of the State Constitution, under which "the method of creating amendments to the constitution is fully provided for" in "a separated and independent article, standing alone and entirely unconnected with any other subject." *Id.* at 506. Indeed, the *Griest* panel noted the Article does not "contain any reference to any other provision of the constitution as being needed or to be used in carrying out the particular work to which [it] is devoted[,]" but rather, "is a system entirely complete in itself; requiring no extraneous aid, either in

[18] At the time *Griest* was decided, the Article concerning amendments was denominated as Article XVIII. Aside from being renumbered, the structure and substance of the relevant provisions are materially identical to the ones presently in force.

matters of detail or of general scope, to its effectual execution." *Id.* at 507.[19]

Conversely, this Court continued, the entirety of Article III "is confined exclusively to the subject of legislation[,]" and does not contain "the slightest reference to or provision for the subject of amendments to the constitution[,]" nor is it "even alluded to in the remotest manner." *Id.* at 507. Given that the act of proposing a constitutional amendment "is not lawmaking … but it is a specific exercise of the power of a people to make its constitution[,]" *id.* at 506—and based on the structural considerations outlined above—the Court declined to interpret Article III as coextensive with Article XI.

Applying *Griest*'s erudite constitutional rubric, the Commonwealth Court correctly recognized that legislative powers are inherently distinct from impeachment powers. *See* Opinion at 21. As *Griest* explains, like the amendment process of Article XI, "the method of [impeachment] is fully provided for" in Article VI, which is "a separated and independent article, standing alone and entirely

[19] Later, in *Grimaud v. Com.*, 806 A.2d 923 (Pa. Cmwlth. 2002), the Commonwealth Court further clarified that "[o]ther than the express requirements set forth in Article XI, the procedures to be used in proposing amendments are exclusively committed to the Legislature." *Grimaud*, 806 A.2d at 935; *Mellow v. Prizzingrilli*, 800 A.2d 350, 359 (Pa. Cmwlth. 2002).

unconnected with any other subject." *Griest*, 46 A. at 506. Moreover, in striking resemblance to Article XI, the impeachment provisions of Article VI do not "contain any reference to any other provision of the constitution as being needed or to be used in carrying out [an impeachment,]" but rather prescribe "a system entirely complete in itself; requiring no extraneous aid, either in matters of detail or of general scope, to its effectual execution." *Id.* at 507.

For its part, the entirety of Article II, much like Article III, "is confined exclusively to the subject of [the legislature,]" and does not contain "the slightest reference to or provision for" impeachment, nor is it "even alluded to in the remotest manner." *Id.* And just as proposing a constitutional amendment is not lawmaking, the Senate's role in impeachment "is a specific exercise of the power" to render a verdict in impeachment proceedings; thus, it is also not lawmaking. Given these similarities, DA Krasner's attempts to distinguish *Griest* as establishing only that different rules apply to different proceedings where the constitutional so provides are unavailing.

In sum, the text and structure of the State Constitution suggest a conscious and deliberate effort by the framers and convention delegates to treat the impeachment function independent of the legislative power.

2. Persuasive authority and historical practice are relevant considerations and firmly support the Senate's duty to act on the articles of impeachment in a new session.

As an initial matter, historical practice and persuasive precedent are crucial considerations in constitutional interpretation. See *Molina*, 104 A.3d at 441. In challenging the Commonwealth Court's reliance on these considerations, DA Krasner and Senator Costa overlook constitutional analyses regularly undertaken by this Court. Even where there is no federal constitutional provision counterpart to analyze, the *Edmunds* factors[20]—constitutional text, history, related caselaw from other states, and policy considerations—are helpful to the analysis of our state constitutional provisions. *Robinson Twp., Washington Cty. v. Commonwealth*, 83 A.3d 901, 944 (Pa. 2013). In addition to the provision's plain language, the Court may consider "any relevant decisional law and policy considerations argued by the parties, and any extrajurisdictional caselaw from states that have identical or similar

[20] *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991).

provisions, which may be helpful and persuasive." *Id.* In furtherance of understanding constitutional provisions, reference to history and interpretation of other states are relevant along with the plain language of a provision. *Id.*; *see also In re Bruno*, 101 A.3d 635, 660 n.13 (Pa. 2014) (same); *Com. v. Duncan*, 817 A.2d 455, 456-60 (Pa. 2003) (discussing precedent from courts in Alaska, Louisiana, Michigan, Illinois, Minnesota, and Connecticut in support of interpretation of the Pennsylvania Constitution).

Turning to the persuasive precedent and historical practice, both establish that DA Krasner and Senator Costa's interpretation of the *sine die* principle is unsupported. Although no court in Pennsylvania assessed the interplay between *sine die* adjournment and the impeachment responsibilities vested in each chamber under Article VI until the Commonwealth Court here, persuasive authority establishes a trend that legislative powers and impeachment duties are distinct. First, historical surveys of impeachment proceedings both at the state and federal level support the notion that *sine die* does not extinguish impeachment articles. Second, persuasive authority from other jurisdictions further supports this reading.

Initially, an opinion issued by the Attorney General expressly rejects the argument that the exercise of impeachment powers is affected by *sine die* adjournment. *See Umbel's Case*, 41 Pa.C.C. 414, 415 (Pa. Att'y Gen. June 26, 1913).[21]

To explain, in 1913, the chairman of a special committee empaneled by the House for the purpose of conducting an impeachment investigation requested a formal opinion from the Attorney General on "the power of [the] committee to continue its hearings and compel the attendance of witnesses and the production of books and papers after the adjournment *sine die* of the present session of the general assembly[.]" *Umbel's Case,* 41 Pa.C.C. at 415. Examining the provisions of the State Constriction and the relevant authorities, including *Com. v. Costello*, 21 Dist. R. 232 (Pa. Quar. Sess. Phila. 1912), on which DA Krasner relies heavily, Attorney General Bell concluded the committee's authority to continue its business "will not cease by reason of the adjournment of the general assembly." *Umbel's Case*, 41 Pa.C.C. at 417.

While the Attorney General acknowledged that, under *Costello*, "the functions of the legislature are terminated by the adjournment,

[21] *Also available at* https://www.attorneygeneral.gov/wp-content/uploads/2018/01/1913_1914_AG_Bell_opinions.pdf (pages 362-366).

and that the conclusion of the session puts an end to all pending proceedings of a *legislative character*," he explained that the issue presented for his consideration was distinguishable and that *Costello* "furnishe[d] no precedent" because "the impeachment of a civil officer is not a joint power or duty, nor is it a legislative function within the ordinary acceptation of that word." *Umbel's Case*, 41 Pa.C.C. at 417 (emphasis added). Rather, "[e]ach branch of the legislature has a separate and distinct function to perform in such proceedings." *Id.*

Moreover, a historical survey of impeachment proceedings under the State Constitution reveals a long-standing recognition that impeachment is not a legislative undertaking and, thus, adjournment *sine die* has no impact on pending proceedings. Turning to that history, a careful review of the Senate's journals shows that at least *five* impeachment proceedings (more than half of all impeachment trials held by the Senate) saw articles of impeachment passed by the House in one session, then adjournment *sine die*, and then a trial in the Senate in a new session.

Of course, the Senate's "understanding and practice are not … binding on the judiciary," *Com. ex rel. Greene v. Gregg*, 29 A. 297, 298

(Pa. 1894), but as this Court has emphasized, "the view of the two co-ordinate branches of the government … are entitled to respectful consideration and persuasive force, if the matter be at all in doubt." *Id.* And a "long continued legislative practice … is strong evidence of the true interpretation of the constitutional power of the legislature[.]" *Olive Cemetery Co. v. Philadelphia*, 93 Pa. 129, 132 (1880). Here, the fact that multiple iterations of the General Assembly employed this procedure shows a "long continued legislative practice" and presents "strong evidence" in support of the procedure DA Krasner and Senator Costa contest.

Importantly, the Senate's practice in this regard is not a novel arrogation of previously foreclosed powers. Rather, it is in keeping with the British parliament's longstanding interpretation of adjournment *sine die*, which is also sometimes referred to as "prorogation." As Sir William Anson, who has been described as "[o]ne of the most prominent English Constitutional Law scholars in the 1800s,"[22] explains, "[p]roceedings in the House of Lords on an impeachment are unaffected by a prorogation or a dissolution, and this has been held without

[22] Garrett Ward Sheldon, *Constituting the Constitution: Understanding the American Constitution Through the British Cultural Constitution*, 31 Harv. J.L. & Pub. Pol'y 1129, 1130 (2008).

question since Warren Hastings' case in 1786." Sir William R. Anson, *The Law and Custom of the Constitution*, pt. I, at 340 (2d ed. 1892);[23] *see also Jefferson's Manual of Parliamentary Practice*, at § 620 (relying on authorities from the 1790s).

DA Krasner's attempts to discredit these past practices because they pre-date the 1968 Constitution are, therefore, unavailing. This principle derived from parliamentary procedures that existed long before the 1968 Constitution and was even recognized by this Court. *See McGinley v. Scott*, 164 A.2d 424, 426 (Pa. 1960) ("The 1960 Session of the Pennsylvania Legislature has not yet adjourned *sine die*[.]); *U.S. Steel Co. v. Allegheny Cty.*, 86 A.2d 838 (Pa. 1952) (Jones, J., dissenting) (discussing bills passed in relation to adjournment *sine die* of the legislature in 1935).

As well as being relevant persuasive authority, the Senate's centuries-old practice of allowing impeachment matters to proceed unimpeded from one session to the next is also consistent with settled practice in the United States Congress. For example, the first federal judge impeached (Judge John Pickering) was "impeached by the House

[23] *Available at* https://babel.hathitrust.org/cgi/pt?id=nyp.33433075894778&view=1up&seq=366.

in one Congress and tried by the Senate in the next." Lewis Deschler, *Deschler's Precedents of the United States House of Representatives*, vol. 3, ch. 14, § 4 (Jan. 1, 1994) (also noting that the impeachment of Judge Harold Louderback spanned from the 73rd to the 74th Congress); *see also id.* at § 4.1 ("It should be noted that in neither the Louderback nor Pickering impeachments did the trial in the Senate begin before the adjournment *sine die* of the Congress.").[24] And this practice has endured the test of time, as evidenced by the fact that President Clinton was impeached in the 105th Congress but tried and acquitted by the Senate in the 106th Congress. *See generally* U.S. Senate, *Impeachment of President William Jefferson Clinton*, 106th Congress, Doc. 106-2 (Jan. 13, 1999).[25]

DA Krasner acknowledges this federal practice, but maintains that Congressional precedent is irrelevant because: (1) "the federal Constitution, unlike Pennsylvania's, does not codify the *sine die* principle or address what matters carry over to a new session nor to a new Congress[;]" and (2) "unlike the Pennsylvania Senate, the U.S.

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[24] *Available at* https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V3/pdf/GPO-HPREC-DESCHLERS-V3.pdf.

[25] *Available at* https://www.govinfo.gov/content/pkg/CDOC-106sdoc2/pdf/CDOC-106sdoc2.pdf.

Senate is a 'continuing body' after elections because two-thirds of U.S. Senators (more than a quorum) do not change." Krasner Br. at 39. Senator Costa similarly challenges the Commonwealth Court's reliance on federal practice because the U.S. Senate is a continuing body. Senator Costa's Br. at 20 n.5. Neither argument withstands scrutiny.

As an initial matter, DA Krasner's first argument is simply wrong. The doctrine that adjournment *sine die* (or prorogation) terminates all pending legislative business is, as discussed above, a basic tenet of parliamentary law. *See N.L.R.B. v. New Vista Nursing & Rehab*., 719 F.3d 203, 221-44 (3d Cir. 2013) (tracing the underpinnings of the concepts of adjournment and prorogation and its modern application). And like the Pennsylvania General Assembly, "Congress is automatically dissolved—and any ongoing session ended—every two years by termination of the terms of one-third of Senators and all members of the House." *Id.* at 223. In fact, specifically discussing the effect of this principle on the Senate, the Third Circuit explained a "session of the Senate, everyone agrees, begins at the Senate's first convening and ends either when the Senate adjourns *sine die* or

automatically expires at noon on January 3 in any given year." *Id.* at 234; *see also The Pocket Veto Case*, 279 U.S. 655, 672 (1929).

As for DA Krasner's and Senator Costa's contention that the U.S. Senate practice is irrelevant because it is a continuing body, this theory is, candidly, difficult to follow. Insofar as it simply recasts DA Krasner's first argument to focus on the one chamber, the notion that the U.S. Senate never adjourns *sine die* is wrong in light of the foregoing. The U.S. Senate, therefore, is not a "continuing body"—despite the fact that, as a practical matter, it may experience less "turnover."

Moreover, as at least one Pennsylvania Court has recognized, "[t]he Senate of Pennsylvania is a continuing body, the members of which are elected for a period of 4 years, but are so divided that one half of its members are elected every 2 years." *Shelby v. Second Nat. Bank*, 19 Pa. D. & C. 202, 211 (C.P. Fayette 1933). Relying on federal precedent, the *Shelby* Court concluded that "[i]f the Senate of the United States is a continuing body, it would necessarily follow that the Senate of Pennsylvania is also a continuing body and that its committee would have authority to act during a recess of the legislature." *Id.* (citing *McGrain v. Daugherty*, 273 U.S. 135, 181 (1927)). Thus, none of

DA Krasner's and Senator Costa's attempts to distinguish the U.S. Senate and the Pennsylvania Senate withstand scrutiny.

Historical practices, therefore, further confirm that which is implicit in the text and structure of the State Constitution: adjournment *sine die* cannot extinguish any pending matter related to impeachment. Despite DA Krasner's and Senator Costa's disagreement with reliance on this practice, it is relevant and appropriately relied on in interpreting constitutional provisions. *See Robinson Twp.*, 83 A.3d at 944.

Finally, DA Krasner takes issue with the Commonwealth Court's reliance on caselaw outside of Pennsylvania, where at least four states have expressly held that adjournment *sine die* does not affect impeachment. DA Krasner attempts to discredit the value of that precedent on the basis that (1) these cases did not involve an intervening election, (2) the respective state constitutional impeachment provisions differ from those here. These reasons are unpersuasive.

As to the first reason, the intervening election has no bearing on the analysis in this case despite DA Krasner's new assertion of a public

policy argument before this Court. As discussed, the fundamental difference between legislative powers and impeachment powers within the text of the Constitution means that *sine die* does not apply to impeachment and, therefore, any intervening election that may affect legislative duties is irrelevant. Because the Senate is acting in a judicial capacity, and not legislating, it is not responding to constituent concern and an intervening election has no bearing on the task.

DA Krasner's second basis for attempting to devalue relevant persuasive authority also falls flat. In Texas, where the Supreme Court held that "an impeachment proceeding, begun at one session of the Legislature, may be lawfully concluded at a subsequent one," the impeachment procedure is materially identical to Pennsylvania's. *Ferguson v. Maddox*, 263 S.W. 888, 891 (Tex. 1924). Specifically, the Texas Constitution provides that the power of impeachment is in the House of Representatives, impeachment is tried by the Senate, and when the Senate is "sitting as a Court of Impeachment," impeachment requires concurrence of two-thirds of the present Senators. Tex. Const. art. XV, §§ 1, 2, 3.

Similarly, the New York Supreme Court (a trial court) rejected an argument that the Legislature, "having adjourned *sine die* in any year, … is without power, no matter what hideous acts of crime of monstrous acts of tyranny or usurpation a Governor may be guilty of, to set the machinery of his punishment in motion until the stated day of the meeting of both branches of the Legislature." *People ex rel. Robin v. Hayes*, 143 N.Y.S. 325, 327 (N.Y. Sup. Ct. 1913), *aff'd*, 149 N.Y.S. 250 (App. Div. 1914). Like Pennsylvania and Texas, the New York State Constitution then in effect in *Robin* had an impeachment process under which the power of impeachment was vested in the lower chamber and the duty to conduct the trial was imposed upon the upper chamber, sitting together with judges of New York's court of last resort. N.Y. Const. of 1894, art. VI, § 13. DA Krasner's contention that the New York Constitution "expressly provided that impeachment is a judicial function" exaggerates the actual text. Far from "expressly provid[ing]" that impeachment is a "judicial function," the New York Constitution's placement of the impeachment provision in Article VI, titled "Judiciary," rather than Article III, titled "The Legislature,"

underscored that legislative powers are separate and distinct from impeachment duties.

3. There are no persuasive policy reasons that overcome the text, structure, and history of Article II.

As a last resort, DA Krasner and Senator Costa point this Court to broad public policy bases for extrapolating the application of *sine die*, asking this Court to reject the Commonwealth Court's interpretation because it does not account for the purported will of the electorate. The foundation of these arguments is premised, again, on the contention that impeachment is a form of legislative power rather than the exercise of a judicial duty.

DA Krasner recognizes that *sine die* is "a basic constitutional principle of Pennsylvania legislative procedure." Krasner Br. at 35. But, citing to *McCormick v. Hanover Twp.*, 92 A. 195, 196 (Pa. 1914), he asserts that a governing body cannot bind successors in an exercise of governmental power. This misconstrues *McCormick* and ignores the nature of impeachment proceedings. *McCormick* did not involve the General Assembly's powers but, instead, highlighted the distinction between governmental functions and proprietary functions of municipal

entities. Specifically, the *McCormick* Court considered the validity of a contract between a township's board of supervisors and the township's counsel for the next fiscal year, ultimately determining it was not within the township supervisors' power to enter into the contract. *Id.* Indeed, the portion of *McCormick* cited by DA Krasner is in direct reference to *municipalities'* powers to bind successors, as the *McCormick* Court recognized was discussed by the Eighth Circuit and the Indiana Supreme Court. Under this rubric, there is a distinction between the exercise of governmental powers, which are binding on successors, and proprietary functions, which may bind the municipality after the municipal board no longer exists. *Id.* at 174. This principle, applied regularly to municipal entities, is not applied to the General Assembly in the context of its constitutional duties. *See, e.g.*, *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012) (applying the principle to a municipal authority); *Lobolito, Inc. v. North Pocono Sch. Dist.*, 755 A.2d 1287 (Pa. 2000) (applying the *McCormick* framework to actions of a local school board).

Further, the Senate, in carrying out its impeachment duty, is acting in a different capacity than when it is legislating on behalf of

constituents. DA Krasner's and Senator Costa's concerns regarding the will of the voters rises and falls on their contention that impeachment is a legislative power under Article II. As set forth above, this interpretation is inconsistent with the text, structure, and history of Articles II and VI. Because the Senate is not legislating when carrying out its impeachment obligation, DA Krasner's and Senator Costa's contentions that the 206th General Assembly will dictate the business of the 207th General Assembly are unfounded.

B. Article VI impeachment of civil officers by the General Assembly encompasses local officials like DA Krasner.

The Commonwealth Court's interpretation of Article VI is consistent with its plain language, prior interpretation, and historical context. Following these principles, DA Krasner, a public official regularly representing the Commonwealth, is a civil officer in a constitutionally created office that is subject to Article VI's impeachment provisions.

1. Civil officers are defined by the duties of the office and include local officials, who are subject to Article VI impeachment.

DA Krasner was elected to a constitutionally created position of public trust in order to exercise the sovereign power of the Commonwealth in Philadelphia. *See* Pa. Const. art. IX, § 4 ("County officers shall consist of commissioners, controllers or auditors, district attorneys …"). In that position, he is a civil officer subject to impeachment by the General Assembly. DA Krasner attempts to distinguish himself from a civil officer by equating civil officers with statewide officeholders and not local officials. This distinction is not based in caselaw or the common understanding of the term civil officer.

To explain, civil officers can and often do include municipal officers because that role is defined not by the level of government but by the nature and inherent authority of the office. *See Richie v. City of Philadelphia*, 74 A. 430, 431 (Pa. 1909) (noting the considerations for analyzing whether an office is a public office is determined by the nature of the office's services, duties imposed, and the governmental function and important character of the office's duties); *Alworth v. Cty. of Lackawanna*, 85 Pa. Super. 349, 352 (1925) (considering the nature of

services, duties imposed, powers, conferred, election or appointment, and tenure of the office in classifying a public officer).

This Court explained this in the context of removal procedures for a tax collector, which it deemed to be a public official.[26] *Houseman v. Com. ex rel. Tener*, 100 Pa. 222 (1882). *Houseman*, upon which the Commonwealth Court relied, addressed the validity of a tax collector's appointment and the former officeholder's removal. The former tax collector argued that his removal from office was improper because the relevant constitutional provision does not extend to municipal officers. This Court disagreed. *Id.* at 230. Then-Article VI, Section 4 provided that "appointed officers" may be removed at the pleasure of the appointing power. *Id.* at 229. While the former tax collector asserted that this provision did not apply to municipal officers, the Supreme Court "saw nothing in [that section] which authorizes a distinction between state, county and municipal officers." *Id.* Rather, the only distinction drawn was between appointed and elected officers. *Id.* at 230.

[26] Public officer and civil officer are often used interchangeably in constitutional analysis. *See Opinions of the Attorney General of Pennsylvania, 1974*, Official Opinion No. 49 (Sept. 18, 1974).

Further, focusing on the character of the public office, this Court explained that the tax collector receives public money, a considerable part of that money is payable to the Commonwealth, the sums received can be large, and "[n]o element of mere private trust pertains to his functions[.]" *Id.* at 234. "[S]uch considerations sufficiently indicate the public character of his official position." *Id.; see also Com. ex rel. Foreman v. Hampson*, 143 A.2d 369, 372 (Pa. 1958) (interpreting the phrase "public officer" in the Constitution as applied to a county solicitor to mean an elected or appointed officer with important duties and some functions of government exercised for the public benefit).

Similarly, in Philadelphia County, the Court of Common Pleas focused on the nature of the office and not whether it was local or statewide in *Bromley v. Hadley*, 10 Pa. D & C. 23 (C.P. Phila. 1927). There, the Board of Revision of Taxes appointed a chief personal property assessor whose qualifications were challenged under Article II, Section 6's prohibition on senators or representatives being appointed "to any civil office under the Commonwealth." *Id.*; Pa. Const. art. II, § 6. Although concluding it was not a civil office, the Court further emphasized the importance of analyzing the duties of the office in that

determination. The duties of the chief personal property assessor were defined and administrative, with no function of government being exercised, and no oath being required. *Bromley*, 10 Pa. D & C. at 24. These duties and powers did not include "the delegation of sovereignty" that marks a civil office. *Id.* As the Court explained:

> "'Civil officer' is a term embracing such officers as in whom part of the sovereignty or municipal regulations or the general interests of society are vested.... 'Civil officers ... are governmental agents–they are natural persons–in whom a part of the state's sovereignty is vested or reposed, to be exercised by the individual so entrusted with it for the public good. The power to act for the state is confided to the person appointed to act. It belongs to him upon assuming the office. He is clothed with the authority which he exerts, and the official acts done by him are done as his acts and not as the acts of a body corporate[.]'"

Id. at 24-25 (quoting 11 Corpus Juris 797, title "Civil Officer," and notes). Therefore, the crux of the Court's analysis was the distinction between mere employees or contractors from public officers with governmental power, duties, and privileges. *See id.* at 25; *see also Com. v. Kettering*, 119 A.2d 580, 583 (Pa. Super. 1956) (equating a district attorney to a "quasi-judicial officer" entrusted with "grave responsibilities" in representing the Commonwealth). The local nature

of the office was never the Court's focus in determining if it was a civil office, as DA Krasner urges this Court to consider.

Further, the Commonwealth Court, in *In re Ganzman*, 574 A.2d 732 (Pa. Cmwlth. 1990), albeit in a statutory context, defined and applied the term "civil officer" without distinction for the municipal or statewide nature of the office. On an appeal from a nominating petition challenge, the Commonwealth Court analyzed whether a Member of the Democratic Executive Ward Committeeperson is a civil office. *Id.* at 733. The Court first examined the definition of "civil office" in Black's Law Dictionary and "civil officer" in Corpus Juris, which defined the terms as non-military offices with the powers and sovereignty of the government. *Id.* at 734. Far from limiting civil officers to statewide officers, Corpus Juris even expressly defined civil officer as a term that "'primarily, if not solely, has reference to municipal and State officers.'" *Id.* (quoting 11 Corpus Juris 797). Distinguishing political party officials from civil officials, this Court reasoned that "'civil officials' are those who are paid by the public, are regulated by public law or regulations, or who owe their loyalty to the public at large, regardless of political party affiliation." *Id.*

DA Krasner's limited definition of civil officers is inconsistent with not just the defining features of civil officers but the historical application of Article VI. As the Commonwealth Court recognized, Article VI is regularly applied to local and/or municipal officers as the only method by which they can be removed from office. In the context of locally appointed civil officers, for example, this Court concluded that Article VI, Section 7 removal procedures applied to the board of the Allegheny Regional Asset District. *Allegheny Inst. Taxpayers Coal v. Allegheny Reg'l Asset Dist.*, 727 A.2d 113, 118 (Pa. 2003). Further, examining recall provisions of a Home Rule Charter, this Court expressly held that Article VI, Section 7 "indisputably applies to *all elected* officers[.]" *In re Petition to Recall Reese*, 665 A.2d 1162, 1167 (Pa. 1995) (emphasis in original).

In sum, *Houseman*, *Bromley*, and *Ganzman* drive home the futility of DA Krasner's argument that civil officers are statewide officeholders only.[27] Civil officers are not determined based on their role

[27] If anything, the term "civil officer" seeks to distinguish between military officers and government officers only. *See Ganzman*, 574 A.2d at 734; *see also* CJS Officer § 8 ("The expression 'civil officer' means any officer who is not a military officer and includes all officers connected with the administration of the government except military officers."). One leading commentator on the Pennsylvania Constitution expressly theorized this was the meaning of the phrase in Article VI,

as state officers but are defined by the position of public trust they hold and the delegation of sovereign power they exercise. *Houseman*, 100 Pa. at 229-30; *Ganzman*, 574 A.2d at 734; *Bromley*, 10 Pa. D & C. at 24-25. Along with the historical understanding of what constitutes a "civil officer," this Court's prior application of Article VI to local officers eliminates any doubt as to the futility of DA Krasner's assertion that only statewide officers hold civil office. *See Allegheny Inst. Taxpayers Coal*, 727 A.2d at 118; *Reese*, 665 A.2d at1167.

Under this framework, DA Krasner is a civil officer subject to impeachment under Article VI. Regardless of the countywide or local nature of the office of district attorney, DA Krasner is a "government agent," in whom the "state's sovereignty is vested[.]" *Bromley*, 10 Pa. D & C. at 24-25. He is in a position of public trust and is entrusted with exerting the power of the Commonwealth within Philadelphia County. *See id.* at 24-25; *Ganzman*, 574 A.2d at 734. The status of his office as one that is statewide, municipal, or local, is irrelevant.

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§ 6: "The expression of 'civil officers' was probably used to distinguish the officers of the state, county or municipality from military or naval officers." *See* Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania*, at 342 (1907), *available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015005476885&view=1up&seq=9. The *Commentaries* treatise has many times been relied up on by the appellate courts of this Commonwealth. *See, e.g.*, *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1111, 1129, 1130 (Pa. 2014).

2. The historical interpretation of Article VI further demonstrates that local officials like DA Krasner are subject to its impeachment provisions.

DA Krasner further contends that selective portions of the debates and legislative history of Article VI support his interpretation of the civil officers as only statewide officers. Krasner's version of the history is not the full story.

Initially, relying on a change in language between the 1838 Constitution and the 1874 Constitution, DA Krasner argues that officers subject to impeachment under Article VI are only those who are officers "under this Commonwealth," which DA Krasner equates to statewide officers. *See* Krasner Br. at 46. But DA Krasner is an officer "under this Commonwealth" and there is no basis for interpreting this phrase as applying only to statewide officers.

As explained above, DA Krasner holds a position of public trust in which he represents the Commonwealth in Philadelphia County (indeed, every criminal proceeding his office brings is in the *name* of the Commonwealth). If an officer exerting the power and authority of the Commonwealth, albeit in one county, is not an officer "under this Commonwealth," it begs the question of which offices would qualify.

Just as the term "civil officer" is not limited to statewide officers, neither is the phrase "under this Commonwealth." In fact, the Office of Attorney General, issuing an opinion interpreting that phrase, did not limit it this way. *See Opinions of the Attorney General of Pennsylvania, 1974*, Official Opinion No. 49 (Sept. 18, 1974).[28] The question posed to the Attorney General was whether a newly elected school district superintendent was precluded under Article II, Section 6 from simultaneously holding the office of state representative. *Id.* at 193. Article II, Section 6 prohibits a senator or representative from being appointed or elected "to any civil office under this Commonwealth to which a salary, fee or prerequisite is attached."

The Attorney General concluded that a school district superintendent is a civil officer under the Constitution because a superintendent is elected by the school board, takes an oath of office, has powers and duties set by statute, is paid a minimum statutory salary, and is specifically created by statute for a specific tenure. Opinion No. 49 at 195. The Attorney General further advised that the district superintendent is an office "under this Commonwealth." *Id.* at

[28] *Available at* https://www.attorneygeneral.gov/wp-content/uploads/2018/01/1974_AG_Packel_opinions.pdf.

196-97. That a district superintendent's authority was limited to one district was not controlling on the question; instead, because a school district is a legislatively created agency that administers the constitutional requirement of maintaining a public school system, he deemed it to be an office under this Commonwealth. *Id.*

Applying this reasoning here, a district attorney is also a "civil officer" holding an office "under this Commonwealth." As developed above, the power and duties inherent in the office of district attorney make DA Krasner a civil officer. It is not relevant that DA Krasner's jurisdiction is limited to Philadelphia. He is a civil officer carrying out the duties of his constitutionally created office.

Along with a change in language between constitutions, DA Krasner notes a portion of the *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to Propose Amendments to the Constitution, Commenced and Held at Harrisburg, on the Second Day of May, 1837*, vol. I (1837) (1837 Debates) in which it was questioned what civil officers were liable to impeachment. *See* DA Krasner Br. at 46 n.18 (quoting the 1837 Debates at 275). But ten pages later, the 1837 Debates include the following:

> But let it be remembered, that whilst this provision relates to judges, it also relates to the Governor, the Heads of Departments, the Prothonotaries, Clerks of Courts, Registers, Recorders, County Commissioners, and in fact, all the officers of the Commonwealth, of which the judges constituted but a small portion; and the provision is a general one as to all officers, whatever their tenure may be.

1837 Debates at 285. This shows that Article VI, Section 6 was intended to be a general provision without limitation to only statewide officers.

Former Chief Justice Saylor's concurrence in *Burger v. Sch. Bd. of McGuffey Sch. Dist.*, 923 A.2d 1155 (Pa. 2007), from which DA Krasner again relies on selective portions, does not make DA Krasner's reading of Article VI any more persuasive.

Initially, despite DA Krasner's attempts, the majority controlling opinion in *Burger* cannot be ignored. At issue in *Burger* was whether the Public School Code removal provision for district superintendents was unconstitutional given an appointing power's exclusive right to remove an appointed official pursuant to Article VI, Section 7. "There [was] *no dispute* that the [superintendent] was a civil officer appointed by the School Board." *Id.* at 1161 (emphasis added). With that threshold question undisputed, this Court determined the removal power of Article VI, Section 7 was not absolute, and the limitations placed on

that power under the Public School Code were constitutional. *Id.* at 1163. Justice Saylor concurred and suggested that the superintendent was not a civil officer because he was not a statewide officer. *Id.* at 1167 (Saylor, J., concurring). But the Court's *majority* expressly noted Justice Saylor's opinion presented a "novel theory," and further observed the theory was in "facial tension with the prior decisions of this Court." *Id.* at 1161 n.6 (citing *Com. ex. rel. Schlofield v. Lindsay*, 198 A. 635 (Pa. 1938); and *Finley v. McNair*, 176 A. 10 (Pa. 1935)).

As DA Krasner states, Justice Saylor reasoned that Article VI, Section 7 was intended to apply to district superintendents and the debates indicate that "state-level officials were almost exclusively in view when then-Section 4 of Article VI was framed[,]" *See* Krasner Br. at 48 (quoting *Burger*, 923 A.2d at 1167 (Saylor, J., concurring)). DA Krasner omits the next part of the same sentence, in which Justice Saylor continued "little attention was paid to the concept of local *appointing* powers and the manner in which their removal powers should or should not be constrained. I recognize that this Court has previously applied Article VI, Section 7 to some classes of local officials[.]" *Burger*, 923 A.2d at 1167 (Saylor, J., concurring; emphasis

added). Although it was not clear to Justice Saylor that those holdings considered a distinction between local officials and Commonwealth officials, in his view, Article VI, Section 7 was not intended to restrain the General Assembly in hiring and firing district superintendents. *Id.*

Viewing the *Burger* opinion in its entirety, Justice Saylor's concurring opinion does not carry the weight DA Krasner ascribes to it. In short, *Burger* supports that the District Attorney of Philadelphia is a civil officer.

To be sure, despite DA Krasner's best attempts, there is no rational explanation for why Article VI, Section 6 would apply only to statewide officers and Article VI, Section 7 would apply to both statewide and local officers. Indeed, this Court's decision in *Commonwealth ex rel. Specter v. Martin*, 232 A.2d 729 (Pa. 1967) forecloses this argument. In three separate opinions, a majority of this Court concluded in *Specter* that the District Attorney of Philadelphia is subject to removal provisions in Article VI. *Id.* at 733-39 (plurality opinion); *id.* at 743-44 (Eagen, J., concurring in part); *id.* at 753-55 (Musmanno, J., separate opinion). Specifically, recognizing that the District Attorney of Philadelphia "does not perform any municipal

functions and his duties involve only his representation of the Commonwealth," the plurality explained that, as an elected constitutional officer, the district attorney may only be removed from office under Article VI. *Id.* at 736-37. In his concurring opinion, Justice Eagen also was "inclined to agree … that a district attorney can only be removed from office as the Constitution prescribes." *Id.* at 744 (Eagen, J., concurring in part). Similarly, Justice Musmanno recognized that removal of the Philadelphia District Attorney from office would be resolved "through quo warranto proceedings, or application of Article VI of the Constitution." *Id.* at 754 (Musmanno, J., separate opinion).

Moreover, to the extent DA Krasner asks this Court to overrule all precedent contradictory to his argument, he has not met the heavy burden to warrant this. Under this Court's requirements, several factors are considered in deciding whether to overrule precedent, "including the quality of its reasoning, the workability of the rule it established, its consistency with other related decisions … and reliance on the decision." *Commonwealth v. Alexander*, 243 A.3d 177, 196 (Pa. 2020). Also relevant is the age of the challenged decision, as "[c]ases with a long lineage tend to have multiple precedents to overcome." *Id.*

As explained above, there are hundreds of years of precedent and historical practices that support the rationale that DA Krasner is subject to impeachment under Article VI. DA Krasner asks this Court to overrule removal decisions that are inconsistent with his interpretation solely because this Court is not bound by those decisions like the Commonwealth Court was. Krasner Br. at 52. Yet, DA Krasner fails to grapple with the fact that the reasoning, consistency, and workability of the prior interpretations of "civil officer" in Article VI all sustain the validity of the existing precedent.

In sum, the text of Article VI, its history, and prior interpretations all support the notion that, regardless of his role as a local officer, DA Krasner is a civil officer subject to Article VI impeachment.

3. DA Krasner's public policy arguments would unfairly shield county district attorneys from oversight other than through the electoral process.

Finally, DA Krasner seeks to overcome the plain reading of Article VI, Section 6 by contending that it is contrary to public policy. DA Krasner's belief that he is accountable only to the citizens of Philadelphia and not the General Assembly is unsupported. As set forth above, DA Krasner brings actions on behalf of the Commonwealth.

Regardless of which subset of voters in the Commonwealth elect him, he is a civil officer in this Commonwealth who must be subject to oversight beyond just the electoral process. Because of the position he holds as an officer acting on behalf of the Commonwealth, DA Krasner cannot escape the impeachment provisions of Article VI by relying on the local nature of his office.

C. The Commonwealth Court incorrectly restricted the definition of the phrase "any misbehavior in office" as used in Article VI, Section 6 when it concluded the phrase is defined conterminously with the common law definition of misbehavior in office.

The Commonwealth Court's holding that "any misbehavior in office" is defined conterminously with the common law offense of the same name is erroneous for the following four reasons.[29]

1. The Commonwealth Court's reliance on *In re Braig* is misplaced because that decision did not interpret Article VI, Section 6.

The Commonwealth Court's interpretation of "misbehavior in office" in Article VI, Section 6 is based primarily on a decision that did not interpret this provision. The *In re Braig* Court endeavored to

[29] Senator Ward refrains from addressing the merits of the impeachment articles and whether they satisfy the "any misbehavior in office" threshold because of her duty to act as an impartial juror during the impeachment trial.

interpret the judicial removal provision in then-numbered Article V, Section 18(*l*):

> A justice, judge or justice of the peace convicted of misbehavior in office by a court, disbarred as a member of the bar of the Supreme Court or removed under this section 18 shall forfeit automatically his judicial office and thereafter be ineligible for judicial office.

In re Braig, 590 A.2d 284, 286 (Pa. 1991) (quoting Pa. Const. art. V, § 18(*l*)).[30]

The Judicial Inquiry and Review Board sought to enforce this removal provision against former-judge Braig, who had already been convicted of three counts of mail fraud and sentenced accordingly. *Id.* at 285. The Board argued Braig's conviction amounted to a conviction "of misbehavior in office" and therefore he should be automatically removed from office. *See id.* at 286.

The *Braig* Court first observed that "[o]ur Constitution has long contained provisions specifying that civil officers 'shall be removed on conviction of misbehavior in office or of any infamous crime.'" *Id.* (quoting Pa. Const. of 1838 art. VI, § 9;[31] Pa. Const. of 1874 art. VI,

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[30] This Section is now at Section 18(d)(3) and is substantively identical. Pa. Const. art. V, § 18 (d)(3).

[31] "All officers for a term of years shall hold their offices for the terms respectively specified, only on the condition that they so long behave themselves

§ 4;[32] (renumbered Article VI, Section 7 on May 17, 1966)[33]). And, according to the *Braig* panel, when those provisions were examined by our courts, "it was uniformly understood that the reference to 'misbehavior in office' was to the criminal offense as defined at common law." *Id*.[34] The Court analyzed some of those cases and concluded: "Based on our reading of all the cases, we must conclude that the language of Article V, Section 18(*l*), like the identical language of present Article VI, Section 7, refers to the offense of 'misbehavior in

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well; and shall be removed on conviction of misbehavior in office or of any infamous crime." Pa. Const. of 1838 art. VII, § 9.

[32] "All officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime." Pa. Const. of 1874 art. VI, § 4.

[33] "All civil officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime." Pa. Const. art. VI, § 7. There are also two other removal provisions contained in Section 7 that do not require a conviction. One allows for appointed civil officers (other than judges) to be removed "at the pleasure of the power by which they shall have been appointed." *Id*. The other allows for "[a]ll civil officers elected by the people, except the Governor, the Lieutenant Governor, members of the General Assembly and judges of the courts of record, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate." *Id*. In other words, this final provision allows for the Senate to remove a civil officer without using the House-led impeachment process.

[34] Apparently, as developed *infra*, this principle was not uniformly understood after all. In *Com. ex rel. Duff v. Keenan*, 33 A.2d 244 (Pa. 1943), this Court indicated that "misbehavior in office" is *not* limited to indictable offenses. *See Duff*, 33 A.2d at 249 n.4 ("'Misbehavior in office' justifying the incumbent's removal does not necessarily involve an act or acts of a criminal character. …. The official doin[g] 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 re Braig* did not even mention the Supreme Court's prior pronouncement.

office; as it was defined at common law." *Id*. at 287. Thus, *In re Braig*'s definition of misbehavior in office is moored directly to its interpretation of present-day Article VI, Section 7—a *removal* provision distinct from, albeit related to, the *impeachment* provision in Section 6.

The Commonwealth Court therefore improperly imposed *In re Braig*'s interpretation of the removal provision in Article V, Section 18 on the impeachment provision in Article VI, Section 6. Indeed, the panel did not take appropriate account of the material distinction between the removal and impeachment provisions. Because removal requires conviction by a court, "misbehavior in office" *must* be defined as a common law crime. The same is not true in the impeachment context, and therefore a court's interpretation in the removal context is of little persuasive weight here.

The Commonwealth Court further failed to appropriately weigh the only Pennsylvania authority interpreting "any misbehavior in office" as used in Article VI, Section 6: *Larsen v. Senate of Pennsylvania*, 646 A.2d 694 (Pa. Cmwlth. 1994). *See* Opinion at 34-36.

In *Larsen*, the Commonwealth Court considered former-Justice Larsen's request to preliminarily enjoin the Senate from conducting its

impeachment trial. *See id.* at 695. One of Larsen's many claims was that the articles of impeachment did not set forth a constitutionally sufficient basis for impeachment. *See id*. at 698. Larsen argued that "misbehavior in office" was defined as it was at common law. *Id*. at 702. Because Larsen's conduct easily satisfied even the stringent common law standard, the Court did not have to decide the issue. *Id*. But, importantly, the panel noted that Larsen's interpretation "finds no support in judicial precedents." *Id*.

The Commonwealth Court in the present appeal downplayed the significance of *Larsen* because it "did not actually hold that Larsen's preferred, narrower definition was incorrect[.]" Opinion at 36. The panel is correct that *Larsen*'s examination of Section 6 is non-binding, but it nevertheless carries significant weight as the only Pennsylvania Court examination of Section 6. Moreover, as developed above, *In re Braig* is inapposite as it involves the interpretation of an entirely different removal provision, and, as is important, was decided *three years before Larsen*, where the Commonwealth Court identified "*no support in judicial precedents*" for engrafting on the common law meaning. *See Larsen*, 646 A.2d at 488 (emphasis added).

The *Larsen* Court's wisdom will soon be apparent. Section 6's plain text, the relationship between the impeachment and removal processes, and the 1966 amendment to Section 6 all support a conclusion that "misbehavior in office" is not limited to its common law definition.

2. A textual interpretation of Article VI, Section 6 leads to the inescapable conclusion that "any misbehavior in office" extends beyond the common law.

The plain language of Section 6 is controlling: It provides that civil officers are liable to impeachment "*for any* misbehavior in office[,]" Pa. Const. art. VI, § 6 (emphasis added). In contrast, civil officers are subject to removal "*on conviction of* misbehavior in office" under Section 7, and judges are subject to removal if "*convicted of* misbehavior" under Article V, Section 18 (d)(3) (emphasis added). This textual difference is material. *See Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (actual language is "our ultimate touchstone" and "effect must be given to all of [the constitution's] provisions whenever possible" (internal quotations omitted)).

The language of the Constitution is interpretated "in its popular sense, as understood by the people when they voted for its adoption."

Id.[35] According to Webster's Online Dictionary, the term "any" means "one or some indiscriminately of whatever kind" or "one, some, or all indiscriminately of whatever quantity[.]" *See also Mairhoffer v. GLS Capital, Inc.*, 730 A.2d 547, 550 (Pa. Cmwlth. 1999) ("In common usage, 'any' means 'one or more indiscriminately from all.' It is inclusive.") (quoting Webster's Third New International Dictionary 97 (1993)).

A natural reading of Section 6, giving the term "any" its due meaning, leads to the conclusion that Section 6 applies to one or more acts of misbehavior in office. The drafters used the "inclusive" term "any" ostensibly to broaden the scope of conduct captured by "misbehavior in office." An attempt to narrow that scope by confining the definition of "misbehavior in office" to a specific common law offense would be inconsistent with that inclusive language.[36] The panel's interpretation ignores the term "any"—a cardinal sin in constitutional interpretation. *Cf. Ind. Oil & Gas Assn. v. Bd. of Assessment*, 814 A.2d

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[35] Section 6 was last amended in 1966, therefore it should be interpreted as it would have been understood in 1966. *See* 1965 P.L.1928, J.R. 10 (May 17, 1966).

[36] Critically, the framers used the term "any" in Section 7 as it relates to "infamous crimes." In so doing, the drafters demonstrated an intent to distinguish the specific (misbehavior in office) from the general (infamous crimes). *See In re Braig*, 590 A.2d at 286 n.4 (the generalized term "infamous crime" included "every species of *crimen falsi*"). The framers meant what they said when they used "*for any* misbehavior in office" in Section 6, and in order to give meaning to those words, DA Krasner's interpretation must be rejected.

180, 183 (Pa. 2002) ("Because the legislature is presumed to have intended to avoid mere surplusage, every word, sentence, and provision of a statute must be given effect."). The interpretation offered here is the only one that gives meaning to the *entirety* of the text of Section 6.

3. The phrase "misbehavior in office" as used in the context of Article VI, Section 6 requires a different interpretation from the same phrase as used in Article VI, Section 7 and Article V, Section 18(d)(3).

Further still, Commonwealth Court's interpretation must fail because it violates the well-established maxim that "the meaning of a particular word cannot be understood outside the context of the section in which it is used[.]" *Jubelirer*, 953 A.2d at 528. Here, the panel extracted the meaning of the term "misbehavior of office" as used in two *removal* provisions, *i.e.*, Section 7 and Article V, Section 18 (d)(3), and thrust it upon that same term in an *impeachment* provision, *i.e.*, Section 6. The differences—as articulated in the Constitution—between Section 6 on the one hand and Section 7 and Article V, Section 18(d)(3) on the other—forbid this approach.

Section 6's impeachment process is unique in that it describes a process committed exclusively to the House and Senate, acting in

sequence. *See Larsen*, 646 A.2d at 704. There is no judicial involvement and traditional rules of court do not apply—save for the requirement that the impeachment trial be conducted in accord with all constitutional rights. The drafters placed the impeachment process within the House and Senate to reach those acts of misconduct that lay just out of our judiciary's grasp. Indeed, with regard to our federal charter:

> [O]ur fathers adopted a Constitution under which official malfeasance and nonfeasance, and, in some cases, misfeasance, may be the subject of impeachment, although not made criminal by Act of Congress or so recognised by the common law of England or of any state of the Union. They adopted impeachment as a means of removing men from office whose misconduct imperils the public safety, and renders them unfit to occupy official position.

William Lawrence, *The Law of Impeachment*, Am. L. Reg., vol. 6, at 647 (Sept. 1867);[37] *see id*. at 655 ("The purpose of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office" which cause may be a violation of law or "may exist where no offence against positive law has been committed, as

[37] *Available at* https://www.jstor.org/stable/pdf/3303883.pdf?refreqid=excelsior%3Afe251025796842905d7ccf5fffad6f19&ab_segments=&origin=&acceptTC=1.

where the individual has from immorality or imbecility or maladministration become unfit to exercise the office." (cleaned-up)).

It does not take much imagination to predict that, under the Commonwealth Court's interpretation, any official subject to impeachment will claim good faith in the exercise of discretion, thereby insulating that official from the courts and from impeachment proceedings. *See id*. at 677-780 (providing examples). That is an untenable outcome—an outcome certainly not intended by the drafters when they bestowed the House and the Senate with the power to regulate public officeholders (which the electorate ratified).[38]

The drafters of our Constitution understood the breadth of conduct subject to impeachment and therefore imposed several safeguards to shield impeachment from political abuse: the two-thirds vote requirement; the separate oath taken by Senators; limiting the scope of actionable conduct to misbehavior *in office*; and the non-criminal nature of the punishment. *See* Pa. Const. art. VI, §§ 4-6.

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[38] *See* John Norton Pomeroy, *An Introduction to The Constitutional Law of the United States: Especially Designed for Students, General and Professional*, at 482-93 (1868) (offering a compelling analysis for why impeachment is not limited to indictable offenses), *available at* https://babel.hathitrust.org/cgi/pt?id=coo.31924019960818&view=1up&seq=514.

To explain, as it relates to the two-thirds vote requirement, a robust debate took place at the 1837 Convention over an amendment to reduce the vote threshold to a majority for conviction. Those who argued against the amendment did so because they understood that "misdemeanor in office" (the language in the Constitution of 1790) was not well defined and thus impeachment was susceptible to political headwinds:

> But the public officer is arraigned, and for what? For misdemeanors in office. And what are misdemeanors in office? Are they a class of crimes recorded in the statute book? No. They are mere political offenses, to be tried by a political tribunal. They are crimes by construction; and may be crimes today, but not crimes tomorrow, according to the temper of the times, the fluctuations of political opinion, and the ascendancy of political parties. I do not know, with any certainty, to what class these offences can be referred.

The Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to Propose Amendments to the Constitution, Commenced and Held at Harrisburg, on the Second Day of May, 1873, vol. I, at 271-72 (1873). This sentiment was echoed by the preeminent Thomas Raeburn White: "The offense for which officers are impeached are, as a rule, offenses of a political nature." White, *Commentaries,* at 342.[39]

[39] Justice Story made similar observations with respect to the United States Constitution:

The drafters therefore viewed the two-thirds requirement as a fundamental safeguard: "Knowing to what heights party violence carried men, he should hesitate long before he would place in the hands of a bare majority the exercise of so dangerous a power." 1837 Debates, vol. I, at 260 (Mr. Earle); *see id.* at 253-54 (James Biddle: citing Judge Addison's impeachment and conviction as an example where "party feeling was permitted to mingle its poisonous influence" and concluding Addison's impeachment demonstrated "every safeguard should be interposed to defend a judge from being swept away by a tempest of political fury").[40]

> The offences, which the power of impeachment is designed principally to reach, are those of a political, or of a judicial character. They are not those, which lie within the scope of the ordinary municipal jurisprudence of a country. They are founded on different principles; are governed by different maxims; are directed to different objects; and require different remedies from those, which ordinarily apply to crimes.

Joseph Story, *Commentaries on the Constitution of the United States*, vol. II, at 220 (1833), *available at* https://babel.hathitrust.org/cgi/pt?id=hvd.hnqe3j&view=1up&seq=228.

[40] *See* White, *Commentaries,* at 342 (two-thirds "clause renders it extremely unlikely that any innocent person will ever be convicted"); *see also id.* at 341 (noting that the Senate is "the proper body to try impeachments" because "[i]t is a more conservative body, not so quickly answerable to waves of popular opinions or prejudices," and because "the offenses charged are apt to be of a political nature, which are more suitable to be tried by the senate than by a court"); Story, *Commentaries*, at 248 (advocating for two-thirds vote because "[i]f a mere majority were sufficient to convict, there would be danger, in times of high popular

Thus, as evidenced by our Charter's text, the drafters intended impeachment to be a broad removal mechanism. And rather than limit the scope of conduct to which impeachment might apply—as the panel held—our drafters put in place safeguards that would prevent baseless convictions.[41] [42] Indeed, by leaving "misbehavior in office" vague the drafters invited the House and Senate to define its contours. *Cf.* Pomeroy, *An Introduction*, at 482-93 (arguing that "high crimes and misdemeanors" in the federal charter "seems to have been purposely vague; the words point out the general character of the acts as unlawful; the context and the whole design of the impeachment clauses show that these acts were to be official, and the unlawfulness was to consist in a violation of public duty which might or might not have been an ordinary indictable offense.").

In contrast, the Article VI, Section 7 and Article V, Section 18(d)(3) removal processes are purely judicial mechanisms. That is,

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commotion or party spirit, that the influence of the house of representatives would be found irresistible").

[41] And those safeguards apparently work as there have only been two individuals in our Commonwealth's history who have been convicted by the Senate.

[42] *Cf.* Lawrence, *The Law of Impeachment*, Am. L. Reg., vol. 6, at 645 (discussing how the impeachment process in England was abused: "These abuses were not guarded against in our Constitution by limiting, defining, or reducing impeachable crimes, since the same necessity existed here as in England, for the remedy of impeachment, but by other safeguards thrown around it in that instrument.").

removal is complete upon a conviction of either misbehavior in office or any infamous crime. *See Com. ex rel. Specter v. Martin*, 232 A.2d 729, 738 (Pa. 1967) (removal applies "by a sentence of a court"). Of course, a person must have committed a crime—either at common law or in statute—in order to be "convicted." This is the precise reason that the Court in *In re Braig* concluded the term misbehavior in office, as used in Section 18(d)(3), is coterminous with the common law *crime*.

With this context in mind, "misbehavior in office" as used in Article VI, Section 6 must be interpreted more broadly than that same phrase in Section 7 and in Article V, Section 18(d)(3) because Section 6—by its plain text, coupled with its two-thirds safeguard—was designed to reach a broader class of conduct. The Commonwealth Court ignored this context entirely. This Court should, however, give this constitutional history its due weight and give the impeachment provision its intended meaning.

4. The 1966 Amendment to Section 6 confirms it reaches beyond the common law.

Perhaps most consequentially, Section 6 was amended on May 17, 1966. *See* 1965 P.L. 1928, J.R. 10 (May 17, 1966).[43] Prior to the amendment, Section 6 subjected a civil officer to impeachment "for any *misdemeanor* in office[.]" Pa. Const. of 1874 art. VI, § 3 (emphasis added). By 1966, this phrase accrued the common law definition of "misdemeanor in office." Indeed, in *In re Investigation by Dauphin County Grand Jury, September, 1938*, 2 A.2d 802 (Pa. 1938), this Court held the phrase means "a criminal act in the course of the conduct of the office, to which impeachments are limited." *Id.* at 803.

Apparently not satisfied with this restrictive definition, *cf. City of Philadelphia v. Clement and Muller, Inc.,* 715 A.2d 397, 399 (Pa. 1998) ("[t]he legislature is presumed to be aware of the construction placed upon statutes by the courts"), the electorate, after a joint resolution from the General Assembly, amended the provision to read "for any misbehavior in office[.]"[44]

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[43] *Available at* https://www.palrb.gov/Preservation/Pamphlet-Laws/View-Document/19001999/1965/0/const/jr10.pdf.

[44] Just before this amendment, "misbehavior in office" had been interpreted by the Pennsylvania Supreme Court to extend beyond indictable offenses. *See Duff*, 33 A.2d at 249 n.4.

The panel dismisses this amendment as a mere stylistic edit. *See* Opinion at 37 ("it is more plausible that the 1966 amendment simply harmonized the wording of article VI's impeachment provision with other, similar provisions elsewhere in the Pennsylvania Constitution."). The panel reasoned that it would be "illogical to conclude, without firm supporting evidence that is not on offer here" that "any misbehavior in office" means something different in Section 6 (as compared to the removal provisions discussed above).

But Senator Ward did offer "firm supporting evidence" that directly undercuts the panel's supposition that the General Assembly "would undoubtedly have been aware of the general understanding of "misbehavior in office" and the fact that it was at that point a common law crime in Pennsylvania, as well as its usage and understanding throughout other parts of the Pennsylvania Constitution." *Id*. at 36-37 (footnote omitted). That evidence: *Com. ex rel. Duff v. Keenan*, 33 A.2d 244 (Pa. 1943).

In *Duff*, this Court indicated that "misbehavior in office" is *not* limited to indictable offenses. *See Duff*, 33 A.2d at 249 n.4 ("'Misbehavior in office' justifying the incumbent's removal does not

necessarily involve an act or acts of a criminal character. …. The official doin[g] 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."). Notably, *Duff* was decided in 1943—well before the 1966 Amendment—and therefore, the General Assembly, is presumed to have been aware of this *Supreme Court* pronouncement when it proposed amending Section 6.

The Commonwealth Court erroneously ignored *Duff*. But when that decision is accounted for, as well as the material differences between the *removal* provisions and the *impeachment* provision, the interpretation of "misbehavior in office" offered by Senator Ward is imminently reasonable. Indeed, the *Duff* decision and these differences show that the General Assembly in 1966 likely intended to shed Section 6 of the common law definition that it had accrued by that time and intended to restore the House's ability to impeach, and the Senate's ability to try impeachment, without extra-textual restraints.

Further, under the panel's interpretation of "misbehavior in office," this amendment would be meaningless because in the panel's view, misbehavior in office and misdemeanor in office are the same. But

that cannot be true. That the General Assembly proposed (and the electorate approved) amending Section 6 from "misdemeanor" to the broader term "misbehavior"—and maintained the word "any"—is compelling evidence that Section 6 reaches beyond the common law crime of misbehavior in office. *Cf. Masland v. Bachman*, 374 A.2d 517, 521 (Pa. 1977) ("A change in the language of a statute ordinarily indicates a change in legislative intent."). This Court should reject the Commonwealth Court's incomplete interpretation that renders the 1966 amendment meaningless.

VII. CONCLUSION

The text, structure, and history of the Constitution lay bare two fundamental principles that belie DA Krasner's and Senator Costa's arguments to this Court: *first*, adjournment *sine* die does not extinguish pending articles of impeachment, and *second*, Article VI impeachment procedures against civil officers apply to local officers along with statewide officers. Despite DA Krasner's and Senator Costa's attempts to persuade this Court otherwise through policy arguments about the role of elections, they cannot overcome the plain language, history, prior interpretations, and persuasive authority related to the controlling

constitutional provisions. All these considerations are hallmarks of constitutional interpretation. Taken together, they firmly support the Commonwealth Court's conclusions on the issues challenged by DA Krasner.

Finally, the text, structure, and history of the Constitution likewise make plain the definition of "any misbehavior in office" in Section 6 is broader than the common law crime of "misbehavior in office." The Commonwealth Court's holding to the contrary does not give meaning to the difference between removal and impeachment proceedings, discredits the importance of *Larsen*, and renders meaningless the 1966 Amendment to Section 6. Worse still, the panel ignored *Duff*—a case that is directly at odds with its holding. This Court should therefore reverse the Commonwealth Court's narrow interpretation of "any misbehavior in office" and restore the intended meaning to that phrase.

Respectfully submitted,

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WORD COUNT CERTIFICATION

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