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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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2 EAP 2023, 3 EAP 2023, 4 EAP 2023

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

Appellant,

v.

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

Appellees.

REPLY BRIEF FOR APPELLEES REPRESENTATIVES TIMOTHY R. BONNER AND CRAIG WILLIAMS

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

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I. INTRODUCTION

In this reply brief, Impeachment Managers address matters (1) raised by D.A. Krasner in his second brief that pertain to Impeachment Managers' issues on appeal—all relating to Count III of D.A. Krasner's PFR and ASR challenging whether the Articles of Impeachment sufficiently allege "any misbehavior in office" under Article VI, § 6 of the Constitution, governing impeachment—and (2) not previously addressed in Impeachment Managers' initial brief. *See* Pa.R.A.P. 2113(a); Pa.R.A.P. 2136(b).

II. SUMMARY OF ARGUMENT

Perhaps more than anything else, D.A. Krasner's second brief underscores the nonjusticiability of Count III. His *ipse dixit* notwithstanding, Article VI of our Constitution contains an undeniable textual commitment of impeachment matters to the General Assembly, a point highlighted by the lack of judicially manageable standards for defining impeachable offenses and our courts' unwavering history of eschewing involvement in impeachment matters. The political question cases on which D.A. Krasner relies are distinguishable and unhelpful to his cause.

Beyond this, by his own doing, D.A. Krasner thwarted the development of a factual record, and his vague, unsupported allegations

about speculative harms are unavailing. This case is not ripe for judicial review (if it ever could be) because D.A. Krasner prevented the Senate trial from occurring; the harms he claims to have suffered as a result of being impeached are neither substantiated nor relevant; and he has suffered none of the theoretical "harm" that might result from a supermajority conviction.

While this Court should decline to reach the merits of Count III, if it does, it should reject the application of *Braig*—a case wholly divorced from the impeachment context—as inapposite. But even if the Court were to apply *Braig* in defining "any misbehavior in office," the Articles of Impeachment would satisfy *Braig*'s standard. Impeachment Managers have not waived their arguments in this regard, as there was (rightfully so) no judicial precedent defining the standard for impeachment until the Commonwealth Court's decision, below, and Impeachment Managers had neither any reason to argue why the Articles met a non-existent standard nor any meaningful opportunity to do so. Contrary to D.A. Krasner's arguments, which distort the allegations in the Articles of Impeachment and Impeachment Managers' arguments on Count III, the Articles allege intentional, corrupt misconduct by D.A. Krasner, not just his subordinates.

This Court should reverse the Commonwealth Court and allow the impeachment trial to proceed in the Pennsylvania Senate.

III. ARGUMENT

A. Count III is not justiciable under the political question doctrine.

Based on this Court's precedents, Count III of D.A. Krasner's challenges to the Articles of Impeachment approved by the House and referred for trial in the Senate as delineated by the Constitution is indisputably not justiciable under the political question doctrine. Without rehashing the arguments presented in Impeachment Managers' initial brief, D.A. Krasner is simply incorrect in his bald, conclusory assertion that Impeachment Managers have "utterly failed" to show that the Constitution contains a textually demonstrable commitment of impeachment matters to the General Assembly and that there is a lack of judicially manageable standards for defining "any misbehavior in office" in Article VI, § 6, each of which renders Count III nonjusticiable. *See Robinson Twp., Washington Cnty. v. Commonwealth*, 83 A.3d 901, 928 (Pa. 2013) (citing the factors in

Baker v. Carr, 369 U.S. 186, 217 (1962));[1] Impeachment Managers' Initial Brief at 26-30, 49-54.[2] The text of the Constitution unequivocally delegates to the House "**the sole power of impeachment**," Pa. Const. art. VI, § 4 (emphasis added), and provides that "**[a]ll impeachments shall** be tried by the Senate." *Id.* § 5 (emphasis added). These plain words unquestionably commit impeachment matters exclusively to the General Assembly, and there is no need, as D.A. Krasner suggests, for superfluous language to reinforce that conclusion. *See* D.A.'s Second Brief at 12 (arguing that a textual commitment is lacking because the Constitution does not additionally say that the General Assembly has "the power to *exclusively* and *finally determine* all matters relating to impeachment") (emphasis in original).

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

[2] D.A. Krasner's second brief suggests that there must be *both* a textual commitment of authority to a coordinate political department *and* a lack of judicially manageable standards for the political question doctrine to apply, *see* D.A.'s Second Brief at 8-9, but the presence of *any one Baker* factor warrants judicial abstention. *Blackwell v. City of Philadelphia,* 684 A.2d 1068, 1071 (Pa. 1996); *Zemprelli v. Daniels*, 436 A.2d 1165, 1169 (Pa. 1981). Indeed, the case that D.A. Krasner cites, *Council 13, Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO ex rel. Fillman v. Rendell*, 986 A.2d 63, 75 (Pa. 2009), quotes *Baker,* which uses the conjunction "or," not "and," in listing the various factors to be considered.

Further, the cases on which D.A. Krasner relies to support his assertion that Count III is justiciable are readily distinguishable. *In re Jordan,* 277 A.3d 519 (Pa. 2022), for example—which challenged whether a candidate for state representative met the Constitution's residency requirements (Pa. Const. art. II, § 5)—turned on the fact that although Article II, § 9 of the Constitution textually commits to the General Assembly the authority to "judge...the election and qualification of its *members"* (emphasis added), that same authority does not extend to ruling on the qualifications of *non-member candidates*. *Id.* at 530. Further, critical in *Jordan* was the fact that *statutory* authority (the Election Code) expressly permits courts to intervene to set aside nomination petitions filed by candidates not entitled to file them. *See id.* As this Court explained:

> [T]he Constitution has given the Legislature authority over its members, but the Legislature has, in turn, empowered courts to resolve factual questions such as whether a candidate meets the age and residency requirements of our Constitution....Setting aside the General Assembly's constitutional responsibility for questions of *membership*, *candidate* eligibility cannot lie outside the judiciary's purview if the Constitution and the Election Code are to be applied impartially and with fidelity to their terms.

Id. at 531 (emphasis in original). *See also id.* at 534 ("[N]omination challenges predicated upon allegations that a candidate for the General Assembly cannot meet the qualification requirements set forth in Article II,

Section 5 of the Pennsylvania Constitution are justiciable—not by dint of implicit constitutional authority standing alone, but per the implicit legislative prerogative embodied by Section 977 of the Election Code.”). *Jordan* is thus wholly distinguishable from this case in which the text of the Constitution unequivocally confers impeachment powers exclusively on the General Assembly, *see* Pa. Const. art. VI, §§ 4-5, and the latter has not delegated any of those powers to the courts.

In another case on which D.A. Krasner relies, *Powell v. McCormack*, 395 U.S. 486 (1969), the United States Supreme Court held that the House does not have unfettered discretion to judge the qualifications of its members under Article I, § 5 of the U.S. Constitution, because the qualifications—age, citizenship, and residency—are expressly set forth in Article I, § 2. Accordingly, *Powell* held that the “textual commitment” formulation of the political question doctrine does not bar federal courts from adjudicating claims that a member was improperly precluded from being seated for reasons *other than* those prescribed by the Constitution. *Id.* at 548. Here, by contrast, the Pennsylvania Constitution expressly grants the House the ***sole*** power to impeach a civil officer for ***any*** misbehavior in office—a term not defined or limited by the Constitution, unlike the federal Constitution’s narrowly circumscribed standing

requirements for House members—and mandates that the Senate conduct the trial of those so impeached. *See* Pa. Const. art. VI, §§ 4-6.

Indeed, the *Nixon* court readily distinguished *Powell. Nixon* noted that the qualifications of House members were expressly defined in the Constitution and not placed in the House. *Nixon v. U.S.*, 506 U.S. 224, 237 (1993). It explained, however, that "there is no separate provision of the Constitution that could be defeated by allowing the Senate final authority to determine the meaning of the word 'try' in the Impeachment Trial Clause." *Id.* Like "try" in *Nixon*, "any misbehavior in office" in Article VI, § 6 is not constrained by any other provision of the Pennsylvania Constitution. If anything, *Powell supports* Impeachment Managers' position.

In *Sweeney v. Tucker*, 375 A.2d 698, 712 (Pa. 1977), this Court decided that the House's power to expel its members under Article II, § 11 of the Constitution was subject to judicial review. Absent from the latter provision, however, is the word "sole," which clearly appears in Article VI, § 4. As D.A. Krasner notes, "the framers are 'presumed to understand that different terms mean different things.'" *See* D.A.'s Second Brief at 72 (quoting *PECO Energy Co. v. Commonwealth*, 919 A.2d 188, 191 (Pa. 2007)). The word "sole" cannot be ignored. Like *Powell, Sweeney* serves to illustrate Impeachment Managers' point.

Zemprelli v. Daniels, 436 A.2d 1165 (Pa. 1981), is likewise distinguishable. There, this Court interpreted the phrase "a majority of the members elected to the Senate" in Article IV, § 8(a) (concerning Senate confirmation of officers appointed by the Governor), finding an interpretation proffered by the petitioners—which would have included in "the majority" persons not even eligible to vote and caused Article IV, § 8(a) to require greater than a majority vote whenever there was a vacancy in the Senate—"irrational" and violative of the Constitution. *Id.* at 1170-71. As this Court noted in finding the matter justiciable, "[w]hen the Constitution clearly sets forth the manner in which something shall be done, that procedure must be followed to the exclusion of all others[.]" *Id.* at 1170. Unsurprisingly, the Court rejected the proposal to read the Constitution in a strained, unnecessarily technical, and unnatural way. Unlike "majority" in Article IV, § 8(a), "any misbehavior in office" in Article VI, § 6 is not subject to "natural interpretation," *see id.*, and unlike the proposal advanced by the *Zemprelli* petitioners, the General Assembly's pursuit of impeachment proceedings against D.A. Krasner has not been "repugnant" to the

Constitution, *id.* at 1169, but instead consistent with it and the exclusive authority that it grants to the General Assembly in impeachment matters.[3]

D.A. Krasner is also incorrect in asserting that the phrase "constitutional lines" in *In re Investigation by Dauphin Cnty. Grand Jury, Sept., 1938*, 2 A.2d 802, 803 (Pa. 1938) is not *dicta*. *See* D.A.'s Second Brief at 10, n.3. *Dauphin County* did not turn on any so-called "constitutional lines," and the Court's comment, which was not necessary to its decision, is not binding authority. *See BouSamra v. Excela Health*, 210 A.3d 967, 976 n.5 (Pa. 2019) (*dicta* generally is regarded as information in a court opinion not necessary for determining the case); *Hunsberger v. Bender*, 180 A.2d 4, 6 (Pa. 1962) (a statement in a prior opinion that was "clearly not decisional" and instead merely *dicta* "is not binding upon us"). Further, even if the Court's comment on "constitutional lines" were not *dicta,* the impeachment proceedings against D.A. Krasner *were* advancing "within constitutional lines," with the House issuing impeachment articles

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[3] In *Larsen,* the Commonwealth Court distinguished *Zemprelli* as among those cases in which the courts had ruled on legislative actions as justiciable questions where they "were *reviewing actions already theretofore taken* by the processes of the legislative body." *Larsen v. Senate of Pennsylvania*, 646 A.2d 694, 700 (Pa. Cmwlth. 1994) (emphasis in original). Here, the Senate was thwarted from proceeding with its "processes" (*i.e.,* D.A. Krasner's impeachment trial) by the Commonwealth Court's ruling, which was contrary to its own precedent in *Larsen*.

consistent with its ***sole*** power to do so, *see* Pa. Const. art. VI, § 4, and the Senate preparing to conduct the trial, consistent with its authority and mandate to conduct ***all*** impeachment trials, *see* Pa. Const. art. VI, § 5, during which D.A. Krasner could have raised all of his current claims and fully responded to the allegations against him. The Constitution's "lines" require no more.[4]

B. Count III is not (and may never be) ripe for judicial review.

As Judge McCullough aptly stated in dissent, Claim III presents an "unripe political question that at this point is constitutionally reserved for the Senate's determination." (Appendix B at PAM-5). Comparing this case to *Larsen v. Senate of Pennsylvania*, 646 A.2d 694 (Pa. Cmwlth. 1994)—in which the Commonwealth Court "implicitly recognized" that the Constitution commits to the Senate the determination of whether articles of impeachment sufficiently allege "misbehavior in office" and thus "declined

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[4] The degree of judicial scrutiny presupposed by D.A. Krasner, by contrast, is seemingly limitless. Similarly, the Commonwealth's Court's analysis of the Articles was not an exercise of reserved oversight focused on compliance with core constitutional principles, but unrestrained judicial review, without reference to evidentiary burdens or even a cogent legal standard. *See* Impeachment Managers' Initial Brief at 62-63. These few words appearing in *Dauphin County*, whether *dicta* or not, do not endorse or justify the essentially unfettered review employed by the Commonwealth Court, and certainly do not support the sort of analysis that D.A. Krasner invites this Court to apply.

to afford any relief in advance of trial in the Senate"—Judge McCullough emphasized the "ill-advised" nature of indulging D.A. Krasner's request that the courts "evaluate the substance of legislative action that has not yet occurred," and rightly criticized the lower court's decision to "shirk[] the more prudential course of exercising judicial restraint" in an unripe matter. (Appendix B at PAM-7-9).

In deciding whether the ripeness doctrine bars a declaratory judgment action, Pennsylvania courts consider "[1] whether the issues are adequately developed for judicial review and [2] what hardships the parties will suffer if review is delayed." *Twp. of Derry v. Pennsylvania Dep't of Lab. & Indus.*, 932 A.2d 56, 57-58, 60 (Pa. 2007). Regarding the first part of the inquiry (adequate development), courts consider "whether the claim involves uncertain and contingent events that may not occur as anticipated or at all; the amount of fact finding required to resolve the issue; and whether the parties to the action are sufficiently adverse." *Id.* at 58. Under the second part of the inquiry, courts assess whether, even if the case is not fully developed, refusal to decide it would place a demonstrable hardship on the party seeking relief. *Id.*

Here, D.A. Krasner cannot satisfy the requisite test. First, he has not even been tried in the Senate, let alone convicted and removed from office.

His future harm is contingent entirely upon events (trial and conviction) that have not happened and are not certain to occur.

Second, because the Senate had yet to conduct the trial (let alone render a decision) when the Commonwealth Court ruled, the relevant facts were (and remain) "not sufficiently developed to permit judicial resolution of the dispute." *Robinson Twp.*, 83 A.3d at 917. D.A. Krasner himself takes issue with the facts, such as, regarding Article V, whether he "lied by omission" or was completely truthful. *See* D.A.'s Second Brief at 52, n.27.[5] The evidence on this and other issues was not, and was not required to be, set forth in the Articles of Impeachment; has never been presented to the Senate; and certainly was not developed in the court below.

Third, D.A. Krasner cannot demonstrate the kind of hardship that would warrant a decision on Claim III despite that it is otherwise unripe for judicial review. D.A. Krasner makes two key allegations of harm—*i.e.,* (1) that the Articles of Impeachment "challenge" "[p]ublic confidence in his integrity, commitment to public safety and pursuit of justice;" and (2) that the impeachment "threatens to interfere" with the functions of his office in

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[5] Contrary to D.A. Krasner's assertions, *see* D.A.'s Second Brief at 50, 53, the Articles of Impeachment do not concede that he was "truthful," but just the opposite. Regardless, that is a matter for the finder of fact—*i.e.,* the Senate, not the courts.

that "[h]e has been required to divert attention from his work" and suffered an impact in his "interactions with witnesses, law enforcement, defense counsel, and his constituents." *See* D.A.'s Second Brief at 22-23. D.A. Krasner, however, cites no evidence or concrete details to support these vague allegations. And, practically, these same or similar complaints might be lodged by *any* civil officer who has been impeached. That D.A. Krasner has had to "divert attention from his work" to answer the Articles of Impeachment, for example, surely cannot be a sufficient "hardship" to overcome the fact that he has not even been tried (on evidence yet to be presented) *and* convicted by the Senate.[6] As another practical matter, the courts are powerless to "undo" D.A. Krasner's impeachment. It has already occurred and that fact will never change. Finally, due consideration must

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[6] Relatedly, while D.A. Krasner continues to characterize the impeachment proceedings as an exercise in "voter nullification" (*see* D.A.'s Second Brief at 4), no votes have been "nullified;" he remains in office and would be ousted as a result of the impeachment proceedings only on a supermajority vote by the Senate to convict him (if the impeachment trial were to occur). More importantly, his "voter nullification" argument is a red herring. *Any* impeachment resulting in the conviction of an elected official could be characterized as overturning the will of the voters. As D.A. Krasner admits: "To be sure, impeachments of elected officials necessarily have the effect of reversing an election[.]" D.A.'s Second Brief at 63. *See also* Sen. Costa's Second Brief at 32 ("[I]t is certainly true that being elected is not a 'defense to impeachment.'"). That, however, does not mean that such a description is either accurate or indicative of an underlying political motive.

be given to the assertion that any supposed "harm" that D.A. Krasner may experience is the result of his own engagement in the misconduct described in the Articles of Impeachment. The practical consequences of facing an impeachment of which D.A. Krasner complains do not justify court intervention midstream to stop his trial from occurring.

Our courts have sound reasons for not giving advisory opinions about merely speculative harm. *See Gulnac v. South Butler County School District*, 587 A.2d 699, 701 (Pa. 1991) (undertaking decisions in unripe matters wastes judicial resources). If D.A. Krasner is entitled to any judicial review (and Impeachment Managers deny that he is), at a minimum, it must happen after any such trial and conviction. This controversy is not ripe, the Commonwealth Court erred in ruling otherwise, and its decision should be overturned.

C. If this Court reaches the merits of Count III, it should reverse the holding of the Commonwealth Court.

While Impeachment Managers continue to refute that this Court should rule on the merits of Count III, D.A. Krasner's arguments are equally flawed in that regard.

1. *Braig* is inapposite.

When defining "any misbehavior in office" in the impeachment provision, the Commonwealth Court improperly applied the standard from

In re Braig, 590 A.2d 284 (Pa. 1991), a case construing Article V's automatic judicial forfeiture provision. Until that decision, no Pennsylvania Court had suggested that Article VI's impeachment for "any misbehavior in office" is the same as Article V's removal by automatic forfeiture of office on conviction of "misbehavior in office," and for good reason: removal and impeachment are textually and contextually distinct constitutional remedies for addressing different kinds of misconduct by public officials. *Braig* has no application here.

In *Braig*, this Court considered whether a judge was "convicted of misbehavior in office by a court" and subject to automatic forfeiture of judicial office under Article V § 18(*l*) if convicted of mail fraud. *Id.* At that time, § 18(*l*) provided:

> 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.

Braig, 590 A.2d at 286.[7]

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[7] A substantially similar provision now appears in Article V, § 18(d)(3).

During its review of historical constitutional removal provisions "on conviction of misbehavior in office," the *Braig* Court stated:

> "Misbehavior in office" was a common law crime consisting of the failure to perform a positive ministerial duty of the office or the performance of a discretionary duty with an improper or corrupt motive. Our Constitution has long contained provisions specifying that civil officers "shall be removed on conviction of misbehavior in office or of any infamous crime."…In the several cases where interpretation of these provisions came before the appellate courts, it was uniformly understood that the reference to "misbehavior in office" was to the criminal offense as defined at common law.

Id. It then went on to discuss those cases–involving an official's disqualification or removal after conviction of misbehavior in office. *Id.* at 286-87. Based on those removal cases, the *Braig* Court "conclude[d] that the language of Article V, Section 18(*l*) [judicial forfeiture], like the identical language of present Article VI, Section 7 [civil officer removal],[8] refers to

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[8] Article VI, § 7 was not at issue in *Braig*, nor is it at issue here. However, a comparison between Article VI's impeachment and removal provisions is instructive insofar as the removal provision expressly requires conviction for criminal misconduct, whereas the impeachment provision does not. *See* Pa. Const. art. VI, § 7 (providing for removal of civil officers "on conviction of misbehavior in office or of any infamous crime").

the offense of 'misbehavior in office' as it was defined at common law."[9] *Id.* at 287.

Ultimately, the question in *Braig* was whether Judge Braig had sustained a qualifying predicate conviction requiring forfeiture of judicial office: thus, a categorical comparison between the old common law offense of misbehavior in office and the subsequent statutory offense of mail fraud made sense. *See Braig,* 590 A.2d at 289. By contrast, here, the impeachment provision makes no textual reference to criminal law (indeed, removal for criminal misconduct is handled elsewhere in Articles V and VI).

Braig is inapposite in the impeachment context. First, the text of the Constitution's impeachment and forfeiture provisions are different: impeachment for *any* misbehavior in office is not the same as automatic

[9] "This conclusion," the Court acknowledged, "is not without its difficulties," since common law crimes were abolished under the Crimes Code in 1973. *Braig,* 590 A.2d at 287. The Court therefore held that "the automatic forfeiture provision of Article V, Section 18(*l*) applies where a judge has been convicted of a crime that satisfies the elements of the common law offense of misbehavior in office" since "[i]n such cases it will have been established as a matter of record, and beyond a reasonable doubt, that the judge has engaged in conduct directly affecting the integrity of the office." *Id*. at 287-88. (Whether such a record would actually be developed given that misbehavior in office may no longer be prosecuted as an offense may be open to debate.) Nonetheless, the Court ultimately concluded that Judge Braig's mail fraud conviction did not constitute misbehavior in office warranting automatic forfeiture. *Id.* at 288.

forfeiture after being *convicted* of misbehavior in office in court. *Compare* Pa. Const. art. VI § 6 (stating that "civil officers shall be liable to impeachment for *any misbehavior in office*"), *with id.* art. V, § 18(d)(3) (stating that a judge "*convicted of misbehavior in office by a court*...shall forfeit automatically his judicial office") (emphases added); *see also* Impeachment Managers' Initial Brief at 56-64. Impeachment is more naturally construed as a constitutional remedy for a broader range of political misconduct that may (but need not) be criminal.

Likewise, impeachment is a structurally distinct remedy involving a constitutionally bifurcated process, where—deviating from the traditional judicial process contemplated by the removal provisions—the House is the body to raise articles of impeachment; and, to sustain an impeachment for any misbehavior charged by the House, a civil officer must also be convicted by the Senate via a two-thirds vote.

Second, and as *Braig* illustrates, context matters. *Braig* involved judicial review of *post-conviction removal by automatic forfeiture of judicial office* under Article V, § 18(*l*), not a *pre-conviction* challenge to an *impeachment trial in the Senate* under Article VI, § 6. Although removal and impeachment may result in the same outcome (loss of public office), that does not mean they employ the same process, and sensibly so. In

Braig, the record for determining whether automatic removal was appropriate due to a conviction was established, whereas here, the record supporting impeachment has yet to be established. Thus, unlike in *Braig*, it is, at a minimum, premature (if ever appropriate) for a court to review an officer's impeachment until the Senate trial is concluded.

2. Impeachment Managers did not waive the opportunity to argue that the Articles of Impeachment would meet the Commonwealth Court's newly minted definition of "any misbehavior in office."

As the lead opinion below acknowledged, before the Commonwealth Court's December 2022 decision, no prior case had determined what "any misbehavior in office" means in the context of impeachment. (*See* Appendix B at 31). Further, in the only other case in which a court was asked to do so, *Larsen*, the Commonwealth Court expressly declined that undertaking, held that the petitioner's proposal to equate "any misbehavior in office" with "the common law crime of misconduct in office" "finds **no support** in judicial precedents," and held that the court was barred from intervening *ex ante* in impeachment proceedings committed by the Constitution to the Senate. *Larsen*, 646 A.2d at 702, 705 (emphasis

added).[10] Accordingly, there was no precedential analytical model to apply in opposing D.A. Krasner's filings in the court below, and while he offered his own definition of "any misbehavior in office," it was the very same one that the Commonwealth Court had *rejected* in *Larsen*. Moreover, Impeachment Managers refuted in their Preliminary Objections (as they continue to do) that the courts have *any* authority to interpret "any misbehavior in office" as it appears in Article VI, § 6.

Beyond this, because the Commonwealth Court, in a decision inexplicably at odds with its earlier one in *Larsen*, announced its new standard in the context of granting D.A. Krasner's ASR, Impeachment

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[10] D.A. Krasner accuses Impeachment Managers and Senator Ward of "mischaracteriz[ing]" *Larsen,* but then says, incorrectly, that "the Commonwealth Court held that *various criminal allegations* in impeachment articles against former Justice Larsen passed constitutional muster because they would meet virtually *any* definition of 'misbehavior in office.'" *See* D.A.'s Second Brief at 39 (first emphasis added). Most of the seven articles of impeachment adopted against Justice Larsen did *not* involve criminal allegations. They instead charged him with things such as having *ex parte* communications with an attorney friend and campaign contributor who appeared before him and voting consistent with that attorney's position; communicating with a trial judge on a case pending before her and providing extra-record information beneficial to a party represented by one of his friends; making allegations in bad faith against other Supreme Court justices; and undermining confidence in the judiciary and betraying the trust of the people of Pennsylvania. *See Larsen v. Senate of the Commonwealth of Pennsylvania,* 152 F.3d 240, 243-44 (3d Cir. 1998).

Managers had no opportunity to answer the PFR or otherwise raise their arguments as to the sufficiency of the Articles of Impeachment in the court below after it made its novel pronouncement.[11] Further, as described at length in Impeachment Managers' initial brief (at 56-84), the Commonwealth Court's lead opinion described unprecedented requirements for Articles of Impeachment—such as that they must be akin to criminal indictments, yet contain even greater facts and specificity—that could not have been predicted and are themselves confusing and unmanageable. Impeachment Managers can hardly be faulted for not anticipating the unprecedented path that the Commonwealth Court took, including because it is one that the court altogether declined to venture in *Larsen*. Further, in doing so, the lead opinion undertook its own analysis of each Article of Impeachment, opening the door for this Court to evaluate the propriety and accuracy of that analysis.

Under these circumstances, Impeachment Managers did not waive the arguments asserted in their initial brief as to why the Articles of Impeachment would meet the Commonwealth Court's definition *even if* this

[11] Briefing in the court below was also expedited (*see* Commonwealth Court docket, December 6, 2022), as per D.A. Krasner's request. (R. 172a)

Court were to both hold that the courts have the authority to define "any misbehavior in office" in Article VI, § 6 *and* accept the definition proffered by the Commonwealth Court.

3. Prosecutorial discretion does not cover refusing to enforce entire classes of crimes.

As charged in Articles I and VII, a district attorney's discretion over whether to prosecute individual cases does not extend to the wholesale refusal to enforce or uphold the law, which constitutes *de facto* nullification of the law and a violation of the separation of powers. *See* Impeachment Managers' Initial Brief at 80-84. Rather than addressing the authorities that Impeachment Managers cited, D.A. Krasner cites a series of cases that, at best, stand for the undisputed proposition that prosecutors enjoy discretion in making *individualized* case determinations and fail to rebut the legal principles underlying the allegations in Articles I and VII. *See* D.A.'s Second Brief at 45, n.22.

Mummau v. Ranck, 531 F. Supp. 402 (E.D. Pa. 1982), was a federal employment discrimination case brought by an assistant district attorney in which the district court said, in *dicta,* that "the allocation of scarce resources and the decision to prosecute a particular individual and specific classes of crime requires the reasoned and informed exercise of discretion which is normally entrusted to a prosecutor." *Id*. at 405. *Mummau,*

however, had nothing to do with classes of crimes (nor did the case that it cited in support of the quoted *dicta*, *U.S. v. Berrigan*, 482 F.2d 171 (3d Cir. 1973)).

Commonwealth v. Metzker, 658 A.2d 800 (Pa. Super. 1995), involved a district attorney's exercise of discretion not to pursue charges in a case in which he concluded, after investigation, that a particular conviction would be "doubtful or impossible." *Id.* at 801. Although the court referred to the district attorney's decision as a "policy determination," it was based on an individualized conclusion that the case lacked "prosecutorial merit," not a blanket decision not to prosecute an entire class of crimes. *See id.*

In re Ajaj, 288 A.3d 94 (Pa. 2023), challenged a district attorney's refusal to pursue felony charges in response to a private criminal complaint filed by a father against the mother of his children with whom he was in a custody dispute. Although the case referenced the district attorney's general policy of not approving private criminal complaints alleging felonies, *id.* at 101, the court's finding that the district attorney's decision was not made in bad faith, due to fraud, or unconstitutional turned on the district attorney's consideration of a case-specific "myriad of evidentiary challenges associated with bringing charges against [the mother]." *Id.* at 110.

Finally, in *Commonwealth v. Ebert*, 535 A.2d 178 (Pa. Super. 1987), the Superior Court explained that a district attorney may properly offer Accelerated Rehabilitative Disposition to "only those classes of defendants who are likely to be rehabilitated." *Id.* at 181. It was thus permissible for the district attorney to conclude that "former juvenile delinquents who have been charged with crimes as adults are not a class of defendants with strong prospects for successful rehabilitation." *Id*. The Superior Court was not addressing the inverse situation we have here: a prosecutor unilaterally suspending prosecution of certain classes of individuals or crimes on a wholesale basis, contrary to the separation of powers.

The dispute between the parties on Articles I and VII also underscores the impropriety of the Commonwealth Court's intervention in the impeachment proceedings. The parties disagree over whether the allegations in those articles rise to the level of impeachable conduct, which boils down to whether the District Attorney abused his office by nullifying certain laws the General Assembly has passed. The constitutionally prescribed remedy is an impeachment trial in the Senate (not litigation in court).

4. D.A. Krasner mischaracterizes Impeachment Managers' arguments as to Articles III, IV, and V.

In an attempt to recast Impeachment Managers' argument on Articles III through V, D.A. Krasner accuses them of trying to "rewrite" those Articles by "add[ing] unpled criminal violations" in an effort to "cure" the Articles' purported "deficiencies." *See* D.A. Krasner's Second Brief at 52-56. This is a blatant distortion of Impeachment Managers' argument. Articles III through V, as written, establish impeachable misbehavior in office under any standard; they do not need a rewrite and Impeachment Managers have not attempted one.

To the contrary, Impeachment Managers explained that in drafting the Articles of Impeachment, including III through V, the House had the option of framing the alleged misbehavior in numerous ways. These included by reference to Rules of Professional Conduct (R.P.C.) that relate to the misbehavior at issue, as the House did here. As described in Impeachment Managers' opening brief (at 66-70), accusing D.A. Krasner of misbehavior in office "in the nature of" violations of the R.P.C. was not an

attempt to supplant this Court's exclusive authority over attorney disciplinary matters.[12]

Meanwhile, D.A. Krasner minimizes, mischaracterizes, or just ignores the specific allegations in Articles III through V. He claims that the Articles do not allege specific intent on his behalf, D.A.'s Second Brief at 53-54, but Articles III and IV expressly state that he "directed" others in his office to engage in the corrupt conduct at issue. (R. 119a, 124a) These Articles allege intentional misbehavior by D.A. Krasner, not just his subordinates. Nor do the Articles allege or presuppose that he is subject to impeachment for mere "mistake[s]," "inadvertence," "fail[ure] to detect" subordinates' misconduct, or "incompetent supervision of employees." *See* D.A.'s Second Brief at 49. Article V alleges that D.A. Krasner misled this Court, under oath, by concealing material facts from its investigator. (R. 124a-126a) The accusations are levied against D.A. Krasner himself.

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[12] D.A. Krasner fails to respond to Impeachment Managers' argument on the severity of the misconduct alleged in the Articles invoking the Codes and Canons; instead, he attempts to dodge the argument, reframing it as a dispute about this Court's jurisdiction over attorney discipline, D.A.'s Second Brief at 46-47, which Impeachment Managers do not contest.

Furthermore, Articles III and IV allege corrupt conduct. D.A. Krasner fails to acknowledge the judicial findings of prosecutorial misconduct described in those articles or that he "directed, approved and or permitted" the misconduct at issue. (R. 119a-120a, 124a) Providing misleading testimony under oath, lying to and misleading judges and grand juries, and repeatedly violating a defendant's constitutional rights—with D.A. Krasner either performing or orchestrating that misconduct in his official capacity—embodies misbehavior in office and breach of the public trust. That R.P.C. 3.3 and 8.4[13] also expressly prohibit as unethical "dishonesty, fraud, deceit or misrepresentation," actions "prejudicial to the administration of justice," criminal acts by lawyers, "false statements" to tribunals, and inducing or assisting others in violating those and other Rules only supports (not supplants) the impeachable nature of that misconduct.[14]

In drafting Articles III through V, the House could just as well have invoked Crimes Code provisions "in the nature of" the conduct at issue, as the concepts and terminology of the R.P.C. invoked in the Articles overlap

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[13] D.A. Krasner does not cite directly to Rule 3.3 or 8.4 in his second brief, nor does he acknowledge the conduct those rules prohibit.

[14] Although this Court should not be persuaded by D.A. Krasner's attempts to sidestep those allegations, the body responsible for trying the merits of his arguments is the Senate, not this Court.

with the crimes discussed in Impeachment Managers' opening brief. *See, e.g.*, Impeachment Managers' Initial Brief at 70-76. The General Assembly is no more empowered to convict and imprison an individual for committing a crime—whether under the common law or Crimes Code—than it is to impose attorney discipline for a violation of the R.P.C. Nor would every violation of the R.P.C. be impeachable under Article VI, § 6. It is the actual misconduct alleged in Articles III though V, and not reference to certain Rules, Codes, or Canons, that makes D.A. Krasner subject to impeachment. But that does not mean the General Assembly cannot impeach a prosecutor for conduct that may otherwise constitute crimes or ethical violations.[15]

Impeachment Managers' reference to crimes was not an attempted rewrite, but rather served to illustrate that there are different ways that the House could have drafted the Articles. Nor does it reflect some deficiency in the Articles, as D.A. Krasner erroneously suggests, or an acknowledgement that impeachment requires criminal conduct. *See* D.A.'s Second Brief at 52-56. To the contrary, Impeachment Managers

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[15] While D.A. Krasner asserts that 16 P.S. § 1401(o) does not apply to district attorneys in Philadelphia, *see* D.A.'s Second Brief at 47-48, the lead opinion below disagreed based on the plain, clear, unambiguous text of the statute. (*See* Appendix B at 42 n.25).

emphasized that commission of a crime, including the common law crime of misbehavior in office, is not a prerequisite for impeachment. Impeachment Managers' Initial Brief at 72. Rather, this discussion served to illustrate an error in the Commonwealth Court's reasoning, the gravity of the allegations in Articles III through V, and, with respect to the political question doctrine, the lack of a judicially manageable standard for a court to say what does (or does not) constitute impeachable misconduct. Impeachment Managers' Initial Brief at pp. 70-76. Accordingly, D.A. Krasner's arguments on this point, being without merit, should be rejected.

5. Article VI alleges willful and corrupt violations of victims' rights statutes that impose affirmative duties on prosecutors.

As a preliminary matter, D.A. Krasner's suggestion that Impeachment Managers waived argument on the sufficiency of Impeachment Article VI by not individually referencing it in their filings, *see* D.A.'s Second Brief at 56, is meritless. Impeachment Managers, first in their jurisdictional statement and then again in their statement of issues on appeal, challenged the Commonwealth Court's holding that "none of the Articles" of Impeachment allege conduct that constitutes what would amount to the common law crime of misbehavior in office. *See* Impeachment Managers' Jurisdictional Statement at 5 (§ V.3); Impeachment Managers' Initial Brief at 7 (§ IV.E.).

Then, in their initial brief, Impeachment Managers specifically addressed D.A. Krasner's argument that Article VI fails to provide adequate notice of the charges against him. *See* Impeachment Managers' Initial Brief at 62-66.

Turning to his scattershot challenges on the merits, D.A. Krasner's argument that Article VI is unconstitutional because it does not read like a criminal indictment is wrong. The rules of criminal procedure do not govern impeachment proceedings, and regardless, a criminal indictment would require no more specificity than what Article VI provides. *See* Impeachment Managers' Initial Brief at 62-66. Moreover, D.A. Krasner cannot complain that the impeachment proceedings denied him due process, when he sought judicial intervention to halt the very proceedings that would have afforded him that process.[16]

Next, D.A. Krasner's argument that a violation of Pennsylvania's Crime Victims Act cannot constitute impeachable conduct because that

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[16] D.A. Krasner's challenges ultimately circle back to nonjusticiability and ripeness: the constitutionally designated forum responsible for hearing his arguments on the articles is the Senate; and, even if the sufficiency of the articles were a justiciable question, the Senate has not had the opportunity to hear argument on threshold questions or receive evidence, and therefore, the record is not ripe for this Court to review. *See* Impeachment Managers' Initial Brief at 64.

statute "imposes obligations on no one–it is a list of victims' rights and nothing more," D.A.'s Second Brief at 57-58, is both surprising and wrong.

Pennsylvania's Crime Victims Act has an entire subchapter titled "Responsibilities," which imposes obligations on, among others, prosecutors' offices to ensure that victims' rights are protected. 18 P.S. §§ 11.211-11.216. Specifically, the Act lists over a dozen duties that district attorneys' offices "shall" perform to keep victims informed and involved during an investigation and prosecution, particularly in cases involving personal injury crimes, and requires that victims have an opportunity to participate in that process. *Id.* § 11.213. The federal Crime Victims' Rights Act imposes similar duties on prosecutors handling federal habeas corpus proceedings arising out of state convictions, and it tasks courts with ensuring that these rights are afforded. 18 U.S.C. § 3771(b)(2)(A). Thus, D.A. Krasner's suggestion that he and his office have no duties under victims' rights statutes is false.

Finally, D.A. Krasner's argument that Article VI is unconstitutional because it fails to allege that he violated the Crime Victims Act with "the requisite willfulness or corrupt intent," D.A.'s Second Brief at 50, is again wrong. He ignores the allegation that he violated state and federal victims' rights acts, in part "by specifically failing to timely contact victims,

deliberately misleading victims and or disregarding victim input and treating victims with contempt and disrespect." (R. 126a-127a) D.A. Krasner cannot erase that language from the Articles of Impeachment by ignoring it in his brief. Thus, even if required, Article VI adequately alleges willful and corrupt violations of statutes that impose affirmative duties on the District Attorney.

IV. CONCLUSION

For the reasons above and in Impeachment Managers' initial brief, the Commonwealth Court erred in overruling Impeachment Managers' preliminary objections on Counts I through III and this Court should reverse that decision and allow the impeachment trial to proceed before the Senate as the Constitution requires.

Alternatively, if this Court believes it is appropriate to rule on the merits of Counts I through III, it should affirm the order of the Commonwealth Court on Counts I and II, by holding that impeachment proceedings do not cease with adjournment *sine die* and that D.A. Krasner is a "civil officer" subject to impeachment under Article VI, § 6, and reverse on Count III, by holding that the Articles of Impeachment sufficiently allege

"any misbehavior in office" for purposes of Article VI, § 6 and to allow the trial to proceed in the Senate.

Respectfully submitted,

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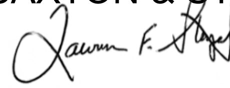

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CERTIFICATE OF COMPLIANCE

I, Lawrence F. Stengel, certify that the foregoing Reply Brief for Appellees, excluding the cover page, table of contents, table of authorities, proof of service, signature block, and appendices, contains 6,995 words, as calculated by the word count function of the word processing system used to prepare the brief, and complies with Pa. R.A.P. 2135.

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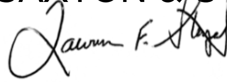

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PUBLIC ACCESS POLICY CERTIFICATION

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

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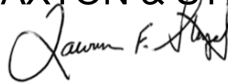
Dated: September 14, 2023 By:  ____________________

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