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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Nos. 2, 3 and 4 EAP 2023

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

Appellant in No. 3 EAP 2023,

v.

SENATOR KIM WARD, in her official capacity as Interim President Pro Tempore of the Senate;

Appellant in No. 4 EAP 2023,

REPRESENTATIVE TIMOTHY R. BONNER, in his official capacity as an impeachment manager; REPRESENTATIVE CRAIG WILLIAMS, in his official capacity as an impeachment manager;

Appellants in No. 2 EAP 2023,

REPRESENTATIVE JARED SOLOMON, in his official capacity as an impeachment manager; SENATOR JAY COSTA, in his official capacity as Minority Leader of the Senate; and JOHN DOES, in their official capacities as members of the SENATE IMPEACHMENT COMMITTEE.

SECOND BRIEF OF APPELLANT DISTRICT ATTORNEY LARRY KRASNER

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

Dated: August 28, 2023

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I. INTRODUCTION

District Attorney Krasner's opening brief framed the central concern in these appeals – whether the Pennsylvania Constitution empowers the statewide General Assembly to impeach a locally elected prosecutor for his lawful (*i.e.*, non-improper, not corrupt) exercise of his discretionary duties. Respondents would deny the courts any role in answering this question, because no court has done so before. In reality, it is the House's attack on democracy that is unprecedented.

District Attorney Krasner's opening brief demonstrates that the Amended Articles of Impeachment are contrary to basic democratic principles, enshrined in the Pennsylvania Constitution, for two reasons: the Amended Articles expired upon the adjournment *sine die* of the 206th General Assembly and District Attorney Krasner is a locally elected official, not subject to impeachment by the statewide General Assembly under Article VI, Section 6.

Respondents' opening briefs respond to these two arguments and advance two further positions: judicial review of the Amended Articles is not justiciable under the political question and ripeness doctrines, and the Amended Articles state an impeachable offense because they need not allege conduct that arises to conduct violating the common-law crime of misbehavior in office.

This brief responds to Respondents' opening briefs. It starts by focusing on what the Commonwealth Court correctly concluded: District Attorney Krasner's

claims for declarations concerning the viability of the Amended Articles of Impeachment are justiciable; and the long-recognized constitutional definition of "misbehavior in office" – as the common-law crime of that name – applies to impeachments and plainly is not met by the conduct alleged in the Amended Articles. Next, this brief replies to Respondents' arguments that the Amended Articles did not expire upon the adjournment *sine die* of the 206th General Assembly, and that the statewide General Assembly has the authority to impeach a local official.

This Court should conclude that the Amended Articles are not viable for three reasons: District Attorney Krasner did not engage in "any misbehavior in office," as shown by the facially inadequate Amended Articles; the Amended Articles expired *sine die*; and they impermissibly seek to impeach a local official and not a "civil officer." Thus, this Court should affirm the Commonwealth Court's decision to the extent it granted the relief the District Attorney requested, and otherwise reverse.

II. COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Does the political question doctrine preclude judicial review of a constitutional challenge to the Amended Articles concerning whether they carry over past the adjournment *sine die* of the 206th General Assembly and whether they allege conduct constituting "any misbehavior in office" for purposes of Article VI, Section 6?

No, as the Commonwealth Court correctly answered.

2. Is a constitutional challenge to the Amended Articles ripe because the House of Representatives has already impeached District Attorney Krasner, the Senate has initiated impeachment proceedings, his claim presents threshold questions of law and constitutional interpretation that require no additional fact development, and hardship would result from delayed review?

The Commonwealth Court correctly answered yes.

3. Do the Amended Articles fail to satisfy the constitutional standard of "any misbehavior in office" because they do not allege that District Attorney Krasner engaged in conduct that would amount to the common-law crime of misbehavior in office, *i.e.*, a failure to perform a positive ministerial duty of the office or the performance of a discretionary duty with an improper or corrupt motive?

The Commonwealth Court correctly answered yes.

III. SUMMARY OF ARGUMENT

This Court should affirm those portions of the Commonwealth Court's Order that Respondents challenge.

First, the political question doctrine does not bar review. District Attorney Krasner challenges the constitutionality of his impeachment, including whether the Amended Articles carry over past the legislature's adjournment *sine die* or allege conduct constituting "any misbehavior in office" under Article VI. Respondents' argument that this Court should overlook these constitutional questions collides with settled precedent and the text of Article VI. For Respondents to prevail, they must demonstrate that Article VI commits exclusive power to the General Assembly to fully and finally determine whether the Amended Articles survive its own death, or what constitutes "any misbehavior in office." But, fatally, nowhere does Article VI (or any other provision) do so. Additionally, courts have regularly decided – and not left to the General Assembly – whether conduct rises to the level of "misbehavior in office" in the related (also Article VI) context of removal from office. Here, just like these other decisions, the judiciary is obligated to make sure the General Assembly stays within the constitutional guardrails established by Article VI. If not enforced by the judiciary, the General Assembly would have license to allow a majority party to nullify an opposing party's election victory. That is anathema to the Constitution and basic democratic principles.

Second, District Attorney Krasner's challenge is plainly ripe for review. He has been impeached by the House, and the Senate has initiated impeachment proceedings. He presents a concrete (not abstract) dispute, raising purely legal constitutional challenges that do not require further factual development. The pertinent facts are undisputed. And District Attorney Krasner will suffer hardship if review is delayed until after a Senate trial.

Third, the Amended Articles fail as a matter of law to allege conduct that constitutes "any misbehavior in office" within the meaning of Article VI, Section 6. In the closely related context of removal from office –in the next section (Section 7) of Article VI – the courts have repeatedly recognized that "misbehavior in office" is limited to conduct that constitutes a violation of the common-law crime of misbehavior in office, *i.e.*, a "failure to perform a positive ministerial duty of the office or the performance of a discretionary duty with an improper or corrupt motive." Respondents argue that this standard, while applicable to removal, is not applicable to impeachment. They say there is no standard governing "any misbehavior in office" other than what the General Assembly wants it to mean. None.

Respondents' "theory" fails for multiple reasons. Primarily, it asks the Court to do what it cannot do – interpret "misbehavior in office" in one way in the textually nearly-identical and thematically-related removal context (Section 7) and

then abandon that interpretation in the context of impeachment (Section 6). This dooms the Amended Articles in full. The Amended Articles bear hug Respondents' fatally flawed theory by expressly stating that "any misbehavior in office" is *not* constrained by the common-law crime standard. But that constraint is a necessary limitation on the General Assembly's ability to undo democratic elections. District Attorney Krasner has not engaged in any such conduct, and the Amended Articles do not allege such conduct. Instead, the Amended Articles express disagreement with and disapproval of District Attorney Krasner's policies and discretionary decisions, as well as matters within this Court's exclusive authority over attorney conduct. That disagreement and disapproval are not grounds for impeachment.

Finally, the Amended Articles are not viable for the additional reasons covered in District Attorney Krasner's opening brief: the Amended Articles expired at the end of the 206th General Assembly, and they attempt to impeach a local official, not a "civil officer."

IV. ARGUMENT

A. Judicial Review of the Amended Articles Does Not Involve a Political Question and Is Ripe.

"The foundation for the rule of law as we have come to know it is the axiom that, when disagreements arise, the Court has the final word regarding the Constitution's meaning." *William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 435-36 (Pa. 2017); *see also Council 13, Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO ex rel. Fillman v. Rendell*, 986 A.2d 63, 76 (Pa. 2009). Fundamentally, "[i]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts." *Robinson Twp., Washington Cnty. v. Com.*, 83 A.3d 901, 927 (Pa. 2013).

Respondents insist that this Court should abrogate its duty to review Respondents' efforts to impeach District Attorney Krasner under the political question and ripeness doctrines. But their arguments are contrary to settled precedent and the text of the Constitution, and ignore the undemocratic impact of their impeachment efforts on District Attorney Krasner. Just as this Court has dismissed these kinds of justiciability arguments when courageously safeguarding the democratic process in the Commonwealth's elections[1], so too should the Court

[1] *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 740-41 (Pa. 2018) ("It is a core principle of our republican form of government 'that the voters should choose their

reject Respondents' invocation of those doctrines to shield the House's effort to erase District Attorney Krasner's re-election by a wide majority of Philadelphia voters. Here, too, courts are vital to keeping the General Assembly's impeachment proceedings within constitutional guardrails and preserve democracy in the Commonwealth.

1. The Constitutional Validity of the Amended Articles is Justiciable, Not a "Political Question."

"We will not refrain from resolving a dispute which involves only an interpretation of the laws of the Commonwealth, for the resolution of such disputes is our constitutional duty." *Council 13,* 986 A.2d at 76. "Courts will refrain from resolving a dispute and reviewing the actions of another branch only where the determination whether the action taken is within the power granted by the Constitution has been entrusted exclusively and finally to the political branches of government for 'self-monitoring.'" *William Penn. Sch. Dist.*, 170 A.3d at 438 (quotations omitted).

The key to this inquiry turns on the text of the Constitution. Following *Baker v. Carr*, 369 U.S. 186 (1962), the inquiry is whether "there is a textually

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representatives, not the other way around.'"); *Kelly v. Commonwealth*, 240 A.3d 1255, 1257 (Pa. 2020) (per curiam) (exercising extraordinary jurisdiction to prevent "the disenfranchisement of millions of Pennsylvania voters"); *County of Fulton v. Sec'y of Commonwealth*, 292 A.3d 974, 1002 n.109 (Pa. 2023) (rejecting argument that county boards have "exclusive authority" over voting equipment such that they "may unilaterally disregard a court order").

demonstrable constitutional commitment of the [disputed] issue to a coordinate political department" and "there is a lack of judicially discoverable and manageable standards for resolving the disputed issue." *See Council 13*, 986 A.2d at 75 (quoting *Baker*, 369 U.S. at 217).

Respondents fail utterly in making such a showing. They do not and cannot demonstrate that the Constitution's text "can be read as reflecting the clear intent to entrust the legislature with the sole prerogative to assess the adequacy of its own effort to satisfy [a] constitutional mandate." *William Penn Sch. Dist.*, 170 A.3d at 439; *accord Nixon v. United States*, 506 U.S. 224, 228 (1993) (the Court must examine the text "and determine whether and to what extent the issue is textually committed").[2] Additionally, they fail to show that the "any misbehavior in office" standard is so unmanageable that it should be left to the General Assembly to interpret it however it wants.

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[2] Historically, there are very limited instances where the political question doctrine has precluded court review.

Between 1962 and 2003, the U.S. Supreme Court "found a case nonjusticiable on the basis of the political question doctrine only twice." *See Doe v. Bush*, 323 F.3d 133, 140 n.8 (1st Cir. 2003) (citing *Nixon*, 506 U.S. at 228; *Gilligan v. Morgan*, 413 U.S. 1, 5-6 (1973)). In 2019, the Supreme Court added a third case to the list. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019) (partisan gerrymandering claims nonjusticiable). The U.S. Supreme Court has found no case nonjusticiable as a political question since *Rucho*.

Because Pennsylvania courts' prudential standards provide for greater judicial review than the federal standard, *Robinson Twp.*, 83 A.3d at 917, this Court has allowed for the judicial review of matters which federal courts would not. *See League of Women Voters*, 178 A.3d at 781 (partisan gerrymandering claims justiciable).

(a) The Text of the Pennsylvania Constitution Does Not Exclusively Commit to the General Assembly the Power to Determine Whether Articles of Impeachment Carry Over or What Conduct Constitutes "Any Misbehavior in Office."

The Constitution does not clearly and unambiguously entrust to the General Assembly the "sole prerogative" to determine whether articles of impeachment survive the adjournment *sine die* of the General Assembly, or to assess whether articles of impeachment satisfy the constitutional standard of "any misbehavior in office." *See Sweeney v. Tucker*, 375 A.2d 698, 710 (Pa. 1977) (finding that procedures followed by the House of Representatives in exercising its power to expel a member were subject to judicial review in due process claim). Rather, this Court has unanimously recognized that it has the power to make sure that the General Assembly is exercising its impeachment powers within the limits of the Constitution: "[T]he courts have no jurisdiction in impeachment proceedings, and no control over their conduct, *so long as actions taken are within constitutional lines*." *In re Investigation by Dauphin Cnty. Grand Jury*, 2 A.2d 802, 803 (Pa. 1938) (emphasis added).[3] These appeals ask only that this Court exercise its

[3] *Dauphin County* states outright that one of those "constitutional lines" is that, "[f]or crimes not misdemeanors in office, impeachment cannot be brought." 2 A.2d at 803. Respondents seek to dismiss this precedent as dicta. Bonner/Williams Br. at 28 n.11. It was not, as the Court specifically "reserved for further consideration" other questions that implicated those "constitutional lines." *Id.* Further, Respondents suggest that *Dauphin County* may be ignored because courts have so far not exercised – much less, improperly exercised – their authority to declare impeachment's "constitutional lines." Bonner/Williams Br. at 28 n.11. But

jurisdiction to address whether the General Assembly is acting within constitutional lines – as required by Article VI, Section 6 – in its efforts to impeach District Attorney Krasner.

Respondents now take the remarkable position that this Court should ignore *Dauphin County*'s admonition that impeachment proceedings must be taken within constitutional lines, as determined by this Court. *See* Bonner/Williams Br. at 28 n.11. Yet, contrary to *William Penn School District*, they point to no text of the Constitution providing that the House has the "sole prerogative" of determining whether articles of impeachment survive the adjournment *sine die* of the General Assembly, or whether its articles satisfy the constitutional standard of "any misbehavior in office.

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that is only because the General Assembly has so rarely sought to improperly exercise its authority.

Properly viewed, Respondents' effort to impeach District Attorney Krasner is part of a national movement to overturn the election of locally elected prosecutors by politicians predominately from outside the prosecutors' jurisdiction. *See* 2023 Georgia Laws Act 349 (S.B. 92) (Georgia law enacted in 2023 creating state entity with power to "discipline, remove, and cause involuntary retirement of appointed or elected district attorneys"); 2023 Tex. Sess. Law Serv. Ch. 366 (H.B. 17) (Vernon's) (Texas law enacted in 2023 amending state removal law to allow for removal of local prosecutors for exercise of prosecutorial discretion); *Warren v. DeSantis*, 631 F. Supp. 3d 1188, 1197 (N.D. Fla. 2022), *motion to certify appeal denied*, No. 4:22CV302-RH-MAF, 2022 WL 19395252 (N.D. Fla. Oct. 4, 2022) (in lawsuit challenging Florida governor's removal of local prosecutor, holding that "[e]lected officials are beholden to their constituents, not to some other elected official," and that Governor DeSantis "had no right to dictate how [the prosecutor] did his job—whom he hired, what policies he adopted, or any of the myriad other policy matters a state attorney must address").

This Court clearly has the authority to stop the present abuse of the Commonwealth's impeachment process, just it has fulfilled its duty to prevent attacks on the orderly election process. *See supra* n.1.

Respondents' briefs distract in arguing that Sections 4 and 5 grant to the General Assembly unfettered discretion over *all* impeachment matters, including whether articles survive adjournment *sine die* and what conduct could *constitute* "any misbehavior in office" in the first place. *See* Bonner/Williams Br. at 26-30, 49-52. But the text of the Constitution does not deliver what Respondents want. Neither Section 4 nor 5 commits to the House or the Senate, through text, the power to *exclusively* and *finally determine* all matters relating to impeachment, including the meaning of the phrase "any misbehavior in office," and certainly neither does so clearly or unambiguously.

Section 4 states: "The House of Representatives shall have the sole power of impeachment." Pa. Const. art. VI § 4. Section 5 states, in relevant part: "All impeachments shall be tried by the Senate…." *Id.* § 5. That these provisions empower the General Assembly to take certain actions does not give it exclusive responsibility to interpret its own power, thereby insulating it from court review. "[T]he issue in the political question doctrine is *not* whether the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches.... Rather, the issue is whether the Constitution has given one of the political branches <u>final responsibility for interpreting the scope and nature of such a power</u>." *William Penn Sch. Dist.*, 170 A.3d at 439 (quoting *Nixon*, 506 U.S. at 240 (White, J., concurring)) (italics in original; all underlining added).

Sections 4 and 5 do not give the General Assembly the exclusive responsibility to determine the meaning of the impeachment provisions. Section 4's reference to the House's "sole power of impeachment" is only "a grant of authority" to the House, indicating that the authority to impeach "is reposed in the [House] and nowhere else." *See Nixon*, 506 U.S. at 229. Similarly, Section 5's use of the phrase "shall be tried by the Senate" reflects only that it is the Senate's job to "determine whether an individual should be acquitted or convicted," to the exclusion of the House or any other body. *Nixon*, 506 U.S. at 231. Neither provision gives the General Assembly "final responsibility for interpreting the scope and nature of" Article II, Section 4 (establishing *sine die*) or Article VI, Section 6 (establishing the "any misbehavior in office" standard). And Respondents offer no explanation of how Sections 4 and 5 grant the General Assembly this "final responsibility"; indeed, Respondents are left to simply assert – without explanation – that these provisions deprive the judiciary of the power to review the constitutional lines or guardrails of impeachment.[4]

[4] For example, Respondents Bonner and Williams assert that "it is difficult to conceive of a clearer example than impeachment where the Constitution grants a single branch exclusive authority." Bonner/Williams Br. at 27. But that fails to address the question for this Court under existing precedent, namely, whether the text of the Pennsylvania Constitution provides that the General Assembly has the "sole prerogative" to determine the constitutional limitations on its own impeachment powers. The answer to that question is "no."

Further, the "any misbehavior in office" standard is included in a completely separate provision, Section 6 of Article VI. Section 6 does not even refer to the General Assembly, let alone exclusively and finally commit to it the determination of what could constitute "any misbehavior in office." It – like many constitutional provisions – states a standard without indicating who is to interpret it. This Court thus has the duty to determine finally what constitutes "any misbehavior in office" and whether the House and Senate overstepped constitutional bounds by basing impeachment proceedings on conduct that does not meet that standard. *See, e.g.*, *Sweeney*, 375 A.2d at 710.

Similarly, the termination of all business pending before the General Assembly arises from Article II, Section 4. It states that "[t]he General Assembly shall be a continuing body during the term for which its Representatives are elected." It does not expressly commit to the General Assembly the power to review its compliance with this provision or exempt issues relating to *sine die* adjournment (including impeachment) from judicial review. In fact, Pennsylvania courts have for decades adjudicated the effect of *sine die* adjournment on actions of the General Assembly. *See, e.g.*, *Brown v. Brancato*, 184 A. 89, 93 (Pa. 1936); *Frame v. Sutherland*, 327 A.2d 623, 627 (Pa. 1974); *Commonwealth v. Costello*, 21 Pa. D. 232, No. 315, 1912 WL 3913, at *6 (Pa. Quar. Sess. Mar. 15, 1912).

Respondents next assert that the General Assembly's Article II, Section 11 rulemaking powers allow it to carry over impeachments from one General Assembly to the next as a "basic housekeeping matter." Bonner/Williams Br. at 27-28. But generalized authority to make rules does not strip this Court of its power to determine whether the General Assembly acted in accordance with constitutional requirements. The legislature's rulemaking authority cannot override specific constitutional limitations on the power of the legislature to carry over proceedings from one iteration of the General Assembly to the next. *See Zemprelli v. Daniels*, 436 A.2d 1165, 1170 (Pa. 1981) (discussed *infra*).[5] As with the provisions discussed above, Article II, Section 11 does not contain any discernible textual intent to commit a particular issue exclusively to a coordinate political department for its own self-monitoring. *See William Penn. Sch. Dist.*, 170 A.3d at 439; *accord Baker*, 369 U.S. at 217.[6]

Key cases that have considered the political question doctrine – both in this Court and the U.S. Supreme Court – support the conclusion that this Court is

[5] Indeed, if Respondents were correct that the political question doctrine bars review of the General Assembly's application of the *sine die* rule, the General Assembly could enact rules to provide for legislation to carry over from one session to the next, and the courts would have no power to enforce the clear requirements of the Constitution barring this activity.

[6] For this reason, as the Commonwealth Court's lead opinion concluded, *Krasner v. Ward*, 292 A.3d 624, 2023 WL 164777, at *6-8 (Pa. Commw. Ct. Jan. 12, 2023), Senate Rules that would apply in an impeachment trial that purport to allow District Attorney Krasner to bring challenges to the sufficiency of the Amended Articles, *see* Bonner/Williams Br. at 51, do not demonstrate that this Court lacks the authority to adjudicate such challenges here and now.

empowered to determine the General Assembly's constitutional authority in impeachments. In *In re Jordan*, 277 A.3d 519 (Pa. 2022), the Court considered whether the political question doctrine bars judicial review of whether an electoral candidate satisfies the constitutional residence requirements for office in Article II, Section 5 of the Constitution. The Court rejected the contention that Article II, Section 9 – which provides that each chamber of the General Assembly "shall judge of the election and qualifications of its members" – is a "textually demonstrable constitutional commitment of the issue of a '*candidate's*' constitutional qualifications." *Jordan*, 277 A.3d at 524. Likewise, here, the Constitution's delegation of the power to impeach to the House and to try impeachments to the Senate is not a "textually demonstrable constitutional commitment" of the power to define "misbehavior in office" or determine whether the General Assembly may carry impeachments over from session to session to the Legislature. Just as the power to judge qualifications is not the same as the power to judge what the qualifications must be in the first place, the power to impeach and try is not the power to determine what "misbehavior in office" is in the first place. *See also Powell v. McCormack*, 395 U.S. 486, 548 (1969) (distinguishing between "[t]he decision as to whether a Member *satisfied* the[] qualifications [for

membership]" (which was "placed with the House"), and "the decision as to *what these qualifications consisted of*" (which was not)).[7]

Respondents' political question argument collapses in leaning so heavily on *Nixon*, *Dauphin County*, and the Commonwealth Court's *Larsen* decision. None has any bearing. First, each concerned procedural issues – not the constitutional definition of impeachable conduct or whether a House impeachment expires on adjournment *sine die* – that were clearly non-justiciable. *See Nixon*, 506 U.S. 224 (constitutionality of a Senate evidence rule); *Dauphin Cnty.*, 2 A.2d at 803 ("courts cannot prohibit a witness from testifying before a legislative committee"); *Larsen v. Senate of Pennsylvania*, 646 A.2d 694, 703-04 (Pa. Commw. Ct. 1994) (challenges to "the procedure employed by the Senate Impeachment Trial Committee" and a Senate Rule). Indeed, one of these decisions recognizes that judicial review of such constitutional questions is appropriate. *Nixon*, 506 U.S. 237–38 ("We agree…that courts possess power to review either legislative or executive action that transgresses identifiable textual limits.").

[7] Older decisions support the same conclusion. In *Zemprelli*, this Court rejected an argument that the meaning of the phrase "a majority of the members elected to the Senate" in Article IV, Section 8 was a political question textually committed to the General Assembly. *See Zemprelli*, 436 A.2d at 1170. As the Court in *Zemprelli* observed, the Senate's "exclusive power over its internal affairs and proceedings…does not give the Senate the right to usurp the judiciary's function as ultimate interpreter of the Constitution under the guise of rulemaking, or for that matter, to make rules violative of the Constitution." *Id.*

Second, these cases plainly do not bar review of the *sine die* issue, which arises from the text of the constitution. *Nixon, Dauphin County,* and *Larsen*, by contrast, concerned the review of rules and procedures adopted for impeachment proceeding, where the judiciary's review has no source in the constitutional text.

Third, Respondents rely mainly on distinguishable federal impeachment authorities. *E.g.,* Bonner/Williams Br. at 27, 29, 52-54. But the U.S. Constitution's "high crimes and misdemeanors" standard resists specification. *E.g.*, *Nixon*, 506 U.S. 224; *see* Michael J. Gerhardt, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 106 (2000); Federalist No. 65 ("This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security.").

Pennsylvania courts, by contrast, have regularly and without difficulty interpreted the "misbehavior in office" standard in our Constitution, as discussed below. Decades of Pennsylvania precedent mandate that the constitutional viability of the Amended Articles is not a "political question." *See Zemprelli*, 436 A.2d at 1170 ("Since the issue here is the meaning of a constitutional provision and not the internal workings of the Senate, we need not address respondents' other

contentions under the aegis of the political question doctrine.").[8] If the General Assembly pursues impeachment based on conduct that does not fit the Court's definition of "any misbehavior in office," the General Assembly is coloring outside constitutional lines and the Court necessarily has the authority to stop it.

(b) The Court's Extensive History of Interpreting "Misbehavior in Office" in Article VI of the Constitution Shows This is Not a Political Question.

Unable to identify any supportive constitutional text, Respondents ask the Court to throw up its hands because the meaning of "any misbehavior in office" purportedly lacks judicially manageable standards. Bonner/Williams Br. at 52-54, 63. That argument fares no better.

While Respondents may be stumped as to the meaning of the impeachment standard, our courts are not. Respondents' argument defies the fact that courts have repeatedly found no difficulty in interpreting the phrase "misbehavior in office" in the closely related context of removal from office under Article V, Section 18 and Article VI, Section 7. In *In re Braig*, the Court defined "misbehavior in office" for purposes of judicial removal as conduct that would amount to the common-law criminal offense of "misbehavior in office," the

[8] Respondents also quote at length the conclusions of Judge McCullough's dissent at the Commonwealth Court and cite Judge Wojcik's concurrence. But they fail to explain *why* those conclusions are correct or offer any explanation or independent reasoning for those conclusions. *See, e.g.,* Bonner/Williams Br. at 50-51.

contours of which had been developed over decades (if not centuries) of case law. *See In re Braig*, 590 A.2d 284, 286 (Pa. 1991). Likewise, in many other cases, the Court has "uniformly understood that the reference to 'misbehavior in office' was to the criminal offense as defined at common law." *Id*. (citing *Commonwealth v. Davis*, 149 A. 176, 178 (Pa. 1930); *Commonwealth v. Shaver*, 3 Watts & Serg. 338 (Pa. 1842); *Commonwealth v. Peoples*, 28 A.2d 792, 794 (Pa. 1942)).[9]

These decisions demonstrate that there is a manageable standard for determining what is "any misbehavior in office." In addition to being a brazen power grab, Respondents' theory also invites the Court to do what it plainly cannot do: abandon any review of the "any misbehavior in office" impeachment standard as judicially unmanageable, yet also decide removal cases in which there is a longstanding judicially established standard for "misbehavior in office."[10]

2. The Fact and Impact of the Passage of the Amended Articles Makes District Attorney Krasner's Claims Ripe

Respondents' final justiciability contention is that the Amended Articles present no ripe controversy. Bonner/Williams Br. at 38-41, 54-56. They contend

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[9] *See also Commonwealth v. Green*, 211 A.2d 5, 9 (Pa. Super. 1965); *Commonwealth v. Hubbs*, 8 A.2d 618, 620 (Pa. Super. 1939); *Commonwealth v. Steinberg*, 362 A.2d 379, 386 (Pa. Super. 1976).

[10] Quantum physics allows that the same chunk of matter can be in two places at the same time, https://www.scientificamerican.com/article/giant-molecules-exist-in-two-places-at-once-in-unprecedented-quantum-experiment/#:~:text=So%20any%20chunk%20of%20matter,demonstrated%20it%20using%20small%20particles. It doesn't take Einstein to know that no such rules apply to courts interpreting the Constitution.

that the Amended Articles and District Attorney Krasner's impeachment by the House and impending Senate trial are insufficient to allow the determination of (a) whether District Attorney Krasner is a "civil officer" within the meaning of Article VI, Section 6, and (b) the viability of the Amended Articles under the "any misbehavior in office" standard. Settled Declaratory Judgment Act and ripeness law dooms this contention.

The Declaratory Judgments Act addresses precisely the sort of claims presented by District Attorney Krasner. "[T]he courts are generally open to declare rights, status, and other legal relations." *See Twp. of Derry v. Pennsylvania Dep't of Lab. & Indus.,* 932 A.2d 56, 59 (Pa. 2007). The Act "provides a relatively lenient standard for ripeness.…Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered." *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1217-18 (Pa. Commw. Ct. 2018) (*en banc*).

In deciding whether a claim for declaratory relief is ripe, "courts generally consider whether the issues are adequately developed and the hardships that the parties will suffer if review is delayed." *Derry*, 932 A.2d at 60. The requirement that a claim be ripe reflects the concern "that relevant facts are not sufficiently developed to permit judicial resolution of the dispute…." *Robinson Twp.*, 83 A.3d

at 917. "Pure questions of law…do not suffer generally from development defects and are particularly well suited for pre-enforcement review." *Id.*

District Attorney Krasner's challenge is ripe for multiple reasons. Fundamentally, it presents immediate issues and controversies about acts already undertaken by the General Assembly – the House's adoption of the Amended Articles and the Senate's initiation of impeachment proceedings.

The Amended Articles are also already causing substantial and obvious hardship to District Attorney Krasner. Withholding court consideration until after the Senate trial will only exacerbate that harm. He is the chief law enforcement officer for the City of Philadelphia. Public confidence in his integrity, commitment to public safety, and pursuit of justice is imperative to the performance of his duties. The Amended Articles challenge this and impair his ability to do his job.

Indeed, the Amended Articles accuse him, among other things, of contributing to an increase in violent crime in Philadelphia. R.108a-113a. Their passage injured District Attorney Krasner's reputation without regard to whether he is ultimately convicted. *See Yocum v. Commonwealth Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 237 (Pa. 2017) (claim alleging potential harm to reputation conferred standing and was ripe). But a decision declaring the

Amended Articles not viable under the Constitution – as the Commonwealth Court entered – substantially remediates that injury.

Further, the impeachment threatens to interfere with the important public safety functions of District Attorney Krasner's office. He has been required to divert attention from his work to contend with an impeachment effort that should not take place. The Amended Articles' accusations have a direct and immediate impact on his office's interactions with witnesses, law enforcement, defense counsel, and his constituents. In short, he has already suffered injury and will continue to suffer hardship should the impeachment proceed. *See Derry*, 932 A.2d at 60; *accord Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967) ("[P]etitioners deal in a sensitive industry, in which public confidence in their drug products is especially important. To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily."), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

Finally, this challenge does not require findings on disputed facts. For instance, whether the Amended Articles' allegations satisfy the constitutional standard of "any misbehavior in office" is a legal question. There are no disputes of material fact: District Attorney Krasner was impeached by the House; the Amended Articles say what they say; and the House exhibited the Amended

Articles to the Senate, which has taken steps to further the impeachment process. Accordingly, "District Attorney's claim[] presents threshold questions of law and constitutional interpretation that require no additional factual development." *Krasner*, 2023 WL 164777, at *7.

Ignoring this Court's admonition that the *Court* is the "ultimate arbiter of the Constitution," *Jordan*, 277 A.3d at 529, Respondents contend that the *Senate* must have the first opportunity to decide whether the District Attorney is a "civil officer" within the meaning of Article VI, Section 6. *See* Bonner/Williams Br. at 39-40. But it is the province of the judiciary to interpret the constitution, including Article VI, Section 6. *See Robinson Twp.*, 83 A.3d at 927. Nowhere does the Constitution commit that task to the Senate. Further, Respondents argue that District Attorney Krasner could avail himself of the protections of procedural rules enacted by the Senate in the impeachment trial. Bonner/Williams Br. at 40. But he already has been impeached, and the Amended Articles have already been adopted.

Respondents also argue that no Pennsylvania Court has ever "intervened in an ongoing impeachment proceeding to rule preemptively on questions that the Senate has not yet adjudicated." Bonner/Williams Br. at 38. That is because impeachments are so rare, not because of the ripeness doctrine. Although there have been increasing efforts across the country to weaponize impeachment as a

tool to undo fair and democratic elections, *supra* n.3, impeachment efforts in the Commonwealth are historically rare and have overwhelmingly been reserved for public officials who have committed crimes. District Attorney Krasner has not engaged in that kind of conduct, and the Amended Articles don't even allege he has; in fact, the Amended Articles fatally, expressly disavow any need to demonstrate a corrupt or improper motive. *See* R.102a.[11]

Respondents are left to rely on the Commonwealth Court's *Larsen* decision for their notion that a judicial challenge to pending impeachment proceedings is unripe. Bonner/Williams Br. at 38-40, 41. Again, Respondents are wrong. Of course *Larsen* is not precedent because it is a Commonwealth Court decision. Further, *Larsen* did not involve a ripeness challenge or a claim for declaratory relief. Yes, *Larsen* concluded that the court could not issue a prospective injunction staying an impeachment trial based on allegations that the *process of trial* would violate Larsen's constitutional rights. 646 A.2d at 703-06. But District Attorney Krasner's lawsuit is a declaratory – not injunctive – challenge to the

[11] According to the text cited by Senator Ward, even Judge Addison, who Respondents argue was not convicted of a crime, was nevertheless accused of oppression, tyranny, and partiality in his performance as a Judge, including by interfering with judicial proceedings and impairing court function. *See* Ward Br. at 10 n.6.

Here, impeachment is being used by state officials to remove a locally-elected official over policy disagreements, where he has committed no crime. Taken to its logical extreme, allowing impeachment in such a context would end the ability of municipalities to elect their leaders without the effective consent of statewide elected leaders.

multiple Constitutional infirmities to the Amended Articles that have already been adopted.

B. The Amended Articles Fail to Allege "Any Misbehavior in Office" within the Meaning of Article VI, Section 6.

As the Commonwealth Court correctly concluded, the Amended Articles are not "viable." *Krasner*, 2023 WL 164777, at *2.[12] Fatally, the Amended Articles expressly misstate the applicable standard for impeachment in asserting that the Article VI, Section 6 "any misbehavior in office" standard does not require a showing that District Attorney Krasner's conduct rose to the level of what constitutes the common-law crime of misbehavior in office. R.102a. That dooms the Amended Articles and highlights why the House impeachment vote and any subsequent trial based on them are plainly unconstitutional. The "misbehavior in office" standard is an essential democratic constraint on the General Assembly's impeachment power. In an effort to undo the re-election of District Attorney Krasner, the members of the House voted to impeach him based on the wrong standard, trumped up in the Amended Articles, which tried to airbrush away the Article VI, Section 6 impeachment standard.

[12] The Order states: "[N]one 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'…." Appendix A to Krasner Br., at ¶ 9.

Respondents attempt to salvage the flawed Amended Articles – rather than go back and see if the House (now controlled by Democrats, unlike the expired Republican-controlled House) can pass lawful articles of impeachment – by making essentially two arguments. First, they say, the impeachment standard – "any misbehavior in office" – is not the common-law-crime standard and instead means anything they want it to mean. *See* Bonner/Williams Br. at 49-55, 56-64; Ward Br. at 59-76. But this argument ignores the wealth of precedent interpreting "misbehavior in office" in the closely-related constitutional context of officer removal.

Second, Respondents – for the first time on appeal – argue that the Amended Articles allege facts amounting to "misbehavior in office" under the common-law-crime standard. Bonner/Williams Br. at 64-84. This argument fares no better for two reasons. First, Respondents waived these arguments by not raising them below. Next, the allegations of the Amended Articles fail to clear the bar this Court has established for "misbehavior in office." Respondents also cannot avoid that the House members voted on articles that included the (specious) position that the House could impeach without a showing that District Attorney Krasner's conduct amounted to the common-law crime of misbehavior in office.

Accordingly, the Commonwealth Court's decision that the Amended Articles do not allege "any misbehavior in office," and are therefore not viable, should be affirmed.

1. "Any Misbehavior in Office" in Article VI, Section 6 Means the Failure to Perform a Positive Ministerial Duty or the Exercise of a Discretionary Duty with an Improper or Corrupt Motive.

A civil officer in Pennsylvania may be impeached only if he or she engages in "any misbehavior in office." *See* Pa. Const., art. VI, § 6. At common law, "misbehavior in office" has long referred to specific conduct by a civil officer: "the breach of a positive statutory duty or the performance by a public official of a discretionary act with an improper or corrupt motive." *Peoples*, 28 A.2d at 794; *see also Green*, 211 A.2d at 9; *Steinberg*, 362 A.2d at 386.[13] That definition has historically been interpreted as requiring the commission of a crime and should be applied in impeachment cases.

[13] Convictions for "misbehavior in office" typically arise in the context of a public official committing a crime by abusing that office for personal gain. *See Steinberg*, 362 A.2d at 386 (corrupt motives include "obtain[ing] gain for himself or his political party, or to bestow a gratuity upon a relative or a friend or a political ally at the expense of the Commonwealth"); *see, e.g.*, *In re Cain*, 590 A.2d 291, 292 (Pa. 1991) (judge who "accept[ed] money from an attorney in two separate cases in exchange for action in criminal cases in which the attorney represented the defendants" had committed misbehavior); *Davis*, 149 A. 176.

(a) "Misbehavior in Office" in Article VI of the Constitution Has Long Been Defined as the Common-Law Crime of the Same Name.

As Respondents acknowledge, this Court has not interpreted "any misbehavior in office" for purposes of Article VI, Section 6. But the phrase "misbehavior in office" appears in two other provisions of the Pennsylvania Constitution: Article V, Section 18, which provides for automatic removal of a justice, judge, or justice of the peace "convicted of misbehavior in office"; and Article VI, Section 7, which provides for removal of civil officers on "conviction of misbehavior in office or of any infamous crime." This Court has for nearly two centuries interpreted "misbehavior in office" in Article VI, Section 7 to refer to the common-law offense of the same name. *Shaver*, 3 Watts & Serg. 338 (county sheriff could not be removed under Article VI, Section 7 where "it [was] perfectly manifest that he has not even been charged with, much less convicted of" the common-law crime); *Davis*, 149 A. at 178 (mayor's automatic removal after conviction of "misbehavior in office" satisfied the constitutional removal language of Article VI, Section 7).

Most recently, this Court in *In re Braig* was asked to interpret "misbehavior in office" for purposes of Article V, Section 18, which was adopted after the *Shaver* and *Davis* decisions. The Court followed *Shaver* and *Davis*, noting that "[i]n 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." *Braig*, 590 A.2d at 286. Accordingly, the Court held, "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 office' as it was defined at common law." *Id.* at 287–88. Following *Braig*, Pennsylvania courts have regularly held in the removal context that "misbehavior in office" under the Pennsylvania Constitution means conduct amounting to the common-law crime of that name.[14]

These reasoned decisions mandate that "any misbehavior in office" in Section 6 should be construed consistently with "misbehavior in office" in the Constitution's removal provisions. Of course, similar Constitutional text should be construed consistently where "the language of the two constitutional provisions at issue relates to the same subject matter." *See Cavanaugh v. Davis*, 440 A.2d 1380, 1381 (Pa. 1982); *see also In re Humane Soc'y of the Harrisburg Area, Inc.*, 92 A.3d 1264, 1271 (Pa. Commw. Ct. 2014) (holding that decisions "defining an infamous crime in Article II, Section 7 of the Pennsylvania Constitution equally applies to the same term in Article VI, Section 7").

[14] *See, e.g.*, *In re Dalessandro*, 596 A.2d 798, 798 (Pa. 1991) ("Based on the analysis set out in [*Braig*], we hold that Dalessandro was not convicted of misbehavior in office so as to require automatic forfeiture of office") (internal quotations omitted); *In re Ballentine*, 86 A.3d 958, 971 (Pa. Ct. Jud. Disc. 2013) (quoting and adopting the *Braig* analysis of "misbehavior in office"); *In re Berkhimer*, 877 A.2d 579, 591 (Pa. Ct. Jud. Disc. 2005).

Observing that misbehavior in office, "as it appeared in the Constitution, was understood to mean a specifically defined offense…for over 150 years," *Braig* construed the Constitution's officer removal provisions *in pari materia* with one another. 590 A.2d at 287-88, 289 n.6 (construing "offense of misbehavior in office" in Article V, Section 18 consistently with Article VI, Section 7). *Braig* applied this definition of "misbehavior in office," moreover, notwithstanding that the common-law crime of "misbehavior in office" had long been abolished. *Id*. at 287. As this Court observed, the abolition of the common-law crime complicated applying that definition to officer removal, as an officer must be convicted of misbehavior in office in court to be removed under Article V, Section 18 (and Article VI, Section 7). *Id.* To avoid "the difficult question of whether the legislature could effectively nullify the constitutional provision by abolishing the crime referred to therein," the Court thought it "prudent" to preserve the historical definition of "misbehavior in office," and defined "conviction" to include "convict[ion] of a crime that satisfies the elements of the common law offense of misbehavior in office." *Id*. at 287-88. That "prudent" approach of preserving the historical interpretation of "misbehavior in office" where possible applies at least as well to Article VI, Section 6, where the Court need not define "conviction" of an abolished crime.

Finally, *Braig* compels a "prudent" approach whereby this Court "adopt[s] a holding under which [a] constitutional provision may still be given effect." *Id.* Respondents' argument – that "misbehavior in office" in Section 6 means whatever the House and Senate say it means, *e.g.*, Bonner/Williams. Br. at 56-64; Ward Br. at 56-75 – impermissibly reads the textual standard out of the Constitution. The Court declined to do so in *Braig*, and should decline to do so here too. *Braig*, 590 A.2d at 289 n.6 ("We have not been given a blank slate. The words of the Constitution cannot be ignored.").

(b) The Text of the Constitution Provides No Reason to Construe "Any Misbehavior in Office" in Article VI, Section 6 Differently than "Misbehavior in Office" Has Been Construed in Prior Cases.

Not only do these provisions use the same language, but the text and constitutional history of Article VI, Section 6 support the conclusion that the phrase was intended to be read *in pari materia* with its use in every other part of the Pennsylvania Constitution. None of the Respondents' contrary arguments withstand scrutiny.

First, Respondents point out that Section 6 allows impeachment for "<u>any</u> misbehavior in office," while the removal provisions at issue in *Braig*, *Shaver*, and *Davis* apply only on "conviction" for "misbehavior in office," suggesting that those cases should not apply here. Ward Br. at 64-66; Bonner/Williams Br. at 58-59. That is a non-starter. As noted above, *Braig* separately defines what

"conviction" means to preserve and apply the historical, common-law definition of "misbehavior in office," the same language used in Section 6. *See supra* Part IV.B.1.a.

Furthermore, that Section 6 allows impeachment for "*any* misbehavior in office," and Section 7 removal for "misbehavior in office" cannot support Respondents' position that the word "any" should render the Section 6 standard judicially unmanageable and standardless. Affixing the word "any" before "misbehavior in office" means that impeachment could be for conduct that amounts to anything that would satisfy the elements of the common-law crime. It cannot possibly mean what Respondents argue, namely that adding the word "any" strips the phrase "misbehavior in office" of all meaning.

To be sure, there are procedural differences between Article VI, Section 6 and the removal provision of Section 7. *See* Ward Br. at 66-67, 71-72; Bonner/Williams Br. at 56-57. But so what? Removal occurs after an indictment, trial, and conviction for "misbehavior in office" in the courts, while impeachment is "in essence, an indictment…with the Senate acting in the dual roles of judge and jury." *Krasner*, 2023 WL 164777 at *19. In other words, "impeachable misbehavior in office does not require a preexisting criminal conviction in a court of law," because indictment, trial and conviction happen in the House and Senate. *Id*. But the word "any" does not give the House the power to impeach an officer

for "any*thing*." The House must still base impeachment on alleged conduct – *any* conduct – constituting the common-law crime of misbehavior in office to validly impeach a civil officer. [15]

Second, the history of Article VI, Section 6 does not alter the conclusion that "misbehavior in office" must have the same meaning as that in the removal provision. Section 6 was amended in 1966 to change the standard for impeachment from "any misdemeanor in office" to "any misbehavior in office." Yet "misbehavior in office" was still a common-law offense as of 1966. And, in *Larsen,* the Commonwealth Court recognized that "misdemeanor in office" and "misbehavior in office" mean and meant the same thing in 1966, referring to: "The common law of misconduct in office, variously called misbehavior, misfeasance, or misdemeanor in office." *Larsen*, 646 A.2d at 702 (discussing "writings of the Constitutional Convention Preparatory Committee"). The framers would not have used a term with a settled constitutional meaning unless they intended to adopt that meaning for impeachment. Given this overlap in meaning, Respondents would

[15] Respondents also contend that reading "any misbehavior in office" to include only conduct constituting the common-law crime would essentially eviscerate the impeachment power, because "any official subject to impeachment will claim good faith in the exercise of discretion." Ward Br. at 68. But that argument has no bearing on the Amended Articles, which *do not allege* that District Attorney Krasner committed any crime or acted in bad faith or with "improper or corrupt motive." Indeed, to the contrary, they assert that they do not need to make any such allegation. R.102a.

need to present more than just the change in verbiage to show that the amendment's framers intended to loosen the requirements for impeachment.[16]

This overlap in meaning is also confirmed by legislative history of the 1966 amendment. The Pennsylvania Bar Association proposed this change because "misdemeanor in office" was a "very ambiguous expression," otherwise scarcely used in the Constitution. *See* Pennsylvania Constitutional Revision: 1966 Handbook, PA. BAR ASSOC. (Sep. 12, 1966) at iii, 5. Changing the term to the better-understood "misbehavior in office" resolved the ambiguity, and brought Article VI, Section 6 into conformity with the Constitution's removal provisions. *See* Project Constitution Subcommittee Reports, PA. BAR. ASSOC., 33 Pa. Bar. Assoc. Quarterly 423, 442 (June 1962) ("Apparently there is no intention to have 'misdemeanor' carry a different meaning from 'misbehavior.'").

[16] Nor does *Commonwealth ex rel. Duff v. Keenan*, 33 A.2d 244 (Pa. 1943), afford Respondents any support. *See* Ward Br at 61 n.34, 74-75; Bonner Br. at 57 n.25. *Duff* did not change the common-law definition of "misbehavior in office." To the contrary, it involved the breach of a positive, statutory duty of office, *see id*. at 249, and it affirmed, *as to those acts*, that "no corrupt or malicious motive" need be alleged to sustain a charge of misbehavior in office. *Id.* at 249 n.4 (misbehavior in office "does not *necessarily* involve an act or acts of a criminal character") (emphasis added). Thus, *Duff* is consistent with *Braig* and the centuries of precedent upon which it relies. *E.g.*, *Commonwealth v. Zang*, 16 A.2d 741, 744 (Pa. Super. 1940) (not necessary that "the Commonwealth establish that appellants acted with criminal intent" where alleged that officer "wil[l]fully breached a positive statutory duty of a ministerial nature"); *Hubbs*, 8 A.2d at 620 (distinguishing "willful failure to perform a ministerial duty" from exercise of duty that "permit[s] the exercise of discretion, [where] there must be present the additional element of an evil or corrupt design to warrant conviction").

Third, constitutional history supports reading "any misbehavior in office" as a limitation on the General Assembly's impeachment powers. When language limiting impeachable conduct to "misdemeanor in office" was first enacted in 1790, it specifically *narrowed* the scope of impeachable conduct, which previously included impeachment for "maladministration," or essentially "all official misconduct." *See* 1 *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*, at 404 (Harrisburg 1837) [hereinafter, "1837 Debates"]. This change also rejected the looser "high crimes and misdemeanors" standard used in the federal and other state constitutions. *Id*. at 404, 408; *see id.* at 411 ("Let them be impeached for official misdemeanor; and if they were guilty of high crimes, let it be tried before the ordinary courts of law."). The federal impeachment treatises that Respondents cite are therefore irrelevant. *See, e.g.*, Bonner/Williams Br. at 61-62; Ward Br. at 67-68, 69 n.39, 70-71.

Respondents concede that limiting impeachable conduct to "misdemeanor in office" was itself a constitutional "safeguard" on impeachment enacted in 1790. *See* Ward Br. at 68; Bonner/Williams Br. at 60-61. Concerned by a recent "unconstitutional" impeachment by the House, the 1790 amendment clarified that the legislature has "**no undefined and arbitrary powers**" to impeach. *The*

Proceedings Relative to Calling the Conventions of 1776 and 1790, at 93 (Harrisburg 1925) (**bold** added); *see also* 4 1837 Debates at 319-20 ("The rule of law is, that a judge can only be impeached for matter that is indictable," such that "you cannot remove a judge for matter which is cause for impeachment"). Respondents thus acknowledge this standard was enacted as a limitation on the General Assembly's impeachment powers.

To try to distance themselves from this conclusion, Respondents cite inapposite federal authority and mischaracterize delegate remarks from the *subsequent* 1837 Convention on proposed amendments to Section 5's two-thirds majority requirement for conviction on impeachment. *See* Ward Br. at 69-71. But far from supporting their view, these remarks make clear that impeachments based on trivial political disagreements are an *abuse* of power, rather than a proper exercise of the impeachment function. *See, e.g.*, Ward Br. at 70 (quoting debates discussing the "poisonous influence" of "party violence" in impeachment); 1 1837 Debates at 284-85 (noting that "it is always desirable to guard the tribunal which decides upon a man's rights, as far as practicable, from popular agitations"); 4 1837 Debates at 32 (impeachment "should have nothing to do with the morals of public officers, so long as they performed their duties; because the power was too easily abused to be trusted in this way"). In fact, delegates to the 1837 Convention

near-unanimously rejected an attempt to broaden the scope of impeachable conduct to include "misconduct in office." *See* 10 1837 Debates at 138.

In other words, the 1837 delegates *affirmed* that impeachment only punishes "offences arising from the abuse or violation of public trusts," such that "[n]o officer can be convicted on impeachment, who has not offended criminally." 1 1837 Debates at 284-85; *see also id*. at 278 ("The tribunal was originally instituted for the trial of great offences – for the trial of men, who, it might be supposed, would overawe or exercise an undue influence over the common tribunals."). Thus, mere policy disagreements are not "misbehavior in office"; to the contrary, impeachment punishes "political crimes" insofar as breaching official duties is a "crime against the whole people, in their sovereign character – against the Government of the people; [and] against the people themselves." 1 1837 Debates at 299.

Respondents assert that an impeachable "political crime" is whatever the House says it is and that no actual crime is necessary for a valid impeachment to take place. Bonner/Williams Br. at 59-62. They are correct that District Attorney Krasner has not committed any crime. Yet as even Respondents' authorities (which do not discuss Pennsylvania's constitution) allow, there must be some official misconduct and breach of the public trust before a valid impeachment can occur, whether such official misconduct is criminal or not, and whether the impeachment

is politically motivated or not. Pennsylvania law – the only law that matters here – embodies this concept in its case law interpreting "misbehavior in office" in the related context of removal.

Finally, Respondents argue that the Commonwealth Court's *Larsen* decision, 646 A.2d 694, found that the phrase "misbehavior in office" in Article VI, Section 6 does not refer to the common-law crime. Ward Br. at 62-64; Bonner/Williams Br. at 58-59. But Respondents mischaracterize *Larsen*; 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." *Larsen,* 646 A.2d at 702. It did not need to specify the limits of "misbehavior in office." *Id.* The court's observations about the definition of misbehavior in office were dicta; they cannot support Respondents' argument. *Commonwealth v. Singley*, 868 A.2d 403, 409 (Pa. 2005) (citing *Hunsberger v. Bender*, 180 A.2d 4, 6 (Pa. 1962) (dicta "is not binding upon us")).

Furthermore, the *Larsen* dicta are incorrect: the Commonwealth Court opined that a "strict definition of impeachable offense [*i.e.* the common-law crime of misbehavior in office]…finds no support in judicial precedents." *Larsen*, 646 A.2d at 702. But *Larsen* was decided *just three years* after this Court's decision in *Braig* – which it did not even cite. Nor does Respondents' argument that *Braig* was interpreting a different constitutional provision support their conclusion, since

Braig itself interpreted Article V removal *in pari materia* with Article VI removal. *See* Bonner/Williams Br. at 58; *Braig*, 590 A.2d at 287-88. As demonstrated above, any suggestion in *Larsen* that "misbehavior in office" has a special, different meaning in the impeachment provisions of the Constitution is simply wrong.[17] "Misbehavior in office" should be read the same way across the Constitution.

This Court should reaffirm *Braig* and its antecedents and recognize that their construction of "misbehavior in office" applies consistently throughout the Pennsylvania Constitution.

2. The Amended Articles Are Not Viable Because They Fail to Allege "Misbehavior in Office."

For the first time, Respondents Bonner and Williams argue that, even if the House must allege conduct amounting to common-law "misbehavior in office" under Article VI, Section 6, certain of the Amended Articles do so. *See* Bonner/Williams Br. at 64-84.[18] This argument is fundamentally flawed for several reasons.

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[17] Notably, the court in *Larsen* did not rely at all on the use of the determiner "any" in Section 6 to support its suggestion. This further supports the point, demonstrated above, that "any misbehavior in office" still has to be "misbehavior in office," as defined throughout the Constitution. *See supra* Part IV.B.1.b.

[18] Senator Ward does not address the application of the *Braig* standard to the individual articles, asserting that she cannot do so because she must "act as an impartial juror during the impeachment trial." Ward Br. at 59 n.29.

(a) Respondents Have Waived Any Argument that the Amended Articles in Fact Allege "Misbehavior in Office" Under the *Braig* Definition.

Because Respondents did not make these arguments before the Commonwealth Court, they have waived them in this appeal. *See* Pa. R. App. P. 302(a); *In re F.C. III*, 2 A.3d 1201, 1211 (Pa. 2010) ("Issue preservation is foundational to proper appellate review."); *Dollar Bank v. Swartz*, 657 A.2d 1242, 1245 (Pa. 1995) ("An appellate court does not sit to review questions that were neither raised, tried, nor considered in the trial court....It is a fundamental principle of appellate review that we will not reverse a judgment or decree on a theory that was not presented to the trial court.").

Respondents' waiver is clear. District Attorney Krasner provided detailed explanations to the Commonwealth Court of precisely how each of the Amended Articles fails to satisfy the constitutional standard for impeachment and thus fail to allege the commission of the common-law crime of "misbehavior in office." *See* R.211a-217a. Respondents did not rebut these points. *See* R.361a-455a; R.310a-355a. Further, no public policy justification exists for disregarding Respondents' clear concession of these arguments. *See N. Berks Reg'l Police Comm'n v. Berks Cnty. Fraternal Ord. of Police, Lodge #71*, 230 A.3d 1022, 1041 (Pa. 2020) (Donohue, J.) ("confirm[ing] the extremely limited nature" of any exception to Rule 302(a)).

Yes, Respondents vigorously sought to defend the Amended Articles on multiple grounds. Fatally for this appeal to this Court, however, they chose not to argue that the Amended Articles included allegations that District Attorney Krasner engaged in criminal or other wrongful conduct amounting to a violation of the common-law crime of misbehavior in office.[19] Thus, any argument that the Amended Articles as written satisfy the common-law misbehavior standard has been waived.[20]

(b) Articles I and VII Improperly Challenge District Attorney Krasner's Policymaking Authority and Exercise of Prosecutorial Discretion.

District Attorney Krasner cannot be impeached for the way he exercises his prosecutorial discretion.

First, Articles I and VII do not allege *any* breach of a positive duty or an improper or corrupt motive. At most, they attack District Attorney Krasner's ideology and policy choices, claiming that he has acted to "promote [his] radically progressive philosophies." R.106a. But advancing one's policymaking or political

[19] Of course, they could not do so in good faith because he has engaged in no such criminal or wrongful conduct.

[20] Any suggestion by Respondents that the record was undeveloped below (*see* Bonner/Williams Br. at 64) was due only to Respondents' failure to make these arguments to the Commonwealth Court. In his Application for Summary Relief, District Attorney Krasner argued that each and every one of the Amended Articles failed to allege misbehavior in office. R.211a-217a. Respondents, including Representatives Bonner and Williams, filed lengthy oppositions to that Application. Nowhere did they address this point. Accordingly, they have only themselves to blame.

priorities does not constitute the improper or corrupt motive needed to allege misbehavior in office. *Steinberg*, 362 A.2d at 386; *Commonwealth ex rel. Teller v. Jennings*, 186 A.2d 916, 917 n.4 (Pa. 1963) (officer who switched party registration after election did not commit "any acts of misbehavior in office" warranting removal). Nor may Respondents infer an improper motive from any conduct alleged in Articles I and VII absent "a climate of facts which makes that inference reasonable." *Commonwealth v. McSorley*, 150 A.2d 570, 573-74 (Pa. Super. 1959).

Second, these Articles improperly challenge District Attorney Krasner's exercise of his broad discretion over criminal prosecution in Philadelphia. They specifically state that the House is impeaching District Attorney Krasner because it disagrees with his discretionary policy choices. R.105a-06a (impeaching District Attorney Krasner for implementing "progressive" trainings and prosecutorial policies relating to cash bail, immigration, cannabis, plea offers, and prostitution), 128a (impeaching District Attorney Krasner for exercising discretion to determine that certain minor offenses crimes, such as prostitution, retail theft, and minor drug offenses, should not be prosecuted) (emphasis added). Yet, as "the sole public official charged with the legal responsibility of conducting…prosecutions," a district attorney "must be allowed to carry out [these discretionary powers] without hindrance or interference from any source." *Commonwealth ex rel. Specter v.*

Bauer, 261 A.2d 573, 576 (Pa. 1970); *see also Commonwealth v. Clancy*, 192 A.3d 44, 53 (Pa. 2018) (a district attorney's "discretion is tremendous"); *Commonwealth v. DiPasquale*, 246 A.2d 430, 432 (Pa. 1968) (same). This discretion covers a wide range of matters, including decisions about "the allocation of scarce resources and the decision to prosecute a particular individual *and specific classes of crime*." *Mummau v. Ranck*, 531 F. Supp. 402, 405 (E.D. Pa.) (citing *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973)) (emphasis added), *aff'd*, 687 F.2d 9 (3d Cir. 1982). "A prosecutor has almost unfettered power to charge, or not charge, as he or she sees fit." *Commonwealth v. Brown*, 196 A.3d 130, 145 (Pa. 2018).[21]

Articles I and VII seek to penalize District Attorney Krasner's exercise of discretionary duties precisely where his discretion is greatest: prosecution policies, approach to criminal justice, management of the DAO, and charging decisions. "[S]uch [policy] disagreements, standing alone, are not enough to create a constitutionally sound basis for impeaching and removing District Attorney." *Krasner*, 2023 WL 164777, at *20 (citing numerous cases). Respondents' briefs seemingly concede this as to the vast majority of these Articles' allegations,

[21] Respondents' briefs fail to acknowledge that District Attorney Krasner is *encouraged* to consider all factors he deems relevant in exercising his broad prosecutorial discretion, including "the extent or absence of harm caused by the offense," "the impact of prosecution or non-prosecution on the public welfare," and "the fair and efficient distribution of limited prosecutorial resources," among many others. *See generally Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges*, ABA Standards for Criminal Justice 3-4.4.

acknowledging that District Attorney Krasner possesses "substantial discretion." *See* Bonner/Williams Br. at 80-84.[22]

(c) Articles III, IV, and V Improperly Intrude on this Court's Exclusive Authority to Govern Attorney Conduct Under the Pennsylvania Constitution and Do Not Allege Misbehavior in Office.

Articles III, IV, and V allege that District Attorney Krasner has violated various Rules of Professional Conduct and Canons of Judicial Conduct. Now, Respondents attempt to portray the Amended Articles as alleging District Attorney Krasner has committed various crimes. To be clear, the District Attorney has not violated the Rules or Canons or committed any crimes. He has carried out his duties as prosecutor properly and effectively. The House's objections to the way he does so are not grounds for impeachment. But even taking Articles III, IV, and V at face value, they are not viable.

[22] Respondents' briefs focus on just one allegation, arguing that, as a matter of law, District Attorney Krasner could not implement policies that decline to prosecute low-level misdemeanor offenses. *Id*. at 82-83. But in relying on cases from other jurisdictions, Respondents disregard this Commonwealth's own precedent, which consistently affirms a prosecutor's broad discretion to charge or not charge *classes* of crimes and defendants. *See Mummau*, 531 F. Supp. 402 at 405; *Commonwealth v. Metzker*, 658 A.2d 800, 801 (Pa. Super. 1995) (prosecutor "may exercise [charging] discretion solely on the basis of policy"); *In re Ajaj*, 288 A.3d 94, 109 (Pa. 2023) (Brobson, J.) (further limiting courts' ability to compel prosecution of private complaints to "afford proper deference to the discretionary decision of the prosecutor"); *Commonwealth v. Ebert*, 535 A.2d 178, 181 (Pa. Super. 1987) (prosecutor may rationally exclude "classes of defendants" from referral for dismissal of charges). District Attorney Krasner, as a matter of law, cannot be guilty of misbehavior in office for merely "omitt[ing] and refus[ing] to cause [certain] laws…to be enforced," given his "discretionary power and latitude in the performance of [his] duties." *Hubbs*, 8 A.2d at 620. The effort to impeach District Attorney Krasner for his exercise of prosecutorial discretion is contrary to established Pennsylvania law.

The Constitution does not permit the legislature to regulate or punish lawyers alleged to have violated their professional obligations, as the Amended Articles purport to do here. The Pennsylvania Supreme Court has "exclusive and inherent authority" to "govern the conduct of attorneys practicing law within the Commonwealth." *Beyers v. Richmond*, 937 A.2d 1082, 1089 (Pa. 2007) (citing *Lloyd v. Fishinger*, 605 A.2d 1193, 1196 (Pa. 1992)). Any "encroachment upon the judicial power by the legislature is offensive to the fundamental scheme of our government." *Beyers*, 937 A.2d at 1090-91 (citing *Commonwealth v. Sutley*, 378 A.2d 780, 783 (Pa. 1977)). Crucially, the exclusive allocation of power to this Court to regulate attorney conduct "is founded on the separation of powers of our Commonwealth's government." *Id.* "The General Assembly has no authority under the Pennsylvania Constitution to regulate the conduct of lawyers in the practice of law." *Id*.

Respondents argue that the violations of attorney conduct rules alleged in Articles III-V were only intended to provide "evidence" of "misbehavior in office" and can support an impeachment without encroaching on this Court's exclusive jurisdiction. *See* Bonner/Williams Br. at 68-79. However, the Constitutional

commitment of attorney discipline matters, including those alleged in the Amended Articles, could not be clearer, *Beyers*, 937 A.2d at 1089-91.[23]

(i) The Alleged Violations of the Code of Judicial Conduct and Rules of Professional Conduct Are Not a Valid Constitutional Basis for Impeachment.

In any event, the Amended Articles fail to satisfy the "misbehavior in office" standard articulated in *Braig*.

First, the Code of Judicial Conduct does not apply to District Attorney Krasner as a district attorney of a county of the first class. Respondents and the Amended Articles cite 16 P.S. § 1401(o), part of the County Code, arguing that it binds District Attorney Krasner to the Code of Judicial Conduct. Bonner/Williams Br. at 77; R.103a. However, Section 1401(o) does not apply to district attorneys in

[23] Respondents acknowledge this Court's exclusive authority over attorney discipline, but later seemingly argue that the Legislature may impeach an officer for professional rules violations because the General Assembly can only "remove from office and disqualify from holding office," and cannot "impose many additional kinds of sanctions [available] in an attorney disciplinary proceeding." Bonner/Williams Br. at 77-78. To be clear, the "exclusive remedy" for attorney misconduct is through the "[r]ules promulgated by this Court," and is "within this Court's exclusive regulatory powers." *Beyers*, 937 A.2d 1093; *see also Office of Disciplinary Counsel v. Baldwin*, 225 A.3d 817, 856 (Pa. 2020).

Rizzo v. Haines, 555 A.2d 58, 67 (Pa. 1989), cited by Respondents, Bonner/Williams Br. at 68, does not advance their argument. *Rizzo* merely concluded that expert testimony on a lawyer's fiduciary obligations was unnecessary to show a breach of the applicable standard of care, namely, a violation of a lawyer's duty to investigate and inform a client of a settlement offer. In *Rizzo*, there was a connection between the elements of a negligence claim and the alleged rule violation, which helped establish the standard of care; here, misbehavior in office is defined by *Braig* to include specific conduct and does not incorporate the Rules of Professional Conduct. Thus, the analogy to *Rizzo* is unavailing.

counties of the first class such as Philadelphia. *See* 16 P.S. § 102(a) ("Except incidentally, as in sections 108, 201, 210, 211, 401 and 1401 or as provided in section 1770.12, Article XII-B and Article XXX, [the County Code] does not apply to counties of the first or second classes."). Because Section 1401*(o)* – unlike, for example, Section 1401(b)(1) – does not refer to counties of the first class, it does not "incidentally" apply to Philadelphia County or bind its district attorney.[24]

Moreover, even if Section 1401(o) applied to District Attorney Krasner, it makes him "subject to" judicial canons *only* "insofar as such canons apply to salaries, full-time duties and conflicts of interest," none of which are implicated by the allegations of Articles III and IV. 16 P.S. § 1401(o). *See* R.119a-120a, 124a, 126a (making vague allegations of impropriety or the appearance of impropriety under Pa. CJC Canon 2: "A judge shall perform the duties of judicial office impartially, competently, and diligently"). The Amended Articles do not allege any such violation of the Canons.

Second, Articles III and IV fail because they allege only that District Attorney Krasner's subordinates committed misconduct, not that he engaged in misconduct. A public official may only be found guilty of misbehavior in office if

[24] Even if Section 1401(o) applied to District Attorney Krasner, a violation of that provision is not remediable by impeachment. *Id.* Thus, even if it were relevant here, it simply reinforces the judiciary's exclusive authority over attorneys, precluding impeachment as discussed above.

the officer himself engaged in wrongful conduct with an improper or corrupt motive. *See Commonwealth v. Bready*, 286 A.2d 654, 657 n.4 (Pa. Super. 1971) (no liability for misconduct that "was the product of mistake or inadvertence" by the officer, even for "intentional or inadvertent acts of his employees"). Articles III and IV do not allege any such motive. They allege only that District Attorney Krasner has, in exercising his duty to approve filings, at most "fail[ed] to detect" his subordinates' misconduct, and "institute[d] procedures that allowed" that misconduct. *See Commonwealth v. Bollinger*, 418 A.2d 320, 323 n.1 (Pa. Super. 1979).[25] They do not allege facts rising to "the level of bad faith or corrupt motive necessary for a conviction of misbehavior in office." *Id.* ("misbehavior in office" requires proof "above a showing of incompetence to the level of bad faith or corrupt motive"; incompetent supervision of employees is not misbehavior in office).

Article V is likewise deficient. While it refers to District Attorney Krasner, it does not involve any of his official duties or allege any "improper or corrupt motive." Instead, it merely alleges that he "omitted [certain] material facts" in

[25] *See also* R.118a-119a (Article III: citing trial court opinion alleging that District Attorney Krasner's "*[o]ffice* failed to advise the court" of evidence, and that his "*office's supervisors*," "*office*," and Law Division officials violated federal rules of civil procedure); R.121a (Article IV: citing J. Dougherty concurrence criticizing the "DAO's" conduct of a prosecution, referring to filings "authored by the District Attorney's *Office*"); R.123a (Article IV: citing trial court opinion discussing "[DAO]'s instructions to [an] investigating grand jury," and implicating "assistant district attorneys who handled" matter in alleged misconduct).

testimony to a special master, which resulted in a "partial and misleading" disclosure regarding a "matter under investigation by the Supreme Court." R.126a. But Article V concedes that District Attorney Krasner "affirmatively" and truthfully testified concerning his *organizational* representation. R.125a. It cites only to a single alleged representation of an individual in his past private practice to suggest his testimony was "partial and misleading." R.125a-126a. In fact, his testimony was entirely truthful and the legal challenges underlying his testimony have been rejected twice.

Third, the alleged violations of the Rules of Professional Conduct (and the Canons of Judicial Conduct) do not satisfy the "misbehavior in office" standard. Respondents assert that these rules "simply state the *duties* in a clear and succinct way," and can be "evidence" that "might also be relevant" to an impeachable offense. Bonner/Williams Br. at 69. But misbehavior in office takes two specific forms: a violation of a positive ministerial duty or the performance of a duty with the requisite corrupt or improper motive. Neither has been alleged here.

With respect to the first category, only the violation "of a statute which commands the performance of a *positive, ministerial duty of his office*" can constitute misbehavior in office. *See Commonwealth v. Knox*, 94 A.2d 128, 134 (Pa. Super. 1953), *aff'd*, 97 A.2d 782 (Pa. 1953) (emphasis added). Neither the Rules of Professional Conduct nor the Canons of Judicial Conduct impose

ministerial duties. *Philadelphia Firefighters' Union, Loc. 22, Int'l Ass'n of Firefighters, AFL-CIO ex rel. Gault v. City of Philadelphia*, 119 A.3d 296, 303-04 (Pa. 2015) (a ministerial duty is a mandatory duty "which a public officer is required to perform upon a given state of facts and in a prescribed manner in obedience to the mandate of legal authority….").[26] Nor are District Attorney Krasner's professional obligations as a lawyer "duties *of his office*"; they apply to *all* attorneys, jurists, or officers, and are, standing alone, not impeachable. *See Braig*, 590 A.2d at 288 (violations of judicial conduct rules do not "constitute[] the type of positive duty, the breach of which constitutes misbehavior in office").

With respect to the second category, none of the purported professional misconduct alleged in Articles III-V involves the sort of "improper or corrupt motive" necessary for a charge of misbehavior in office based on an officer's discretionary duties. To the contrary, they allege nothing about his intent, and the Amended Articles expressly state that they need not do so. R.102a. They therefore cannot sufficiently allege "misbehavior in office."

The Amended Articles thus fail to allege any conduct beyond violations of the Rules of Professional Conduct, if that. Even if such a violation were

[26] A district attorney has few such positive statutory duties, and the Amended Articles certainly do not allege any failure to perform one.

sufficiently alleged, these Articles do not satisfy the "misbehavior in office" standard.

(ii) Respondents' After-the-Fact Justifications Improperly Ask this Court to Rewrite these Articles.

To try to revive the Amended Articles, Respondents' briefs urge the Court to consider other allegations that the House could have, but did not, include in the Amended Articles. *See generally* Bonner/Williams Br. at 70-79.[27] Respondents postulate that some of the Amended Articles "could" or "may" allege conduct tantamount to a violation of criminal statutes. *See id.* at 70, 71, 75, 76. Respondents cannot do this. Essentially, Respondents argue that they can go back and cure deficiencies in allegations after the Amended Articles have been voted on. While time travel may work in movies like *Back to the Future*, it is no way to cure fatal constitutional defects. District Attorney Krasner was impeached on the Amended Articles as written and presented. Indisputably, they do not allege – nor could they in good faith – the acts and states of mind required by centuries of Anglo-American jurisprudence.

[27] Respondents rely on allegations about District Attorney Krasner's conduct that appear *nowhere* in the Amended Articles. *Compare* Bonner/Williams Br. at 71-75, 77 (suggesting that District Attorney Krasner "induc[ed]" his subordinates' conduct, "ma[de] materially false and/or misleading" statements, "deliberately abused grand jury and judicial processes," "abuse[d] his power," and "l[ied] by omission"), *with* R.124a (District Attorney Krasner merely "directed, approved, and/or permitted" certain filings); R.118a-119a, R.121a, R.123a (discussing allegations as to conduct of district attorney's *office*) ; R.125a (District Attorney Krasner merely "omitted" a "material fact").

Respondents' attempt to belatedly – after the House has voted – add unpled criminal violations to the Amended Articles' existing allegations fails for several reasons. *First,* Respondents' assertion that District Attorney Krasner "may have violated" various criminal statutes based on "the substance" of Articles III-V is wrong. The Amended Articles do not allege unlawful acts sufficient to establish a crime. For instance, they do not – because they cannot in good faith – allege that District Attorney Krasner solicited or conspired with anyone, 18 Pa. C.S. §§ 902, 903, made any "false" statements under oath, 18 Pa. C.S. §§ 4902, 4903, or failed to perform any official duty, 18 Pa. C.S. §§ 5101, 5103. Rather, they note that he approved his office's filings and otherwise allege an incomplete, but *truthful*, answer to special master testimony. In any case, District Attorney Krasner categorically denies that he has committed any of the criminal acts portrayed in Respondents' brief.

Further, each crime Respondents cite requires specific criminal intent or knowledge that conduct is illegal; the conspiracy and solicitation crimes further require an underlying criminal aim. *See* 18 Pa. C.S. §§ 902, 903 (requiring "the intent of promoting or facilitating [a crime's] commission"); *id.* §§ 4902, 4903 (requiring that person makes statement that "he does not believe [] to be true"); § 5101 (requiring that a person "intentionally obstructs, impairs or perverts the administration of justice" but does not apply to a "failure to perform a legal duty

other than an official duty"); § 5301 (requiring official's "knowing that his conduct is illegal"). The Amended Articles do not include any such allegations of fact or intent – let alone the "improper or corrupt motive" necessary to establish "misbehavior in office." *See supra* Part IV.B.2.c.i.

Second, the kinds of allegations Respondents now propose to add to the Amended Articles do not satisfy the controlling *Braig* standard for "misbehavior in office." For example, none of these criminal statutes impose positive ministerial duties; they are duties "not to engage in certain conduct," which are not actionable as misbehavior in office. *See Braig*, 590 A.2d at 288; *Ballentine*, 86 A.3d 958, 969 ("duty not to tamper with public records, as manifested by Pennsylvania statutory law, is a negative duty"). Moreover, the Amended Articles still do not allege any misuse of District Attorney Krasner's office. *In re Scott*, 596 A.2d 150, 151 (Pa. 1991) ("'Misbehavior in office'…was intended to encompass only those convictions for crimes involving misuse of the [public] office."). Courts have consistently held that violations of generally applicable criminal laws do not constitute "misbehavior in office." *See, e.g., Braig*, 590 A.2d at 288 (judge committing mail fraud not guilty of misbehavior in office); *Dalessandro*, 596 A.2d

798 (judge convicted of attempted income tax evasion under federal law not guilty of misbehavior in office).[28]

Finally, Respondents' attempt to rewrite these articles is improper because it violates District Attorney Krasner's due process rights. It is much too late for Respondents to rewrite the allegations in the Amended Articles. *Commonwealth v. Jones,* 378 A.2d 1245, 1250 (Pa. Super. 1977) ("[A]n indictment cannot be amended in a substantial or material way so as to broaden or change the charge or to prejudice an accused by failing to fully apprise him of the charges against him."); *Commonwealth v. Brown*, 323 A.2d 845, 846 (Pa. Super. 1974) ("It is well settled that a defect of substance in an indictment cannot be amended and the indictment must be quashed."). By arguing that these Articles "may" or "could" be corrected by identifying specific criminal violations, Respondents effectively concede that, as written, they do not "provide [District Attorney Krasner] with sufficient notice to prepare a defense," or "set forth…the required elements of" the wrong alleged. *Commonwealth v. Conaway*, 105 A.3d 755, 764 (Pa. Super. 2014) (citing, *e.g.*, *Commonwealth v. Alston*, 651 A.2d 1092, 1095-96 (Pa. 1994));

[28] While 18 Pa. C.S. §§ 5101 and 5301 arguably implicate official duties, alleged violations of these statutes are not allegations of misbehavior in office. *See Scott*, 596 A.2d at 151 (rejecting position that violations of 18 P.S. §§ 5101 and 5301 are "misbehavior in office" absent further allegations); *e.g.*, *In re Gentile*, 654 A.2d 676, 684 (Pa. Ct. Jud. Disc. 1994), *quashed*, 673 A.2d 339 (Pa. 1995).

Commonwealth v. Taylor, 471 A.2d 1228, 1232 (Pa. Super. 1984) (information that "alleged no facts" and "did no more than charge, in the language of the statute," a criminal violation, insufficient to sustain conviction).[29]

In short, Respondents' attempt to rewrite Articles III, IV, and V fails on many levels, including because it is both improper and ineffective.

(d) Article VI Improperly Challenges District Attorney Krasner's Exercise of Prosecutorial Discretion and Is Unconstitutionally Vague.

Respondents also dispute the Commonwealth Court's conclusion that Article VI does not satisfy the Constitutional standard for "misbehavior in office." Respondents did not address this Article in their jurisdictional statement *or* the statement of questions involved in their brief. *See* Bonner/Williams Jurisdictional Statement, Jan. 26, 2023, at 5; Bonner/Williams Br. at 6-7.[30] Given that omission, and due to Respondents' prior failure to dispute whether *any* Article satisfies the constitutional definition of "misbehavior in office," *see supra* Part IV.B.2.a, the Court should not reach this issue. Pa. R.A.P. 910(a)(5), 2116(a).

[29] This Court has treated similarly vague allegations as insufficient to establish "misbehavior in office" in the related context of removal. *See Scott*, 596 A.2d at 151 ("sparse record presented to this Court is inadequate to sustain a determination that the Respondent has been convicted of 'misbehavior in office by a court'").

[30] The problem is not just that their jurisdictional statement and statement of questions involved do not specifically reference Article VI; they specifically reference every other Article they now defend on this basis, **but not Article VI.** That intentional choice to omit only Article VI (and Article II, which they do not even attempt to defend in their briefs) creates this independent basis for waiver. *Wirth v. Com.*, 95 A.3d 822, 858 (Pa. 2014).

Respondents' argument further has no basis. First, Article VI, like the other Amended Articles, does not provide District Attorney Krasner adequate notice of the charges against him. *See supra* Part IV.B.2.c.ii. Whether by indictment, information, or criminal complaint, the Constitution requires that a defendant be adequately apprised of the charges against him, including the date and the victim of the crime and the acts alleged to have been done. *See Hubbs*, 8 A.2d at 620; *see also Commonwealth v. Diaz*, 383 A.2d 852, 854–55 (Pa. 1978). Article VI merely asserts that, "on multiple occasions," District Attorney Krasner and his subordinates engaged in conduct offensive to the rights of victims. R.127a. This is plainly inadequate notice.

There are other deficiencies as well. Article VI purports to allege that District Attorney Krasner violated "federal and state victims' rights acts," referencing two statutes, but it fails to allege with required specificity the existence or breach of any obligation. R.126a-127a. The first, a federal statute, imposes obligations on courts but not prosecutors. *See* 18 U.S.C. § 3771(b)(2)(A). The second, a Pennsylvania victims' rights law, imposes obligations on no one – it is a list of victims' rights and nothing more. *See* Act of November 24, 1998 (P.L. 882, No. 111) (hereinafter, "Pa. Crime Victims Act"), § 201.[31] Neither imposes any

[31] Although Section 213 of the Crime Victims Act delineates the "responsibilities of [a] prosecutor's *office*" as to victims' rights, these responsibilities are narrower than the broad "right

duty upon District Attorney Krasner, the breach of which would constitute "misbehavior in office."

Finally, Article VI does not allege the requisite willfulness or corrupt intent. Article VI merely states that District Attorney Krasner "violated, and allowed Assistant District Attorneys under his supervision to violate," these statutes. R.127a.[32] Because non-willful conduct, including negligent supervision of subordinates, is not actionable as "misbehavior in office," Article VI fails for this reason, too. *See supra* Part IV.B.2.c.i.

Accordingly, Article VI – like all of the other Amended Articles – alleges no "misbehavior in office" and thus is not constitutionally viable.

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to be kept informed at all stages" on which the House relies in Article VI, but which does not exist in law. *Compare* R.127a, *with* Pa. Crime Victims Act § 201 (providing victims' right to be "notified of *certain significant actions and proceedings*…pertaining to their case") (emphasis added); *id.* § 213 (requiring prosecutors to provide "notice" of certain specific case developments and "opportunity" to provide input in certain proceedings). Even if Article VI implicated Section 213 (and it does not), it does not allege any specific or willful failure to notify or provide an opportunity for input as *specifically* provided under Section 213. R.127a (merely alleging the failure to "*timely* contact" victims, and that victims were mislead, disregarded, and "treat[ed]… with contempt and disrespect"). In any event, these allegations are so vague that it cannot be determined whether they concern the conduct of the District Attorney's Office as a whole, or District Attorney Krasner himself, and thus cannot support his impeachment. *See supra* Part IV.B.2.c.i.

[32] Article VI alleges that District Attorney Krasner and his subordinates have been "deliberately misleading" crime victims. R.127a. However, Respondents identify no allegation of what was actually done to "deliberate mislead[]" crime victims, nor any official duty implicated by such conduct.

C. The Adjournment of the 206th General Assembly *Sine Die* Nullified the Amended Articles, and the 207th General Assembly Senate Cannot Pick Them Up.

In his opening brief, District Attorney Krasner demonstrated that the Amended Articles became null and void on November 30, 2022, upon the adjournment *sine die* of the 206th General Assembly legislative session. Krasner Br. at 22-42. As demonstrated there, all pending business before the General Assembly, including the Amended Articles, terminated under the constitutional *sine die* rule. Contrary to the Commonwealth Court's decision, the Constitution does not include an exception to this rule for "judicial" business.

Respondents' briefs ignore many of District Attorney Krasner's core arguments, including that:

- The Constitution's text contains no exception for impeachment to the rule that *sine die* adjournment brings an end to all business of the General Assembly, *see* Krasner Br. at 24-26;
- All of the Article II principles for how the legislature operates – *e.g.,* quorum, eligibility, speech-and-debate immunity – must apply to impeachment proceedings, and therefore so must the *sine die* rule, *see* Krasner Br. at 26-30[33]; and
- There is no textual support in the Constitution for a "judicial exception" to the *sine die* rule, *see* Krasner Br. at 30-32.

[33] To the extent Senator Ward addresses this point, her argument proves too much. *Cf.* Ward Br. at 22-28. Senator Ward's argument that Article II applies only to legislation, not impeachments, would allow the Senate to decide impeachments, *inter alia*, without a quorum or with unqualified or ineligible members, without a record, and in secret. *See* Pa. Const. art. II, §§ 5, 7, 10, 11, 13. It cannot be that these requirements do not apply to impeachments because they are found in Article II, not Article VI. The same goes for the *sine die* rule.

These arguments alone demonstrate that the Amended Articles lapsed with the 206th Session of the General Assembly. As Respondents concede these arguments, the Court can reverse on these bases alone.

To the extent Respondents address District Attorney Krasner's arguments – instead of simply relying on the portion of the Commonwealth Court opinion that is in error – Respondents' briefs are unconvincing.[34]

First, Respondents cite nonbinding parliamentary authority, specifically, Jefferson's Manual, which provides that impeachment proceedings are not discontinued by a recess. Respondents state that because the Pennsylvania House Rules "endorse" that manual, it supports their interpretation of the *sine die* rule. *See* Bonner/Williams Br. at 32 n.14; Ward Br. at 34. However, District Attorney Krasner's impeachment proceedings *are not* before the House, and thus House Rules do not apply. If anything, the impeachment is before the Pennsylvania Senate, whose rules do not endorse Jefferson's Manual, but rather adopt Mason's Manual. *See* Pa. Sen. R. 26 ("The Rules of Parliamentary Practice comprised in

[34] Respondents Bonner and Williams argue that a rule terminating articles of impeachment upon *sine die* adjournment would give impeached officials an incentive to try to "beat[] the clock." Bonner/Williams Br. at 32 n.14. That argument is deeply ironic. Here, the House adopted the Amended Articles on November 16, 2022, in a lame duck session largely along partisan lines after an election in which it became clear that Republicans would lose control of the House. The House exhibited the Amended Articles to the Senate on November 30, 2022, *the very last day of the session*. In turn, the Senate then issued an impeachment summons hours before the expiration of the 206th General Assembly. If anyone was trying to "beat the clock," it was Respondents and the Republican-led expired 206th General Assembly.

Mason's Manual of Legislative Procedure shall govern the Senate…."), https://www.pasen.gov/rules.cfm. Unlike Jefferson's Manual, Mason's Manual does not state that impeachments survive adjournment *sine die*. *See* Mason's Manual of Legislative Procedures § 445.4 (2020).

Respondents' reliance on Jefferson's Manual is also odd because Section 620 provides that Bonner and Williams were stripped of their authority as House Managers by operation of law upon the adjournment *sine die* of the 206th General Assembly. *See* Jefferson's Manual § 620 ("While impeachment proceedings may continue from one Congress to the next, **the authority of the managers appointed by the House expires at the end of a Congress; and the managers must be reappointed when a new Congress convenes**.") (emphasis added). If Jefferson's Manual applies to District Attorney Krasner's impeachment proceedings, as Respondents apparently contend, then they lost standing to pursue their appeal long ago, and it therefore should be dismissed.

Second, Respondents misstate the teaching of *Commonwealth ex rel. Attorney General v. Griest*, 46 A. 505 (Pa. 1900), arguing that its rationale forecloses the application of the *sine die* rule to impeachment proceedings. According to Respondents, *Griest* stands for the proposition that when separate articles of the Constitution "stand[] alone" and do not require other constitutional provisions to aid

in their execution, they are insulated from the effect of other constitutional provisions. Bonner/Williams Br. at 30-31; *see also* Ward Br. at 25-28.

But as District Attorney Krasner demonstrated in his opening brief, the Court in *Griest* concluded *Article III's* requirements for the presentment of *ordinary legislation* to the governor did not apply to the constitutional amendment process, where the explicit constitutional provision governing amendments did not require presentment of amendments to the Governor. *See* Krasner Br. at 31-32. Nothing in the explicit constitutional text about impeachment, by contrast, is inconsistent with the *sine die* rule. *Id.* at 25-31. The *sine die* rule, just like all the other provisions of Article II, therefore applies to impeachments.

Third, Respondents rely on an attorney general's opinion and several out-of-jurisdiction decisions that pre-date the enshrinement of the *sine die* rule in Article II, Section 4 of the Pennsylvania Constitution. Bonner/Williams Br. at 33-35; Ward Br. at 29-35. But those decisions are all inapposite for the reasons expressed in District Attorney Krasner's Brief. *See* Krasner Br. at 38-42.

Further, Respondents' briefs mischaracterize District Attorney Krasner's position: he does not argue that older or out-of-jurisdiction authorities can *never* be consulted when evaluating constitutional questions. Instead, they matter only if they are persuasive. *See Commonwealth v. Edmunds*, 586 A.2d 887, 894-95 (Pa. 1991). As *Edmunds* explains, this Court has "stated with increasing frequency that

it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated." *Id.* Respondents' authorities are not persuasive because they would undercut such an "independent analysis," either because they were decided prior to Pennsylvania's 1967 constitutional amendment confirming that the General Assembly is a two-year "continuing body", because they interpreted other states' materially different constitutions, or because they involve other distinguishing facts. *See* Krasner Br. at 37-42.[35]

Fourth, Respondents quibble with the very real concerns District Attorney Krasner raises about an impeachment overriding the will of the electorate. To be sure, impeachments of elected officials necessarily have the effect of reversing an election. But to ensure that such a process is fair and respectful to core democratic values, it is critical that the elected bodies that carry out an impeachment – both by adopting articles of impeachment and trying the impeachment – are representative of the will of the electorate. The 2022 election meaningfully altered the composition of the House of the 206th General Assembly. The priorities and pending business of the prior House went with it, giving way to the 207th General

[35] For the historical impeachments cited in Respondents' Brief – all of which occurred prior to the 1967 constitutional amendments codifying *sine die* – it does not appear that any of the officials challenged their impeachments on the basis of the *sine die* rule. Therefore, the mere fact that a multi-session impeachment process occurred proves nothing. *See also* Krasner Br. at 38 n.15.

Assembly House, which has not impeached District Attorney Krasner. For this reason, it is critical that impeachments be tried, if at all, by the same General Assembly that initiated the impeachment in the first place.

To be clear, District Attorney Krasner is not arguing that any time a House or Senate seat is vacated and filled by a special election, the impeachment process must re-start. *Cf.* Bonner/Williams Br. at 35-36. Rather, the *constitutional* expiration of the General Assembly *as a whole* at the end of two years requires the re-passage of impeachment articles, because pending impeachments, like all other business of the legislature, expire at the end of the term. The intervening election of *all* members comprising the House and half of the Senate creates the new body, which alone can exercise the will of the voters. Otherwise, the House elected by a prior group of electors could impose its will on the body elected by subsequent electors, contrary to democratic principles and well-established law. To the extent Respondents contend that trial by a Senate in a later General Assembly "better reflects" the views of the voters, *id.* at 36-37, the views of the voters must also be expressed through trial of articles of impeachment adopted by the *House* they elected, not the expired one. If Respondents truly sought an impeachment process

that best reflects the will of the electorate, they would abandon their appeals and pursue enactment of impeachment articles in the House that exists now.[36]

Finally, Senator Ward's brief offers a number of brief arguments concerning the *sine die* rule that collapse on inspection. As a starting point, it argues that Article II does not apply to impeachment business because it is titled "The Legislature" and therefore "is confined to the subject of the legislative power." Ward Br. at 22. But this adds nothing to Respondents' argument: the question is whether impeachment is subject to the same rules as all other business of the General Assembly. Section 1 of Article II only says that the General Assembly is vested with "the legislative power of this Commonwealth." Pa. Const. art. II, § 1, *quoted in* Ward Br. at 22. It doesn't dictate that the remainder of Article II only applies when the General Assembly is exercising that "legislative power." Nor does anything else in Article II limit its rules to particular functions of the General Assembly. As District Attorney Krasner demonstrated in his opening brief, this

[36] Respondents' contention that the roles of the House and Senate are distinct in impeachments, and thus the expiration of a legislative session is irrelevant, is without merit. *See* Bonner/Williams Br. at 35-36; Ward Br. at 25. Article VI, Sections 4-5 expressly contemplate a procedure by which the House first impeaches and then the Senate tries. The consecutive placement of Sections 4, 5, and 6 in Article VI makes the impeachment process a bicameral undertaking, akin to traditional lawmaking by the General Assembly. The Constitution provides that the full impeachment process (*i.e.*, impeachment and trial) could be completed only by both the House and the Senate playing their parts. There is therefore no reason to think that the drafters intended for the *sine die* adjournment principle established in the Constitution not to apply to impeachment.

structure shows why the *sine die* rule must apply to impeachment proceedings, Krasner Br. at 26-32, not the contrary, as Senator Ward contends.

Next, Senator Ward's brief argues that analogies to federal impeachments are persuasive because the Pennsylvania Senate, like the U.S. Senate, is a "continuing body." The Pennsylvania Senate, it argues, is a "continuing body" because half of its members are elected every two years, as opposed to the House, which has complete turnover every two years. Ward Br. at 37-38. But the U.S. Senate is a "continuing body" because two-thirds of its members – well over a quorum – carry over each term. *See McGrain v. Daugherty*, 273 U.S. 135, 181 (1927). As District Attorney Krasner showed in his opening brief, not so for the Pennsylvania Senate, which does not have a continuing quorum. Krasner Br. at 39.[37]

Senator Ward's brief further erroneously argues that the longstanding principle of Pennsylvania law that one legislature is prohibited from compelling a later legislature to take action, Krasner Br. at 35-36, only applies to municipalities, because that is what *McCormick v. Hanover Twp.*, 92 A. 195 (Pa. 1914), involved.

[37] Senator Ward's brief cites *Shelby v. Second Nat. Bank*, 19 Pa. D. & C. 202, 211 (Fayette Cnty. Pa. Com. Pl. 1933), which decided that the Pennsylvania Senate was a continuing body, with little reasoning, except that *some* of its members carried over. That decision has no bearing as it was decided long before Pennsylvania's constitutional amendment that codified the principle that the General Assembly is a continuing body for only two years, and it did not even reference the quorum requirement.

But this argument ignores that this principle has been applied to the General Assembly as well. *See Commonwealth v. Costello*, 1912 WL 3913, at *4 (Pa. Quar. Sess. 1912) (referring to the General Assembly, "each legislature is organized as a body distinct from the legislatures that have preceded it or that may follow it, and is not bound by the acts, purposes or intentions of its predecessors…."). Importantly, it has been recognized to bind *all* legislatures, local, state or federal, for centuries. *See United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (citing Blackstone for the "the centuries-old concept that one legislature may not bind the legislative authority of its successors").

In short, nothing in Respondents' briefs detract from the fundamental point: The text and structure of Article II and the Constitution as a whole establish that the *sine die* rule applies to all business of the General Assembly, including impeachments. As a result, once the 206th Session of the General Assembly ended, the Amended Articles were no longer viable.

D. As a Local Official, District Attorney Krasner Is Not a "Civil Officer" Subject to Impeachment.

District Attorney Krasner established in his opening brief that he is not a "civil officer" within the meaning of Article VI, Section 6, because he holds a local, not statewide, office. Krasner Br. at 42-55. Respondents' briefs ignore District Attorney Krasner's principal argument: The only specific "civil officer" referenced in Section 6 is the governor, a statewide officer, indicating that "all

other civil officers" must be limited to the same type of civil officers, statewide officers. Krasner Br. at 43-44. This argument establishes that the District Attorney is not a "civil officer" under the impeachment provisions of the Pennsylvania Constitution.

It is fundamentally undemocratic to allow statewide legislators who do not live or vote in the jurisdiction of a local official – and who do not represent such persons – to erase local votes by reversing the local official's election. The discussion in Respondents' briefs is unpersuasive in asking this Court to hold otherwise.

First, Respondents' briefs grossly misread *Burger*, in which Chief Justice Saylor concurred to explain why the term "civil officer" in Section 7 of Article VI of the Constitution is clearly limited to state, not local, officers. *See Burger v. School Bd. of the McGuffey Sch. Dist.*, 923 A.2d 1155, 1166-67 (Pa. 2007) (Saylor, J., concurring). Senator Ward asserts that "*Burger* supports that the District Attorney of Philadelphia is a civil officer." Ward Br. at 56. She cites nothing in the opinion that actually demonstrates this, for a simple reason: It is not true. Nor did the majority opinion "reject" Justice Saylor's reasoning, as Respondents Bonner and Williams contend. Bonner/Williams Br. at 43-44.

Rather, as District Attorney Krasner explained in his opening brief, the majority found Chief Justice Saylor's reasoning "cogent," but unnecessary because

the parties did not raise the issue. *Burger,* 923 A.2d at 1161 n.6, *discussed in* Krasner Br. at 49. As District Attorney Krasner has argued all along, the "cogent" analysis supports this Court adopting a holding that only a statewide official can be a "civil officer" impeachable under Section 6.

Second, the text and structure of Section 6 show that it only applies to statewide officers, as District Attorney Krasner established in his opening brief. It disqualifies an impeached "civil officer" from holding "any office of trust or profit *under this Commonwealth*." Pa. Const. art. VI, § 6. "Civil officer" must refer to statewide officers because it would make no sense to provide that the impeachment of local officers would disqualify them from statewide offices (offices "under this Commonwealth"), but allow them to continue holding local offices, including those from which they were impeached. Krasner Br. at 44-45.

In response, Senator Ward argues that District Attorney Krasner is an officer "under this Commonwealth" because he exercises Commonwealth powers by prosecuting criminal proceedings in Philadelphia. Ward Br. at 51-53.[38] Specifically, she argues that District Attorney Krasner was elected to exercise the power of the Commonwealth pursuant to Article IX, Section 4 ("County officers

[38] Senator Ward's brief appears to argue that Section 6 provides for impeachment of any officer "under this Commonwealth." Ward Br. at 51-53. In fact, Section 6 provides for impeachment of "other civil officers." Offices "under this Commonwealth" are what an impeached officer is disqualified from holding. Pa. Const. art. VI, § 6. This confusion further undermines Senator Ward's argument.

shall consist of commissioners, controllers or auditors, district attorneys….").
Ward Br. at 44, 52-53. But he is the *City of Philadelphia's* District Attorney, and Article IX, Section 4 does not apply to him. *See id.* ("Provisions for county government in this section shall apply to every county except a county which has adopted a home rule charter or an optional form of government."). That he enforces Commonwealth-wide laws does not make him a statewide official.

Moreover, Senator Ward's Brief ignores *Commonwealth ex rel. Woodruff v. Joyce*, 139 A. 742 (Pa. 1927), which defined the phrase "under this commonwealth" in a statute to mean state officeholders only.[39] The legislature, "had it wished to include municipal offices within the [statute]," could have referred specifically to "municipal" offices. *Id.* at 743; *see also Emhardt v. Wilson*, 20 Pa. D. & C. 608, 609 (Phila. Cnty. Pa. Com. Pl. 1934) (holding that a Philadelphia officer was not an officer "under this Commonwealth" under Article II, Section 6).[40] Other courts have rejected the argument that the District Attorney of Philadelphia is an officer of the Commonwealth because he carries out

[39] Respondents Bonner and Williams dismiss *Woodruff* in a footnote on the sole basis that it involved a statute. *See* Bonner/Williams Br. at 45 n.22. But they offer no explanation why case law defining the same phrase is not relevant, regardless of where that phrase is used.

[40] Respondents Bonner and Williams dismiss *Emhardt* because it arose under Article II, Section 6 of the Constitution. But that is precisely the same provision at issue in *Bromley v. Hadley,* 10 Pa. D. & C. 23 (Phila. Cnty. Pa. Com. Pl. 1927), on which Senator Ward relies. *See* Ward Br. at 46.

sovereign functions in the performance of his duties. *See Carter v. City of Phila.*, 181 F.3d 339, 350 (3d Cir. 1999); *Chalfin v. Specter*, 233 A.2d 562, 565 (Pa. 1967) (Bell, C.J., concurring).

Third, Senator Ward's brief distracts with other arguments that have nothing do with the issue before the Court.[41] For instance, it cites cases concerning different terms used in other articles of the Constitution, not Article VI. *E.g.*, *Richie v. City of Phila.*, 74 A. 430 (Pa. 1909) (Article III, "public officer"); *Alworth v. Cnty. of Lackawanna*, 85 Pa. Super. 349 (1925) (same); *Commw. ex rel. Foreman v. Hampson*, 143 A.2d 369, 373 (Pa. 1958) (Article XIV, "public officer"); *In re Ganzman*, 574 A.2d 732 (Pa. Commw. Ct. 1990) (statute declaring "election officers" ineligible from "civil office" being voted for at the election at which they are serving). But none of these cases sheds light on the meaning of "civil officer" in Article VI, Section 6, and many define the term "public officer," not "civil officer." While her brief suggests in passing that these terms are equivalent, Ward Br. at 45 n.26, 52 (citing *Opinions of the Attorney General of Pennsylvania, 1974*, Official Opinion No. 49 (Sept. 18, 1974)), that assertion

[41] Senator Ward's complaint that District Attorney Krasner seeks to avoid accountability to the Commonwealth, Ward Br. at 58-59, is simply a restatement of her other arguments. In fact, District Attorney Krasner has consistently recognized that he is subject to the local process for impeachment and removal of municipal officers under the First Class Cities Government Law, Act of June 25, 1919, P.L. 581, No. 274 (June 25, 1919), 53 P.S. §§ 12199-12205, *discussed in* Krasner Br. at 55 n.26.

ignores that Article VI itself uses both terms. Article VI is titled "Public Officers"; its use of the term "civil officers" is necessarily different. *See PECO Energy Co. v. Commonwealth*, 919 A.2d 188, 191 (Pa. 2007) (applying canon of statutory construction that the framers are "presumed to understand that different terms mean different things").[42]

Similarly, Respondents' briefs cite *Houseman v. Commonwealth ex rel. Tener*, 100 Pa. 222 (Pa. 1882), and other decisions of this Court that applied constitutional removal provisions to local officials. Ward Br. at 45-50; Bonner/Williams Br. at 44, 46-47. But they ignore that those cases did not address the distinction in the current text between state and local offices, as Chief Justice Saylor noted. *Burger*, 923 A.2d at 1167 (Saylor, J., concurring).[43]

Senator Ward's brief also misreads history to support her position. For example, it attempts to divine the framers' intent concerning the meaning of "civil

[42] For similar reasons, Respondents Bonner and Williams' reliance on a statement in Thomas Raeburn White's treatise that "civil officers" is in distinction from "military or naval officers," who are not subject to impeachment, is inapposite. Bonner/Williams Br. at 42. Respondents ignore that Mr. Raeburn's comment is entirely speculative: "The expression 'civil officers' was *probably* used to distinguish…from military officers." Thomas Raeburn White, Commentaries on the Constitution of Pennsylvania 342 (1907) (emphasis added). Respondents' brief omits the crucial term "probably."

[43] In *Tener*, the Court concluded that a local official was subject to removal (not impeachment) under the at-will removal provision of then-Article VI, Section 4. But that provision involved far broader language than the current impeachment provision in Section 6. The removal provision then in effect contained "very general" language, but included "nothing in it which authorizes a distinction between state, county and municipal officers." *Tener,* 100 Pa. at 230.

officer" in Article VI, Section 6, from a single statement by a single delegate to a constitutional convention. *See* Ward Br. at 54. That provides no support, *Indem. Ins. Co. of N. Am. v. Bureau of Workers' Comp. Fee Rev. Hearing Off.*, 245 A.3d 1158, 1168 (Pa. Commw. Ct. 2021) (noting that "the statement of a single legislator is not entitled any weight"), and is contrary to the fuller history discussed in District Attorney Krasner's opening brief. *See* Krasner Br. at 45-47.

Further, if anything, Senator Ward's brief's description of the historical impeachment practice of the General Assembly demonstrates that impeachment was directed at statewide, not local officers. Not one of the twelve historical impeachments cited in Senator Ward's Brief was of a local official. *See* Ward Br. at 10-11. Instead, those impeachments include state officers such as judges[44], justices, and one state Comptroller General.

Ultimately, Respondents fail to come to terms with the obvious tension between their various positions on whether the same words mean the same thing in the impeachment and removal provisions of Article VI, Sections 6 and 7. In the context of defending the Commonwealth Court's ruling on "civil officer", they argue that "civil officer" has the same meaning in both provisions. Yet, when seeking to reverse the Commonwealth Court's ruling on "misbehavior in office,"

[44] *See Joyce*, 139 A. at 743 ("We think no one would gainsay that [county] judges are state officers in Pennsylvania.") (citing *Commonwealth v. Conyngham*, 65 Pa. 76 (Pa. 1870)).

they try to draw a distinction between Sections 6 and 7. They cannot have it both ways; either the words in these two sections travel in parallel or they do not. As District Attorney Krasner argued in his opening brief, they should be read in parallel (in the way proposed by Chief Justice Saylor). Both "misbehavior in office" and "civil officer" in Sections 6 and 7 have the same meaning.[45] Krasner Br. at 49-53; *see supra* Part IV.B.1. As to the latter, both sections are limited to statewide officers.

V. CONCLUSION

For the foregoing reasons and those set forth in District Attorney Krasner's opening brief, this Court should:

- Affirm the portion of the Commonwealth Court's December 30, 2022 Order granting District Attorney Krasner's Application for Summary Relief and denying Senator Ward's Cross Application for Summary Relief, concluding that the Amended Articles of Impeachment are not viable because they do not allege "any misbehavior in office," and overruling Respondents Bonner and Williams' Preliminary Objections in full; and
- Reverse the portion of the December 30 Order denying District Attorney Krasner's Application for Summary Relief and granting Senator Ward's Cross Application for Summary Relief with respect to Counts I and II of the Petition for Review.

[45] As District Attorney Krasner explained in his Opening Brief, there are policy reasons the Court could conclude that "civil officer" in Section 6 is limited to statewide officers but not address Section 7 removal in this case. Krasner Br. at 54 n.24. By contrast, as set forth above, Respondents offer no principled reason why "misbehavior in office" should be interpreted differently in Sections 6 and 7.

Respectfully submitted,

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Dated: August 28, 2023

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RULE 2135 CERTIFICATION

The undersigned hereby certifies that this brief contains 18,402 words and therefore complies with the word count limit set forth by Pa. R. App. P. 2135(a)(1) and the Court's August 2, 2023 Order.

Dated: August 28, 2023

/s/ John S. Summers
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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

In compliance with Pennsylvania Rule of Appellate Procedure 127, I certify that this filing 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 require filing confidential information and documents differently than non-confidential information and documents.

Dated: August 28, 2023

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