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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LARRY KRASNER, in his official capacity as the District Attorney of Philadelphia, *Petitioner* v. SENATOR KIM WARD, in her official capacity as Interim President Pro Tempore of the Senate; REPRESENTATIVE TIMOTHY R. BONNER, in his official capacity as an impeachment manager; REPRESENTATIVE JARED SOLOMON, in his official capacity as an impeachment manager; and JOHN DOES, in their official capacities as members of the Senate Impeachment Committee, *Respondents* v. SENATOR JAY COSTA, in his official capacity *Proposed Intervenor*	No. 563 M.D. 2022

SENATOR JAY COSTA'S APPLICATION FOR LEAVE TO INTERVENE

AND NOW comes Proposed Intervenor Senator Jay Costa, via counsel, Corrie Woods, Esq., and submits this Application for Leave To Intervene and offers the following in support thereof:

BACKGROUND

1. Senator Costa is a member of the Senate of Pennsylvania representing the 43rd Senate District, which includes part of Allegheny County. Senator Costa serves as Leader of the Senate Democrats.

2. On December 2, 2022, Petitioner Larry Krasner, in his official capacity as the District Attorney of Philadelphia, filed a Petition for Review in the Nature of a Complaint for Declaratory Judgment in this Honorable Court, initiating this action.

3. Therein, District Attorney Krasner alleges essentially that the 206th Pennsylvania General Assembly adopted resolutions advancing articles of impeachment against him to a pretrial posture, but asserts that the advancement of the articles to trial would be unlawful for three reasons: (1) the 206th General Assembly did not advance them to trial prior to its adjournment *sine die*, such that the unfinished legislative business regarding his impeachment, like all unfinished legislative business, is now a nullity; (2) the General Assembly has no authority to impeach a local official; and (3) the articles do not allege that District Attorney Krasner has engaged in impeachable misconduct and are therefore insufficient to support his removal from office as a matter of law. District Attorney Krasner seeks a declaratory judgment to that end.

4. The same day, District Attorney Krasner filed an Application for Summary Relief, asserting the same arguments and seeking the same relief.

5. On December 6, 2011, this Honorable Court entered an order directing that, *inter alia*, any individual applying for leave to intervene file an application for leave to intervene, together with any proposed filings and memoranda of law, by December 12, 2022, at 3 p.m.

6. Senator Costa now files this Application for Leave to Intervene.

APPLICATION FOR LEAVE TO INTERVENE

7. This action in this Honorable Court's original jurisdiction is governed by the Pennsylvania Rules of Civil Procedure. *See* Pa.R.A.P. 106 (noting that such actions are governed by "the appropriate general rules applicable to practice and procedure in the courts of common pleas").

8. "At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if":

> (3) such person could have joined as an original party in the action or could have been joined therein; or
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa.R.Civ.P. 2327.

9. Procedurally, an application to intervene must be made in the form of and verified in the manner of an initial pleading in a civil action, set forth the basis for

intervention, and state the relief the petitioner seeks or the defense the petitioner seeks to demand. Pa.R.Civ.P. 2327(a).

10. Additionally, the petitioner must attach a copy of any pleading he intends to file if permitted to intervene or state in the petition that the he adopts by reference in whole or in part certain named pleadings or parts of pleadings already filed. Pa.R.Civ.P. 2327(a).

11. Additionally, the petitioner must serve the petition on all parties to the action. Pa.R.Civ.P. 2327(b).

12. After the petition is filed,

> [A]fter hearing, of which due notice shall be given to all parties, the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, if
>
> (1) the claim or defense of the petitioner is not in subordination to and in recognition of the action; or
>
> (2) the interest of the petitioner is already adequately represented; or
>
> (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass, or prejudice the trial or adjudication of the rights of the parties.

Pa.R.Civ.P. 2329.

Intervention Pursuant to Rule 2327(3)

13. As noted above, a person's intervention is warranted if "such person could have joined as an original party in the action or could have been joined therein." Pa.R.Civ.P. 2327(3).

14. This rule applies to persons who could have joined as plaintiffs. *See* Goodrich Amram 2d § 2327:6 (citing, *inter alia*, *Appeal of Denny Bldg. Corp.*, 127 A.2d 724 (Pa. 1956) (permitting purchasers of homes to intervene in contractor's appeal from adverse administrative decision)).

15. "Persons may join as plaintiffs who assert any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common questions of law or fact affecting the rights to relief of all such persons will arise in the action." Pa.R.Civ.P. 2229.

16. "Parties may join . . . in the alternative although the cause of action asserted by or against any one or more of them is inconsistent with the cause of action asserted by . . . the others so joined." Pa.R.Civ.P. 2229.

17. A plaintiff seeking a declaratory judgment must have standing – *i.e.*, a substantial, direct, and immediate interest beyond the general public's interest in the resolution of the question upon which a declaration is sought. *See*, *e.g.*, *Cohen v. Rendell*, 684 A.2d 1102, 1104 (Pa. Cmwlth. 1996) (citing *William Penn Parking*

Garage, Inc. v. City of Pittsburgh, 346 A.2d 269 (Pa. 1975)); *accord* 42 Pa.C.S. § 7532 (noting that declaratory judgments are available to "declare rights, status, and other legal relations whether or not further relief is or could be claimed")

18. As noted above, Senator Costa is a member of the Senate.

19. Like District Attorney Krasner, Senator Costa contends that advancing the articles to trial would be unlawful because the 206th General Assembly did not advance them to trial and judgement prior to its adjournment *sine die*, such that the unfinished legislative business regarding his impeachment, like all unfinished legislative business, is now a nullity.

20. Like District Attorney Krasner, Senator Costa seeks a declaratory judgment that advancing the articles to trial in a successive General Assembly would be unlawful for the reason stated in paragraph 19.

21. Senator Costa, as a member of the Senate, has standing to seek a declaratory judgment that advancing the articles to trial would be unlawful. *Accord*, *e.g.*, *Zemprelli v. Thornburg*, 407 A.2d 102 (Pa. Cmwlth. 1979) (holding State Senator, as such, had standing to challenge gubernatorial nomination as constitutionally procedurally infirm); *Cohen*, 684 A.2d at 1105 (holding council member, as such, had standing to challenge ordinances' adoption as procedurally infirm under the Philadelphia Home Rule Charter); *Morris v. Goode*, 529 A.2d 50 (Pa. Cmwlth.

1987) (holding council member, as such, had standing to challenge ordinances as violative of quorum requirement).

22. Senator Costa in this regard seeks relief separately in respect of or arising from the same transaction, occurrence, or series of transactions or occurrences as District Attorney Krasner.

23. The common questions of law and fact pertaining to the 206th General Assembly's efforts to impeach District Attorney Krasner and the putative trial's unlawfulness will arise in this action.

24. Thus, Senator Costa could have joined as a plaintiff.

25. Thus, Senator Costa is presumptively entitled to intervene pursuant to Rule 2327(3).

Intervention Pursuant to Rule 2327(4)

26. In the alternative, as noted above, a person's intervention is warranted if "the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action." Pa.R.Civ.P. 2327(4).

27. As noted above, Senator Costa is a member of the Senate.

28. In the context of legislators' intervention in their official capacities, the question of whether a legislator has satisfied Rule 2327(4) does not principally depend upon whether he has standing to initiate a complaint. *See Allegheny*

Reproductive Health Ctr. v. Pa. Dept. of Hum. Servs., 225 A.3d 902, 911 (Pa. Cmwlth. 2020) (permitting legislators to intervene in an action challenging legislative and administrative restrictions on appropriations for abortions as unconstitutional as interference with the legislature's power of appropriation); *see also Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Cmwlth. 2019) ("[T]he inquiry to determine whether a party has standing to initiate litigation is different than the inquiry to determine whether a party can intervene.").

29. Indeed, while the test for standing to initiate a complaint requires a party to demonstrate "direct, immediate, and substantial interest in the subject matter of the controversy," Rule 2327(4) permits a party to intervene if he or she demonstrates that a determination of the case will affect a "legally enforceable interest" of the party. *See Allegheny Reproductive Health Ctr.*, 225 A. 3d at 910-11 ("Simply, the test for standing to initiate litigation is not co-terminus with the test for intervention in existing litigation."). As such, the principles of legislative standing are "relevant" to the question of whether a legislator has a "legally enforceable interest" under Rule 2327(4) and Proposed Intervenors do, indeed, adhere to these standards. *See id.* at 911.

30. "Legislators . . . are granted standing . . . when specific powers unique to their functions under the Constitution are diminished or interfered with." *Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Cmwlth. 1976); *see also Fumo v. City of Phila.*, 972

A.2d 487, 501 (Pa. 2009) ("Legislators . . . have been permitted to bring actions based upon their special status where there was a discernable and palpable infringement on their authority as legislators."); *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016) ("Standing exists . . . when a legislator's direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, *see Wilt*, or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator, *see Fumo*").

31. Here, District Attorney Krasner seeks relief that would identify procedural and substantive limits on the General Assembly's power to impeach generally and the lawfulness of his impeachment trial specifically.

32. Thus, the claim would diminish and/or interfere with legislative authority generally and as it pertains to District Attorney Krasner's impeachment trial specifically.

33. Thus, Senator Costa, in his official capacity, has legislative standing.

34. Indeed, the determination of this action not only may, but will, affect Senator Costa's "legally enforceable interest" in his legislative authority.

35. Thus, Senator Costa, on this basis as well, is entitled to intervene pursuant to Pa.R.Civ.P. 2327(4).

Intervention Pursuant to Rule 2329

36. As detailed above, even if a proposed intervenor is presumptively entitled to intervene pursuant to Pa.R.Civ.P. 2327, intervention may nevertheless be denied if (1) the claim or defense of the petitioner is not in subordination to and in recognition of the action; or (2) the interest of the petitioner is already adequately represented; or; (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass, or prejudice the trial or adjudication of the rights of the parties. Pa.R.Civ.P. 2329.

37. Here, Senator Costa does not intend to present any claim "not in subordination to and in recognition of the action." Pa.R.Civ.P. 2329.

38. Here, Senator Costa's interests are not already adequately represented. Although District Attorney Krasner advances the same legal argument, he also advances others, and he lacks Senator Costa's personal and official interest in protecting the appropriate boundaries of constitutional limits on legislative authority generally, as well as Senator Costa's personal and official interest in representing his constituents' interests vis-à-vis those boundaries and the specific subjects of this action.

39. Here, Senator Costa has not unduly delayed in making application for intervention; rather, he has done so according to this Honorable Court's expedited scheduling order; and, upon information and belief, his intervention will not

unduly delay, embarrass, or prejudice the trial or adjudication of the rights of the currently named parties.

40. Thus, Senator Costa is entitled to intervene notwithstanding Pa.R.Civ.P. 2329.

Adoption of Pleadings

41. Senator Costa hereby adopts the by reference, in part, District Attorney Krasner's Petition for Review in the Nature of a Complaint for Declaratory Judgment and Application for Summary Relief. Specifically, Senator Costa adopts those parts:

a. identifying the basis for this Honorable Court's jurisdiction, *see* Petition for Review, 12/2/22, at 4;

b. identifying the parties, basic facts, and legislative actions giving rise to the present controversy, *see id.* at 5-12;

c. identifying that on November 8, 2022, the 206th General Assembly adjourned *sine die*, *see id.* at 12-13;

d. asserting that advancing the articles to trial would be unlawful because the 206th General Assembly did not advance them to trial prior to its adjournment *sine die*, such that the unfinished legislative business regarding his impeachment, like all unfinished legislative business, is now a nullity, *see id.* at 14-17; and

e. seeking a declaration that the legislative actions giving rise to the present controversy are null and void and that advancing the articles to trial would be unlawful, or such other relief as is just and proper, *see id.* at 30-31.

WHEREFORE, in light of the foregoing, Senator Costa respectfully requests that this Honorable Court enter an order granting the Application to Intervene.

Respectfully submitted,

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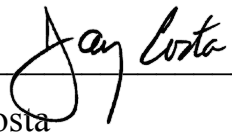
Senator Jay Costa

VERIFICATION

I, Senator Jay Costa, hereby verify that the allegations set forth herein are true and correct to the best of my knowledge or information and belief and subject to the provisions of the Crimes Code relating to unsworn falsification to authorities.



Senator Jay Costa

December 12, 2022

Date

CERTIFICATE OF COMPLIANCE

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* which require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

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APPENDIX A – MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR LEAVE TO INTERVENE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LARRY KRASNER, in his official capacity as the District Attorney of Philadelphia, *Petitioner* v. SENATOR KIM WARD, in her official capacity as Interim President Pro Tempore of the Senate; REPRESENTATIVE TIMOTHY R. BONNER, in his official capacity as an impeachment manager; REPRESENTATIVE JARED SOLOMON, in his official capacity as an impeachment manager; and JOHN DOES, in their official capacities as members of the Senate Impeachment Committee, *Respondents* v. SENATOR JAY COSTA, in his official capacity *Proposed Intervenor*	No. 563 M.D. 2022

MEMORANDUM IN SUPPORT OF APPLICATION TO INTERVENE

AND NOW comes Intervenor Senator Jay Costa, via counsel, Corrie Woods, Esq., and submits this Memorandum In Support of Application to Intervene.

INTRODUCTION

In this original jurisdiction action, Petitioner Larry Krasner, in his official capacity as District Attorney of Philadelphia, alleges that the 206th General Assembly adopted resolutions advancing articles of impeachment against him to a pretrial posture, but that the advancement of the articles to trial would be unlawful for several reasons, including that the 206th General Assembly did not advance them to trial prior to its adjournment *sine die*, such that the unfinished legislative business regarding his impeachment, like all unfinished legislative business, is now a nullity, and seeks a declaratory judgment to that end.

Senator Jay Costa, a member of the Senate of Pennsylvania representing the 43rd Senate District, which includes part of Allegheny County, seeks leave to intervene. Because Senator Costa, as a member of the Senate, had standing to bring this action as a plaintiff in the first instance, because his intervention is appropriate with respect to this action implicating his authority as a legislator, and because his interests are distinct from, and therefore not adequately represented by other parties in this matter, he respectfully requests that this Honorable Court grant him leave to intervene.

BACKGROUND

As referred to above, On December 2, 2022, Petitioner Larry Krasner, in his official capacity as the District Attorney of Philadelphia, filed a Petition for

Review in the Nature of a Complaint for Declaratory Judgment in this Honorable Court, initiating this action. Therein, District Attorney Krasner alleges essentially that the 206th Pennsylvania General Assembly adopted resolutions advancing articles of impeachment against him to a pretrial posture, but asserts that the advancement of the articles to trial would be unlawful for three reasons: (1) the 206th General Assembly did not advance them to trial prior to its adjournment *sine die*, such that the unfinished legislative business regarding his impeachment, like all unfinished legislative business, is now a nullity; (2) the General Assembly has no authority to impeach a local official; and (3) the articles do not allege that District Attorney Krasner has engaged in impeachable misconduct and are therefore insufficient to support his removal from office as a matter of law. District Attorney Krasner seeks a declaratory judgment to that end. The same day, District Attorney Krasner filed an Application for Summary Relief, asserting the same arguments and again seeking a declaratory judgment to that end.

On December 6, 2011, this Honorable Court entered an order directing that, *inter alia*, any individual applying for leave to intervene file an application for leave to intervene, together with any proposed filings and memoranda of law, by December 12, 2022, at 3 p.m. For the reasons that follow, Senator Costa respectfully requests that this Honorable Court grant him leave to intervene.

ARGUMENT

In original jurisdiction actions, the procedures of this Honorable Court are gleaned from "the appropriate general rules applicable to practice and procedure in the courts of common pleas,": here, the Pennsylvania Rules of Civil Procedure. Pa.R.A.P. 106. A party may obtain leave to intervene under those rules where, *inter alia*, he "could have joined as an original party in the action or could have been joined therein," Pa.R.Civ.P. 2327(3), or where "the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action," Pa.R.Civ.P. 2327(4). However, a party may nevertheless be denied intervention where "(1) the claim or defense of the petitioner is not in subordination to and in recognition of the action"; (2) "the interest of the petitioner is already adequately represented"; or (3) "the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass, or prejudice the trial or adjudication of the rights of the parties." Pa.R.Civ.P. 2329.

Here, Senator Costa is presumptively entitled to intervene pursuant to both Rule 2327(3) and Rule 2327(4). First, regarding the former, again, a person's intervention is warranted if he "could have joined as an original party in the action or could have been joined therein." Pa.R.Civ.P. 2327(3). This rule applies to all original parties, including plaintiffs. *See*, *e.g.*, *Appeal of Denny Bldg. Corp.*, 127

A.2d 724 (Pa. 1956) (permitting purchasers of homes to intervene in contractor's appeal from adverse administrative decision)). A person may join as a plaintiff so long as he asserts a right to relief arising out of the same factual transactions and common questions of fact or law will be addressed in the subject action. *See* PA.R.Civ.P. 2229. A plaintiff in a declaratory judgment action must also have standing – *i.e.*, a substantial, direct, and immediate interest beyond that of the general public in the resolution of the question upon which a declaration is sought. *See*, *e.g.*, *Cohen v. Rendell*, 684 A.2d 1102, 1104 (Pa. Cmwlth. 1996) (citing *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975)); *accord* 42 Pa.C.S. § 7532 (noting that declaratory judgments are available to "declare rights, status, and other legal relations whether or not further relief is or could be claimed")

Here, Senator Costa, like District Attorney Krasner, contends that advancing the articles to trial would be unlawful because the 206th General Assembly did not advance them to trial prior to its adjournment *sine die*, such that the unfinished legislative business regarding his impeachment, like all unfinished legislative business, is now a nullity. And like District Attorney Krasner, Senator Costa seeks a declaratory judgment that advancing the articles to trial would be unlawful.

Senator Costa, as a member of the Senate, has standing to seek a declaratory judgment that advancing the articles to trial would be unlawful. Indeed, our

appellate courts have routinely recognized that members of legislative bodies have standing to challenge procedurally infirm legislative enactments emanating therefrom. In *Zemprelli v. Thornburg*, 407 A.2d 102 (Pa. Cmwlth. 1979), this Honorable Court recognized that a State Senator, as such, had standing to challenge gubernatorial nomination as constitutionally procedurally invalid. In *Cohen*, it likewise held that a Philadelphia City Council member had standing to challenge certain ordinances as the product of procedural impropriety. *See Cohen*, 684 A.2d at 1105. Similarly, in *Morris v. Goode*, 529 A.2d 50 (Pa. Cmwlth. 1987), it recognized that a City Council member could challenge ordinances as violative of quorum requirements. Like all the foregoing plaintiffs, Senator Costa, as a member of the Senate, has standing to seek declaratory relief relative to the procedural propriety of impending legislative action. Indeed, Senator Costa in this regard seeks declaratory relief separately from District Attorney Krasner, but arising from the same transactional facts, and the questions of fact, if any, and law, surrounding the putative trail's lawfulness or unlawfulness will certainly be addressed herein. Thus, Senator Costa could have joined as a plaintiff, and he is presumptively entitled to intervene pursuant to Rule 2327(3).

In the alternative, again, a person's intervention is warranted if "the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action."

Pa.R.Civ.P. 2327(4). Where, as here, a legislator relies on this subsection, the question of whether a legislator has satisfied Rule 2327(4) does not principally depend upon whether he has standing to initiate a complaint. *See Allegheny Reproductive Health Ctr. v. Pa. Dept. of Hum. Servs.*, 225 A.3d 902, 911 (Pa. Cmwlth. 2020) (permitting legislators to intervene in an action challenging legislative and administrative restrictions on appropriations for abortions as unconstitutional as interference with the legislature's power of appropriation); *see also Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Cmwlth. 2019) ("[T]he inquiry to determine whether a party has standing to initiate litigation is different than the inquiry to determine whether a party can intervene."). Indeed, while the test for standing to initiate a complaint requires a party to demonstrate "direct, immediate, and substantial interest in the subject matter of the controversy," Rule 2327(4) permits a party to intervene if he or she demonstrates that a determination of the case will affect a "legally enforceable interest" of the party. *See Allegheny Reproductive Health Ctr.*, 225 A. 3d at 910-11 ("Simply, the test for standing to initiate litigation is not co-terminus with the test for intervention in existing litigation."). As such, the principles of legislative standing are "relevant" to the question of whether a legislator has a "legally enforceable interest" under Rule 2327(4) and Senator Costa does, indeed, adhere to these standards. *See id.* at 911.

"Legislators . . . are granted standing . . . when specific powers unique to their functions under the Constitution are diminished or interfered with." *Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Cmwlth. 1976); *see also Fumo v. City of Phila.*, 972 A.2d 487, 501 (Pa. 2009) ("Legislators . . . have been permitted to bring actions based upon their special status where there was a discernable and palpable infringement on their authority as legislators."); *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016) ("Standing exists . . . when a legislator's direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, *see Wilt*, or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator, *see Fumo*").

Applying the foregoing herein, District Attorney Krasner seeks relief that would identify numerous procedural and substantive limits on the General Assembly's power to impeach generally and the lawfulness of his impeachment trial specifically. Thus, the claim could well diminish and/or interfere with legislative authority generally and as it pertains to District Attorney Krasner's impeachment trial specifically. Thus, Senator Costa's intervention is appropriate under principles of legislative standing, and, more importantly, the determination of this action may affect Senator Costa's "legally enforceable interest" in his legislative authority. Thus, Senator Costa, on this basis as well, is entitled to intervene pursuant to Pa.R.Civ.P. 2327(4).

Nevertheless, as noted above, even if a proposed intervenor is presumptively entitled to intervene pursuant to Pa.R.Civ.P. 2327, intervention may nevertheless be denied if (1) the claim or defense of the petitioner is not in subordination to and in recognition of the action; or (2) the interest of the petitioner is already adequately represented; or; (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass, or prejudice the trial or adjudication of the rights of the parties. Pa.R.Civ.P. 2329. Here, Senator Costa does not intend to present any claim "not in subordination to and in recognition of the action." Pa.R.Civ.P. 2329. Here, Senator Costa's interests are not already adequately represented. Although District Attorney Krasner advances the same legal argument, he also advances others, and lacks Senator Costa's personal and official interest in protecting the appropriate boundaries of constitutional limits on legislative authority generally, as well as Senator Costa's personal and official interest in representing his constituents' interests vis-à-vis those boundaries and the specific subjects of this action. And here, Senator Costa has not unduly delayed in making application for intervention; rather, he has done so according to this Honorable Court's expedited scheduling order; and, upon information and belief, his intervention will not unduly delay, embarrass, or prejudice the trial or adjudication of the rights of the currently named parties. Thus, Senator Costa is entitled to intervene notwithstanding Pa.R.Civ.P. 2329.

CONCLUSION

At bottom, Senator Costa, as a member of the Senate, could have brought this action in the first instance, its resolution may well affect his authority as a legislator, and although other parties may have aligned legal arguments, his interests are not adequately represented by other parties. Accordingly, Senator Costa respectfully requests that this Honorable Court enter an order granting the Application to Intervene.

Respectfully submitted,

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APPENDIX B – MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW AND APPLICATION FOR SUMMARY RELIEF

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LARRY KRASNER, in his official capacity as the District Attorney of Philadelphia, *Petitioner* v. SENATOR KIM WARD, in her official capacity as Interim President Pro Tempore of the Senate; REPRESENTATIVE TIMOTHY R. BONNER, in his official capacity as an impeachment manager; REPRESENTATIVE JARED SOLOMON, in his official capacity as an impeachment manager; and JOHN DOES, in their official capacities as members of the Senate Impeachment Committee, *Respondents* v. SENATOR JAY COSTA, in his official capacity *Proposed Intervenor*	No. 563 M.D. 2022

MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW AND APPLICATION FOR SUMMARY RELIEF IN PART

AND NOW comes Intervenor Senator Jay Costa, via counsel, Corrie Woods, Esq., and submits this Memorandum In Support of Petition for Review and Application for Summary Relief In Part.

I. INTRODUCTION

In this original jurisdiction action, Petitioner Larry Krasner, in his official capacity as District Attorney of Philadelphia, alleges that the 206th General Assembly adopted resolutions advancing articles of impeachment against him to a pretrial posture, but that the advancement of the articles to trial would be unlawful for several reasons, including that the 206th General Assembly did not advance them to trial prior to its adjournment *sine die*, such that the unfinished legislative business regarding his impeachment, like all unfinished legislative business, is now a nullity, and seeks a declaratory judgment to that end. Because District Attorney Krasner is correct on this point, this Honorable Court should grant the requested declaratory judgment.

II. BACKGROUND

The background relevant to the issue presented herein is simple and undisputed. From October 26, 2022 to November 30, 2022, the chambers of the 206th General Assembly adopted resolutions advancing articles of impeachment against District Attorney Krasner to a pretrial posture. Most salient herein, the House exhibited articles of impeachment to the Senate; on November 29, 2022, the Senate adopted Senate Resolution 386, which provided for the President *pro tempore* to appoint a committee to conduct the trial; and, on November 30, 2022, the Senate adopted Senate Resolution 388, issuing a writ of impeachment directing

District Attorney Krasner to answer the articles of impeachment by December 21, 2022; and appear before the Senate on January 18, 2023 to answer therefor. But on November 30, 2022, at 11:59 p.m., the 206th General Assembly adjourned *sine die*.

III. LEGAL STANDARD

Where, as here, a party has filed a petition for review and application for summary relief, this Honorable Court should grant said relief "if the right of the applicant thereto is clear" – *i.e.*, where there is no genuine issue of material fact and the applicant is entitled to relief as a matter of law. Pa.R.A.P. 1532(b); *see Jubelirer v. Rendell*, 953 A.2d 514, 521 (Pa. 2008).

IV. ARGUMENT

The advancement of the articles to trial would be unlawful because the 206th General Assembly did not advance them to trial prior to its adjournment *sine die*, such that they, like all unfinished legislative business, are now a nullity.

At the risk of starting at Tinicum,[1] the legislative authority of the Commonwealth of Pennsylvania is reposited in the General Assembly. *See* Pa. Const., art. II, § 1 ("The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."); *see also* 101 Pa. Code § 7.1. However, this legislative authority is reconstituted and reposited into a new group of members composing

[1] Swedish Governor Johan Bjornsson Printz' construction of Fort Elfsborg and Fort Nya Gothenburg at Tinicum Island is generally recognized as the first permanent European settlement in Pennsylvania.

the General Assembly each December 1 after each general election. *See* Pa. Const., art. II, § 2 ("Members of the general assembly shall be chosen at the general election every second year. Their term of service shall begin on the first day of December next after their election."); Pa. Const., art. II, § 4 (providing that the General Assembly is "a continuing body during the term of which its Representatives are elected"); *see also* 101 Pa. Code. § 7.21(a) ("The General Assembly is a continuing body during the term for which its Representatives are elected which begins on December 1 of each even-numbered year and ends at the expiration of November 30 of the next even-numbered year.")[2]

The General Assembly as a body conducts legislative business at session within its members' terms. Each General Assembly begins its first regular session on the first Tuesday in January after each general election, and begins its second regular session on the first Tuesday in January after each municipal election. *See* Pa. Const., art. II, § 4; *see also* 101 Pa. Code § 7.21(a) ("Regular sessions are held annually and begin . . . on the first January of each year."); *id.* ("The regular session held in odd-numbered years is referred to as the first regular session and the regular session held in even-numbered years is referred to as the second regular

[2] Notably, the Pennsylvania Senate in this regard is distinct from the United States Senate. In Pennsylvania, Senators are elected to four-year terms in two classes, and, thus, a full quorum of the Senate never lasts more than two years, consistent with its status as a continuing body for those two years. *Accord* Pa. Const., art. II, §§ 2,3; 101 Pa. Code § 7.2. By contrast, members of the United States Senate are elected to six-year terms in three classes, and is a continuing body in perpetuity. This distinction makes analogies between the two bodies in terms of post-adjournment authority ill-conceived.

session."). Throughout this period, the General Assembly being a "continuing body," its legislative business remains active and pending. *See* 101 Pa. Code § 7.21(b) ("All matters pending before the General Assembly upon the adjournment *sine die* or expiration of a first regular session maintain their status and are pending before the second regular session."). But when the second regular session is adjourned *sine die* or expires at the end of November 30 after a general election of a new General Assembly, the constitutional nature of the body requires that all matters pending before the previous General Assembly are nullities: the previously continuing body is adjourned or lapses because legislative authority has been reconstituted in the newly elected General Assembly.[3] Indeed, nothing in the Constitution or the Pennsylvania Code suggests that any pending legislative business like that implicated herein "carries over" from one General Assembly to the next, and, notably, the Senate rules confirm that it does not. *See* Pa.Sen.R. 12(j) (providing that all "bills, joint resolutions, resolutions, concurrent resolutions, or other matters pending" do not maintain their status "beyond adjournment *sine die* or November 30th" of a general-election year, "whichever first occurs").

This basic constitutional governance structure is consistent with longstanding precedent recognizing that collective bodies which adjourn *sine die* or

[3] Conceivably, where a General Assembly's second regular session adjourns *sine die* prior to November 30, it might be called into special or extraordinary session before it expires. *See* Pa. Const., art. II, § 4; 101 Pa. Code § 7.22. Such a session is not implicated herein.

expire, as well as their subordinate committees and agents, lack the authority to take official action. *See, e.g.*, *Commonwealth v. Thompson*, 1896 WL 3895 at *2 (Ct. Quar. Sess. Venango Cnty. 1896) (noting that "courts of common law have the power to vacate judgment" until "adjourned *sine die*" or "until the call of the next session"); *Order of Solon v. Gaskill*, 43 A. 1085 (Pa. 1899) (noting that private corporation which "omitted to elect any new officers, and adjourned *sine die*" "ceased to exist," and that "[t]he meeting of a minority party the next day was without authority and all its acts were void"); *In re Crawford's License*, 33 Pa. Super. 338 (1907) (holding liquor-license court erred in granting post-adjournment application); *Commonwealth v. Costello*, 1912 WL 3913 (Ct. Quar. Sess. Phila. Cnty. 1912) (holding legislative committee which subpoenaed defendant lost authority to do so after adjournment *sine die*); *Brown v. Brancato*, 184 A. 89 (Pa. 1936) (holding legislative committee investigating Philadelphia Board of City Trusts lost authority to do so after adjournment *sine die*).

Costello and *Brown* are of particular significance here. In *Costello*, Costello was prosecuted for failing to comply with a Senate committee subpoena. *See Costello*, 1912 WL 3913 at *1. The Senate adopted a resolution providing for the appointment and operation of the committee on May 22, 1911. The committee subpoenaed Costello to attend a meeting on November 14, 1911. But the General Assembly adjourned *sine die* on May 25, 1911. *See id.* Costello argued that the

committee had lost authority to subpoena him when the General Assembly adjourned *sine die*, and the Court of Quarter Sessions agreed, holding that the prosecution was fundamentally infirm:

> Little need be said upon the second ground suggested by the demurrer for refusing to consider persons whose subpoena the defendant declined to obey as a committee of the Senate of Pennsylvania on Nov. 14, 1911, almost six months after the legislature had finally adjourned its session.
>
> It is settled law that a committee may, by the joint or concurrent resolution of the two branches of the legislature, be authorized and empowered to continue its sessions after the legislature's adjournment. This follows from the fact that the legislature, as a whole, is, in general, the depository of all the legislative power originally possessed by the people of this commonwealth, except so far as these have been ceded to the United States by the national constitution, or withheld by express exception in the state constitution.
>
> But, while the legislature as a unit is vested with whatever power of legislation has not been expressly denied to it, such is not the case with its constituent houses. Neither branch possesses any powers but those specifically granted to it by the constitution, and those powers implied as necessarily incident to the performance of its indicated functions in the general scheme of government.
>
> Even where, as in Pennsylvania, each house of the general assembly is clothed not only with the power to preserve order at its sessions, to control and discipline its members, and to provide against interference with them and their privileges through bribery, intimidation or violence, but also with "all other powers necessary to the legislature of a free state," it has never been supposed

> that the separate branches of the legislature have severally general legislative authority, or that, except in those particular cases defined by the constitution their respective powers rise beyond what is requisite to enable each to perform the specific duty allotted to it in the work of legislation.

Id. at *5-6 (citations omitted). Indeed, putting a finer point on it, the Court went on to explain that all outstanding legislative business, upon adjournment *sine die*, is concluded:

> An instance of the inherent auxiliary powers of each house of the legislature is seen in its right to order or permit its committees to sit during its recess. When, however, the session of the legislature has finally adjourned and ended, as did the general assembly of Pennsylvania on May 25, 1911, this is equivalent to the prorogation of parliament. **The functions of the legislature are then terminated. The conclusion of the session puts an end to all pending proceedings of a legislative character. Nothing thereafter remains to call into action any auxiliary legislative power.**

Id. at *6 (emphasis added); *see also id.* (quoting *Ex Parte Caldwell*, 55 S.E. 910, 911 (W.Va. 1906) ("If the powers of that branch are at an end, the powers of a committee appointed by it are also at an end. The limb cannot exist after the body has perished.")).

Similarly, in *Brown*, several directors of the Board of City Trusts of Philadelphia brought an action to restrain a House committee from investigating alleged misconduct, arguing that in light of the intervening adjournment of the General Assembly *sine die*, the committee now lacked any authority. *See Brown*,

184 A. at 90-91. Our Supreme Court agreed, reiterating the principle expressed in *Costello* that the adjournment deprived the committee of any continuing authority:

> Legislative power is vested in the General Assembly composed of the Senate and the House of Representatives. Members of the Senate are elected for four years, members of the House for two years. The Assembly shall meet in regular session on the first Tuesday of January every second year and at other times when convened by the Governor, but no adjourned annual session shall be held. No power is vested in the House to act independently of the Senate after the Assembly adjourns sine die. The Constitution contemplates the exercise of legislative power by concurrence of both House and Senate. The legislative action of the General Assembly, in virtue of the session which convened, as required by article 2, § 4, ended with its adjournment. **After adjournment, the power of this committee of the House, if it had any power before, was effectually ended. There is no implied power in the exercise of which the House may sit after adjournment of the Assembly, and therefore no power in the House to create a committee to do what the House itself may not do. From and after the adjournment, the power of the House complained of in this suit was done once and for all.**

Id. at 92-93 (citations omitted, footnote omitted).[4]

[4] The Court also cited a litany of extrajurisdictional decisions and treatises to that end. *See Brown*, 184 A. at 91 (citing *Tipton v. Parker*, 74 S.W. 298 (Ark. 1903); quoting *Ex Parte Caldwell*, 55 S.E. 910, 911 (W.Va. 1906); *State ex rel. Robertson Realty Co. v. Gilbert*, 78 N.E. 931 (Ohio 1906); *Dickinson v. Johnson*, 176 S.W. 116 (Ark. 1915); *Fergus v. Russell*, 110 N.E. 130 (Ill. 1915); *State v. Childers*, 215 P. 773 (Okla. 1923); *Ex parte Hague*, 147 A. 220 (Ct. Ch. N.J. 1929) *People ex rel. Hastings v. Hofstadter*, 180 N.E. 106 (N.Y. Ct. App. 1932); Jefferson's Manual (1876); Cushing's Law and Practice of Legislative Assemblies § 516 (1859); Hinds, Precedents of the House of Representatives, Vol. 4, § 4545).

Turning to the instant case, as detailed above, the 206th General Assembly was elected in November 2020. Its members began their terms on December 1, 2020. Its first regular session began on the first Tuesday in January 2021, and its second regular session began on the first Tuesday in January 2022. On the eve of, and then after, the general election of 2022, the House and Senate advanced articles of impeachment against District Attorney Krasner into a pretrial posture. The Senate adopted a resolution allowing for the appointment of a committee to try them. But it did not appoint the committee or try them. And on November 30, the 206th General Assembly adjourned *sine die* and lapsed by operation of law to make way for the 207th General Assembly. At that moment, the 206th General Assembly, and, by extension, all of its pending bills, resolutions, or other legislative matters, including the rules and articles adopted by resolution of the separate bodies, became nullities. *Accord Costello*, 1912 WL 3913 at *6 ("[T]he conclusion of the session puts an end to all pending proceedings of a legislative character. Nothing thereafter remains to call into action any auxiliary legislative power.") As a result, the authority to form a committee to try the articles, the authority District Attorney Krasner, to answer to them, and the authority to try the articles, are likewise null. *Accord Brown*, 184 A. at 92-93. ("After adjournment, the power of this committee of the House, if it had any power before, was effectually ended. There is no implied power in the exercise of which the House may sit after adjournment of the

Assembly, and therefore no power in the House to create a committee to do what the House itself may not do. From and after the adjournment, the power of the House complained of in this suit was done once and for all.").

V. CONCLUSION

In short, the legislative power of the Commonwealth is vested in the General Assembly, and, by extension, its chambers and their committees. But when one General Assembly adjourns to make way for another, its unfinished work goes undone. Because the 206th General Assembly's efforts to impeach District Attorney Krasner did not come to fruition while it held legislative power, they can no longer provide authority to do so. Accordingly, and in light of all the foregoing, Senator Costa respectfully requests that this Honorable Court enter an order declaring that advancing the articles of impeachment to trial would be unlawful, or granting such other relief as it deems just and proper.

Respectfully submitted,

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