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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, *et al*. *Respondents.*	Docket No. 563 MD 2022

BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS OF RESPONDENTS REPRESENTATIVE TIMOTHY R. BONNER AND REPRESENTATIVE CRAIG WILLIAMS TO PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT

Lawrence F. Stengel (ID No. 32809)
William C. Costopoulos (ID No. 22354)
Robert A. Graci (ID No. 26722)
Carson B. Morris (ID No. 208314)
Emily M. Bell (ID No. 208885)
SAXTON & STUMP, LLC
280 Granite Run Drive, Suite 300
Lancaster, PA 17601
Telephone: (717) 556-1000
Facsimile: (717) 441-3810

Attorneys for Respondents Representative Timothy R. Bonner and Representative Craig Williams

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I. INTRODUCTION

On December 2, 2022, Philadelphia District Attorney Larry Krasner ("Petitioner") filed a Petition asking this Court to grant him declaratory relief stopping the impeachment proceedings pending against him in the Pennsylvania General Assembly. Those impeachment proceedings were lawfully initiated when a majority of the members of the Pennsylvania House of Representatives voted to pursue seven Articles of Impeachment against Petitioner Krasner, determining that he had committed misbehavior in office, which is the Constitutional standard for impeachment, in the course of carrying out his duties as the District Attorney of Philadelphia. Rather than answering the Articles of Impeachment on the merits and in the proper forum, Petitioner Krasner now asks this Court to assist him in making an end run around the impeachment proceedings, which are the legitimate business of the legislative, not judicial, branch; are expressly authorized by our Constitution; and, importantly, have yet *to even be conducted*.

This Court should decline Petitioner Krasner's request to enter into this process, as the only issues he raises are nonjusticiable, involving political questions or matters that are neither ripe nor the basis of any case or controversy that presently could be adjudicated by this Court. Petitioner Krasner's request for declaratory relief should be seen for what it is: a misguided effort to circumvent

his impeachment trial and avoid answering the Articles of Impeachment pending against him.

To be sure, Petitioner Krasner will have every opportunity to answer for and defend his conduct in the impeachment trial, but he must do so in *that* forum, and not through this tribunal.

The Court should dismiss Mr. Krasner's Petition in its entirety.

II. STATEMENT OF JURISDICTION

Respondents object to this Court's exercise of jurisdiction because "the courts have no jurisdiction in impeachment proceedings and no control over their conduct, so long as actions taken are within constitutional lines," as they have been (and will continue to be) here. *See Larsen v. Senate of Pennsylvania,* 646 A.2d 694, 699 (Pa. Commw. 1994) (quoting *Dauphin Cnt'y Grand Jury Investigation Proceeding (No 2)*, 2 A.2d 802, 803 (Pa. 1938)).

III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

In ruling on preliminary objections, the Court must "accept as true all well-pleaded material allegations in the petition for review and any reasonable inferences that . . . may [be] draw[n] from the averments." *Highley v. Dep't of Transportation*, 195 A.3d 1078, 1082 (Pa. Commw. 2018). A court should sustain

preliminary objections "when the law makes clear that the petitioner cannot succeed on his claim[.]" *Id.* A court's review of preliminary objections is limited to the pleadings and all inferences reasonable deducible therefrom. *Pennsylvania State Lodge, Fraternal Order of Police v. Com., Dep't of Conservation & Nat. Res.*, 909 A.2d 413, 415 (Pa. Commw. 2006).

IV. STATEMENT OF THE QUESTIONS INVOLVED

No. 1: Should this Honorable Court dismiss Claim I (on the continuation of impeachment proceedings form one General Assembly to the next) and Claim III (on whether the Articles allege conduct constituting "misbehavior in office") as nonjusticiable under the political question doctrine?

Suggested answer: Yes.

No. 2: Should this Honorable Court dismiss the Petition in its entirety for lack of standing for failure to allege any legally cognizable harm?

Suggested answer: Yes.

No. 3: Should this Honorable Court dismiss Claim II (on whether the office of the district attorney is within the reach of the General Assembly's impeachment power) and Claim III (on whether the Articles allege conduct constituting "misbehavior in office") because they are not (and may never be) ripe for adjudication, as Petitioner's impeachment trial has not even begun?

Suggested answer: Yes.

V. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On December 2, 2022, Petitioner Krasner filed his Petition for Review in the Nature of a Complaint for Declaratory Judgment ("Petition"). The Petition seeks declaratory relief only on the basis of three claims, which (as articulated by Petitioner Krasner) assert that Petitioner Krasner is not subject to impeachment because: (1) the Amended Articles of Impeachment do not survive the Adjournment of the legislative session *sine die* (Claim I); (2) the Pennsylvania Constitution does not authorize the General Assembly to impeach a locally elected official like the Philadelphia District Attorney, and (3) Petitioner Krasner is not alleged to have engaged in any "misbehavior in office" as that term is used in Article VI, § 6 of the Constitution.

Also on December 2, 2022, Petitioner Krasner filed an Application for Summary Relief and Expedited Briefing ("Application") and supporting brief. In his Application, Petitioner Krasner seeks summary relief on the three claims that he asserts in his Petition.

On December 6, 2022, this Court issued an Order granting Petitioner Krasner's Application in part (limited to the request for expedited briefing) and established a schedule for*, inter alia*, pleadings in response to the Petition,

applications for leave to intervene, briefs in opposition to the Application, cross-motions for summary relief, and argument on the Application.

Respondents Bonner and Williams have filed timely preliminary objections to the Petition (due December 12, 2022) and submit this brief in support of those objections.[1]

B. RELEVANT FACTS

On November 16, 2022, the Pennsylvania House of Representatives passed House Resolution 240, as amended, which contains the following seven Articles of Impeachment ("Articles") against Petitioner Krasner:

> Article I: Misbehavior in Office In the Nature of Dereliction of Duty and Refusal to Enforce the Law
>
> Article II: Misbehavior in Office In the Nature of Obstruction of House Select Committee Investigation
>
> Article III: Misbehavior in Office In the Nature of Violation of the Rules of Professional Conduct and Code of Judicial Conduct; specifically Rule 3.3 Candor Toward the Tribunal, Rule 8.4 Professional Misconduct, and Canon 2 of the Code of Judicial Conduct Impropriety

[1] While it is Respondents' position that there are ample grounds for dismissing the Petition as nonjusticiable, as set forth in their Preliminary Objections and this brief, Respondents also intend, in accordance with the schedule set forth in this Court's Order of December 6, 2022, to address the merits of Petitioner's arguments in accordance with the Court's requirement that briefs in opposition to the Application be filed no later than December 16, 2022. It is respectfully submitted, however, that the Court need not reach the merits and, indeed, should refrain from doing so for the reasons set forth in Respondents' Preliminary Objections and herein.

> and Appearance of Impropriety in the Matter of *Robert Wharton v. Donald T. Vaughn*
>
> Article IV: Misbehavior In Office In the Nature of Violation of the Rules of Professional Conduct; specifically Rule 3.3 Candor Toward the Tribunal, Rule 8.4 Professional Misconduct, and Canon 2 of the Code of Judicial Conduct Impropriety and Appearance of Impropriety in the Matter of *Commonwealth v. Pownall*
>
> Article V: Misbehavior in Office In the Nature of Violation of the Rules of Professional Conduct and Code of Judicial Conduct; specifically Rule 3.3 Candor to Tribunal, Rule 8.4 Professional Misconduct, and Canon 2 of the Code of Judicial Conduct Impropriety and Appearance of Impropriety In the Matter In re: Conflicts of Interest of Philadelphia District Attorney's Office
>
> Article VI: Misbehavior in Office in Nature of Violation of Victims [sic] Rights
>
> Article VII: Misbehavior In Office In the Nature of Violation of the Constitution of Pennsylvania By Usurpation of the Legislative Function

See Petition ¶¶ 24-26, 28, including Exhibit C, House Resolution No. 240, as amended (Nov. 16, 2022) ("HR 240").[2]

On November 18, 2022, consistent with the requirements of HR 240, Speaker of the House of Representatives Bryan D. Cutler appointed House Representatives Timothy R. Bonner, Craig Williams, and Jared Solomon to the

[2] The Constitution of the Commonwealth of Pennsylvania confers on the House of Representatives "the sole power of impeachment." Pa. Const. art. VI, § 4.

committee responsible for managing the impeachment trial against Petitioner Krasner. *See* Petition ¶¶ 27, 30.

On November 29, 2022, the Pennsylvania Senate adopted a resolution establishing rules of practice and procedure for impeachment trials and a second resolution providing for the appointed House floor managers (Representatives Bonner, Williams, and Solomon) to exhibit the Articles to the Senate the following day. *See* Petition ¶¶ 31-32, including Exhibit D, Senate Resolution No. 386, Printer's No. 2020 (Nov. 29, 2022) ("SR 386") and Exhibit E, Senate Resolution No. 387, Printer's No. 2021 (Nov. 29, 2022).

On November 30, 2022, the Pennsylvania Senate adopted a resolution directing that a Writ of Impeachment Summons be issued and served on Petitioner Krasner by December 7, 2022 (if possible) and that the Writ command that Petitioner Krasner file an Answer to the Articles by December 21, 2022 and appear before the Senate on January 18, 2023 to answer to the Articles. *See* Petition ¶ 33, including Exhibit F, Senate Resolution No. 388, Printer's No. 2023 (Nov. 30, 2022).

On November 30, 2022, the Writ of Impeachment Summons was signed by the President Pro Tempore of the Senate, Jacob D. Corman, III, and the Secretary of the Senate, Megan L. Martin, for service on Petitioner Krasner. *See* Petition ¶

36, including Exhibit G, Precept to the Sergeant-at-Arms and Writ of Impeachment Summons (Nov. 30, 2022).

In accordance with the Writ of Impeachment Summons, Petitioner Krasner's Answer to the Articles is not due until December 21, 2022, and the start of trial in the Senate[3] is more than a month away.

Instead of proceeding in accordance with the lawfully issued Writ of Impeachment Summons, Petitioner Krasner now asks this Court to intervene to stop the impeachment proceedings on his behalf.

Petitioner Krasner advances three main arguments: (1) the impeachment trial cannot proceed because impeachment proceedings do not carry over from the 206th General Assembly in which the Articles were passed and exhibited to the Senate (and which ended on November 30, 2022) to the current 207th General Assembly; (2) Article VI, § 6 of the Pennsylvania Constitution, which provides for impeachment of "civil officers," does not authorize the impeachment of a district attorney, and (3) the Articles do not allege impeachable conduct constituting "misbehavior in office" under Article VI, § 6.

Respondents herein, Representatives Bonner and Williams, submit that the Petition is not properly before this Court because: (1) Petitioner Krasner

[3] Pennsylvania's Constitution provides that "[a]ll impeachments shall be tried by the Senate." Pa. Const. art. VI, § 5.

challenges matters or actions that are within the exclusive jurisdiction and province of the General Assembly, such that the Court's intervention would violate the separation of powers doctrine; (2) Petitioner Krasner lacks standing, as he has suffered no harm to date (and, indeed, has not even alleged any redressable harm); and/or (3) Petitioner's claims are not (and may never be) ripe for judicial review.

VI. ARGUMENT

A. This Court should grant Respondents' preliminary objections and dismiss the Petition in its entirety because the matters it raises are not justiciable or fail to allege any case or controversy.

Challenges raising the foundational matters of political questions, standing, and ripeness arise under the body of caselaw governing "the general notions of case or controversy and justiciability." *Rendell v. Pennsylvania State Ethics Comm'n*, 983 A.2d 708, 717 (Pa. 2009).[4] Because they call into question the Court's jurisdiction and authority to act, "[i]ssues of justiciability are a threshold matter" to be "resolved before addressing the merits" of any dispute. *Robinson Twp., Washington Cnty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013) (citing *Council 13, Am. Fed. of State, Cnty. & Mun. Emps., AFL-CIO v. Com.*, 986 A.2d 63, 74 n.10 (Pa. 2009)).

[4] Unless otherwise indicated, all additional citations are omitted.

Justiciability questions are properly raised in "preliminary objections to a petition for review filed in the original jurisdiction of the Commonwealth Court[.]" *Robinson Twp.*, 83 A.3d at 917.

1. Petitioner's first and third claims inappropriately ask this Court to intervene in nonjusticiable legislative matters in violation of the separation of powers doctrine.

"The political question doctrine derives from the principle of separation of powers which . . . is implied by the specific constitutional grants of power to, and limitations upon, each co-equal branch of the Commonwealth's government." *Robinson Twp.*, 83 A.3d at 926-27. The separation of powers "is essential to our triparte governmental framework"—consisting of the legislative, executive, and judicial branches—as it "prevents one branch of government from exercising, infringing upon, or usurping the powers of the other two branches." *Renner v. Ct. of Common Pleas of Lehigh Cnty.*, 234 A.3d 411, 419 (Pa. 2020); *see also Zemprelli v. Daniels,* 436 A.2d 1165, 1168 (Pa. 1981) (quoting *Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977) for the principle that "no branch should exercise the functions exclusively committed to another branch").

Although, as this Court has observed, "nonjusticiable cases do not come already labeled with a 'Keep Off' sign to keep the courts at a distance," *Larsen v. Senate of Pennsylvania,* 646 A.2d 694, 700 (Pa. Commw. 1994), the political question doctrine is implicated when, among other triggers, there is "a textually

demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it[.]"[5] *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); *see also Robinson Twp.*, 83 A.3d at 928 (citing and relying on *Baker*, 369 U.S. at 217). "Courts will not review actions of another branch of government where political questions are involved because the determination of whether the action taken is within the power granted by the constitution has been entrusted exclusively and

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[5] In *Baker v. Carr*, the Court set forth the following factors to guide the political question analysis:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). The presence of any one *Baker* factor has warranted abstention under the political question doctrine. *Id.*; *Blackwell v. City of Philadelphia*, 684 A.2d 1068, 1071 (Pa. 1996); *Zemprelli*, 436 A.2d at 1169. Our Supreme Court has recognized, however, that "prudential" concerns inform Pennsylvania law on the political question doctrine and that each case must be considered anew. *See William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 463 (Pa. 2017) ("[T]he political question doctrine in Pennsylvania is of wholly prudential cloth, and hence must be considered anew each time it is invoked.").

finally to political branches of government for self-monitoring." *Blackwell*, 684 A.2d at 1071.

Accordingly, where—as Petitioner Krasner has here—a party presents "a challenge to legislative power which the Constitution commits exclusively to the legislature," the matter constitutes a "non-justiciable political question" that is not properly before a court of law. *Id.* Specifically, Petitioner Krasner raises political questions in his pleas for declaratory relief challenging both the continuation of the impeachment proceedings against him from one General Assembly to the next (Claim I) and whether he has committed impeachable conduct constituting "misbehavior in office" (Claim III).

a. It is exclusively for the General Assembly to decide, as a procedural matter, whether impeachment proceedings are continuing in nature.

The Commonwealth's Constitution vests legislative power in the General Assembly, which comprises the Senate and the House of Representatives, Pa. Const. art. II, § 1, and grants each of those bodies the "power to determine the rules of its proceedings." *Id.* § 11. The General Assembly's legislative power is both exclusive and, unless limited by the Constitution, plenary. *See Killam v. Killam*, 39 Pa. 120, 123 (Pa. 1861) (where "our constitution is silent on [a] subject the legislative power is plenary"); *see also Com. v. Keiser*, 16 A.2d 307, 310 (Pa.

1940) ("[P]owers not expressly withheld from the Legislature inhere in it, and this is especially so when the Constitution is not self-executing.").

Especially relevant here, the Constitution confers on the House of Representatives "the sole power of impeachment," Pa. Const. art. VI, § 4 (emphasis added), and provides that "[a]ll impeachments shall be tried by the Senate." *Id.* § 5 (emphasis added). Impeachment proceedings are thus clearly the domain of the General Assembly, and absent any provision in our Constitution prohibiting such proceedings from carrying over from one General Assembly to the next (there is none), it is within the rulemaking power of the House and Senate to prescribe how such proceedings are to be carried out. *See id.* art. II, § 11.

Accordingly, it is not for this Court to offer or substitute its own judgment. *See Maurer v. Boardman*, 7 A.2d 466, 472-73 (Pa. 1939) ("There is no appeal to the courts from the judgment of the legislature as to the wisdom or policy which the Commonwealth shall adopt.").

While the foregoing, without more, is sufficient to end the inquiry on Petitioner's first claim, it is worth noting that a rule in fact exists that permits impeachment proceedings to carry over from one General Assembly to the next. Jefferson's Manual[6]— which the House Rules explicitly endorse as

[6] Jefferson's Manual was prepared by Thomas Jefferson during his Vice Presidency from 1797 to 1801 for his own guidance as President of the Senate.

authoritative[7]—unequivocally provides that "impeachment proceedings are not discontinued by a recess" (*i.e.,* adjournment). Jefferson's Manual, § 620 (emphasis added) (attached to Respondents' preliminary objections as Exhibit 1).[8] While Petitioner Krasner cites other provisions of Article II and Pennsylvania regulations on the length of General Assembly sessions, *see* Petition ¶¶ 42-44, he merely cobbles them together, providing a strained reading designed to support his own narrative. On review, nothing in those provisions prohibits the continuation of impeachment proceedings from one General Assembly to the next or limits the impeachment and procedural rulemaking powers that the Constitution confers on the General Assembly.

Further, the *absence* of statutory authority permitting impeachment proceedings from carrying over from one General Assembly to the next, *see* Petition ¶ 45, likewise fails to advance Petitioner's position. There is ample

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[7] Pennsylvania House Rule 78, Parliamentary Authority, provides: "Mason's Manual supplemented by Jefferson's Manual of Legislative Procedure shall be the parliamentary authority of the House, if applicable and not inconsistent with the Constitution of Pennsylvania, the laws of Pennsylvania applicable to the General Assembly, the Rules of the House, the established precedents of the House and the established customs and usages of the House." *See* https://www.house.state.pa.us/rules/DisplayRules.cfm?Rules=2013HouRules.htm (last visited December 12, 2022).

[8] Section 620 cites five examples of impeachment proceedings that have carried over from one United States Congress to the next. Although they involve federal impeachments, Jefferson's Manual is relevant to state impeachment proceedings by operation of House Rule 78.

affirmative authority—first in the Constitution's bestowal of impeachment power on the General Assembly, and second in Jefferson's Manual—to support the conclusion that the continuation of impeachment proceedings is a matter to be taken up (if at all) within the legislative branch.

Simply put, impeachment is a political process constitutionally committed to the General Assembly, which the courts should not review. *See Nixon v. U.S.*, 506 U.S. 224, 228-38 (1993) (holding that challenge to federal impeachment trial received by Senate committee rather than full Senate was a nonjusticiable question); *Dauphin Cnt'y Grand Jury Investigation Proceeding (No 2)*, 2 A.2d 802, 803 (Pa. 1938) ("[T]he courts have no jurisdiction in impeachment proceedings, and no control over their conduct, so long as actions taken are within constitutional lines. . . . The courts cannot stay the legislature[.]"); *Larsen*, 646 A.2d at 703-04 (noting that state and federal constitutional provisions are nearly identical and concluding that it is "within the exclusive power of the Senate to conduct impeachment trial proceedings" and that impeachment procedures employed by the Senate "cannot be invaded by the courts").

Consistent with the United States Supreme Court's opinion in *Nixon*, which turned on a detailed and thorough analysis of the federal Constitution's analogous and unquestionable assignment of impeachment powers to the legislature, this Court should decline to intervene in this matter. *See Nixon,* 506 U.S. at 228-38.

For these reasons, Petitioner Krasner's challenge to the continuing nature of the impeachment proceedings against him should be dismissed.

b. It is likewise exclusively for the General Assembly to determine whether Petitioner has committed impeachable conduct constituting "any misbehavior in office."

As set forth above, the plain text of Article VI confers the power of impeachment exclusively to the General Assembly. *See* Pa. Const. art. VI, § 4 (bestowing the "sole" power of impeachment on the House), § 5 (committing all impeachments to trial by the Senate). Implicit in this grant of authority is the political question of whether a civil officer's conduct rises to the level of "any misbehavior in office" warranting impeachment. *See id.* § 6 ("The Governor and all other civil officers shall be liable to impeachment for any misbehavior in office[.]").

That question, as to what constitutes "misbehavior in office," is for the General Assembly, and it alone; whether a civil officer has committed impeachable conduct constituting "any misbehavior in office" is a political question that this Court also should decline to review. *See Nixon*, 506 U.S. at 228-38; *Dauphin Cnt'y Grand Jury Investigation Proceeding (No 2)*, 2 A.2d at 803; *Larsen*, 646 A.2d at 703-04.

Determining what conduct rises to the level of "any misbehavior in office" warranting impeachment is a policy question that courts are ill-equipped to define.

See Baker, 369 U.S. at 217 (noting political question factors, including lack of judicially discoverable and manageable standards for resolving it, the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion, and the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government).[9]

For these reasons, Petitioner Krasner's challenge to whether he has been accused of impeachable conduct constituting "any misbehavior in office" is a political question not appropriately before this Court.

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[9] Indeed, what conduct rises to the level of an impeachable offense is widely regarded as a political question reserved for the legislature. *See* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 795 (1833) ("Again, there are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offences are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it."); *see also* Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 Duke L.J. 231, 263-64 (1994) ("The question in . . . [an impeachment] proceeding is whether an impeachable officer is fit to preserve the public trust and therefore to remain in office. In other words, impeachment is a special disciplinary mechanism for special officials. The specific procedural protections given to the subjects of an impeachment are spelled out in the Constitution, including the division of impeachment authority between the House and the Senate and the requirements that senators act under oath, … and that at least two-thirds of the senators present agree in order to convict. Treating impeachments as sui generis is consistent with the absence of any evidence that the Fifth [or Fourteenth] Amendment, including the Due Process Clause, was ever intended to apply to the impeachment process.") (footnotes omitted).

2. The Petition should be dismissed in its entirety, as Petitioner lacks standing to challenge impeachment proceedings that have yet to occur.

"In seeking judicial resolution of a controversy, a party must establish as a threshold matter that he has standing to maintain the action." *Stilp v. Com., Gen. Assembly*, 940 A.2d 1227, 1233 (Pa. 2007). "A challenge to the standing of a party to maintain the action raises a question of law." *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009). To establish standing, a party must "demonstrate that he has been aggrieved" by the matter at hand, and to do this, the party must establish, *inter alia,* that "he has a . . . direct . . . interest in the outcome of the litigation." *Id.*

An interest is "direct" only where the party demonstrates that the conduct complained of caused him legally cognizable harm. *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005). Stated differently, "[t]he keystone to standing . . . is that the person must be negatively impacted in some real and direct fashion." *Id.*

Consistent with this, a plaintiff seeking relief under the Declaratory Judgments Act, 42 Pa. C.S. § 7531, *et seq.*, must demonstrate direct or imminent harm. *See Cnty. Comm'rs Ass'n of Pennsylvania v. Dinges*, 935 A.2d 926, 931 (Pa. Commw. 2007).

While Petitioner Krasner generally alleges that the impeachment proceedings against him are "unlawful," nowhere does he actually assert that he

has been aggrieved, let alone describe how. Indeed—while speculation about future harm would be insufficient to confer standing, *see Kauffman v. Osser*, 271 A.2d 236, 239 (Pa. 1970)—he does not even allege how he *might* suffer any possible harm.[10]

All that has happened to date is that Petitioner Krasner has been timely served with Articles of Impeachment and given the opportunity to answer to those Articles (first in writing, later this month, and then again during his impeachment trial scheduled to begin January 18, 2023)—nothing more.

To the extent that Petitioner Krasner believes that the proceedings against him are "unlawful," he will have the opportunity to make his case, defend himself, and avail himself of the various protections offered in the context of the trial before the Senate.[11] As the Constitution requires, it is in the Senate, and not in this Court,

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[10] In fact, it is difficult to imagine how Petitioner Krasner *could* suffer legally cognizable harm with regard to some of the points that he challenges. On the matter of the continuation of impeachment proceedings from one General Assembly to the next, for example, it is hard to conceive any possible harm. If the perceived "harm" (and, again, Petitioner Krasner has articulated none) is that Petitioner Krasner must defend himself in the impeachment trial (should he so choose), that is no harm at all; it is simply the operation of a legitimate process that is enshrined in our Constitution to serve as a check against abuses by government officials. To the extent conviction and removal is the harm he might suffer, that outcome is neither direct or imminent; it is speculative, and inadequate to confer standing.

[11] For example, Petitioner Krasner will have the opportunities, *inter alia*, to appear and be heard; to be represented by counsel of his choosing; to seek and obtain rulings on procedural and trial-related matters; to make opening and closing

that Petitioner Krasner must seek redress. *See Larsen,* 646 A.2d at 703-04 (it is "within the exclusive power of the Senate to conduct impeachment trial proceedings" and "courts cannot intervene with respect to procedure internal to the legislative body"); *cf. GGNSC Clarion LP v. Kane*, 131 A.3d 1062, 1069 (Pa. Commw. 2016), *aff'd*, 152 A.3d 983 (Pa. 2016) (where issues complained of in a declaratory judgment action could be raised and addressed in the context of a pending enforcement action by the Office of Attorney General, the declaratory judgment action was moot).[12]

3. Petitioner's second and third claims, effectively seeking pre-trial rulings on whether a district attorney is beyond the reach of impeachment and the sufficiency of the impeachment charges, do not present any actual case or controversy ripe for judicial review.

"A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic." *Gulnac v. S. Butler Cnty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991). *See also Pennsylvania State Lodge of Fraternal Order of Police by Bascelli v.*

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statements; and to examine and cross-examine witnesses. *See* SR 386, Petition at Exhibit D.

[12] While *GGNSC Clarion* was decided in the context of a motion to dismiss for mootness, the point is essentially the same: Petitioner Krasner's concerns are amenable to resolution and should be addressed in the impeachment forum, not by this Court.

Com., 571 A.2d 531, 533 (Pa. Commw. 1990), *aff'd,* 591 A.2d 1054 (Pa. 1991) ("Declaratory judgment is not appropriate to determine rights in anticipation of events which may never occur; it is an appropriate remedy only where a case presents antagonistic claims indicating imminent and inevitable litigation."). Under the doctrine of ripeness, "[w]here no actual controversy exists, a claim is not justiciable and a declaratory judgment action cannot be maintained." *Cherry v. City of Philadelphia*, 692 A.2d 1082, 1085 (Pa. 1997).

Even if this Court were inclined to consider the breadth of the definition of "civil officer" or the scope of the phrase "any misbehavior in office" in Article VI, § 6, those issues are not ripe for resolution.

No Pennsylvania Court has ever intervened in an ongoing impeachment proceeding to preemptively rule on questions that the Senate has not yet adjudicated. At this stage in the proceedings, the only questions fairly before this Court are whether the General Assembly has authority for the power it has exercised, and whether it has exercised that authority within the bounds of the Constitution. *See Larsen,* 646 A.2d at 703.

As an initial matter, this Court has already ruled that the impeachment process "is committed by the Constitution to the Senate of Pennsylvania to an extent which clearly bars the courts from intervening with prior restraint." *Id.* at 705. Therefore, "regardless of whatever powers the courts may have to interpret

actions of the legislative body, by way of review, after they have been taken," courts have no power to intervene "in advance of legislative action, any more than a court would have any power to enjoin, in advance, the enactment of a law appearing (to the courts) to be constitutionally invalid."[13] *Id.*; *cf. Sweeney*, 375 A.2d at 708 (noting the question of justiciability was a close call, but reviewing the expulsion of a member of the state House of Representatives on a claim of due process rights violation *after* the contested action had occurred).

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[13] With respect to his third claim, Petitioner Krasner's heavy reliance on *In re Braig*, 590 A.2d 284 (Pa. 1991) is misplaced. That case did not involve impeachment under Article VI. Rather, *Braig* addressed the phrase "convicted of misbehavior in office" under Article V, § 18(*l*); thus, the *Braig* Court's commentary on the language of other Constitutional provisions is dicta, and it is not binding on this Court. *See In re Braig*, 590 A.2d at 287-88 (comparing language of Article V, § 18(*l*) to removal provision in Article VI, § 7 and summarizing prior cases on the removal provision, involving *ex post* challenges to whether an officer's removal was based on a conviction that constituted a "conviction of misbehavior in office"). The same is true for all the cases Petitioner Krasner cites on this issue, which largely involve challenges to removal proceedings. Whatever persuasive value those cases might have in construing convictions under Article VI's removal provision, those cases did not involve impeachment proceedings, and the Court had no occasion to consider the serious nonjusticiability issues addressed herein.

Importantly, *Larsen* is the only recent Pennsylvania case involving an impeachment proceeding. As Petitioner Krasner acknowledges, *Braig* was decided three years prior to this Court's decision in *Larsen*, yet the *Larsen* Court does not rely on it. *See id.* at 702 (noting petitioner's proposed definition of "misbehavior in office," which the Court did not adopt, and concluding that it "finds no support in judicial precedents"). That is because impeachment and removal are two distinct processes under Article VI.

Although courts decline to review the actions of another branch in cases involving political questions, the Supreme Court has explained that "[a] political question is not involved when a court concludes that another branch acted within the power conferred upon it by the Constitution," reasoning:

> In such cases . . . the court does not refuse judicial review; it exercises it. It is not dismissing an issue as nonjusticiable; it adjudicates. It is not refusing to pass upon the power of the political branches; it passes upon it, only to affirm that they had the power which had been challenged and that nothing in the Constitution prohibited the particular exercise of it.

Sweeney, 375 A.2d at 705 (quoting Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597, 606 (1976)).

Thus, at this stage, the sole questions before the Court are: (1) whether the House has the authority to initiate impeachment proceedings, and (2) whether the Senate has the authority to try Petitioner's Krasner's impeachment proceedings. In accordance with Article VI, §§ 4-5, the answer to both questions is undoubtedly yes: the House has the sole authority to impeach; and the Senate has the sole authority to try the impeachment proceeding.

Petitioner is not entitled to ex ante judicial determinations on whether the district attorney's office is beyond the reach of impeachment or on the sufficiency of the impeachment charges or the likelihood of conviction. *See People ex rel. Robin v. Hayes*, 143 N.Y.S. 325, 330 (Sup. Ct. 1913) ("[A court] has no jurisdiction to inquire into the sufficiency of charges for which a Governor may be

impeached, nor, I take it, whether the proceedings looking to that end were properly conducted, unless at their foundation, in their exercise, constitutional guaranties are broken down or limitations ignored.") (citing Story on Const. Law, §§ 374 and 379)); *see also Larsen*, 646 A.2d at 696, 704 (rejecting the petitioner's request to intervene and order the Senate to rule on pretrial motions, which included a motion for dismissal, arguing that articles of impeachment failed to state an impeachable offense). Indeed, Petitioner cites no case to support his unprecedented claim that this Court should insert itself in an ongoing impeachment proceeding.

This Court in *Larsen* expressly cautioned courts against intervening ex ante to rule on impeachment matters that the Senate has not had the opportunity to adjudicate. *See Larsen*, 646 A.2d at 695, 705 (considering "first-impression question as to whether there can be judicial intervention in advance, to bar the state Senate from proceeding with the impeachment trial, on the basis that violations of constitutional rights are threatened," and concluding that the impeachment process "is committed by the Constitution to the Senate of Pennsylvania to an extent which clearly bars the courts from intervening with prior restraint"). In that regard, this case is no different: Petitioner's impeachment proceeding is ongoing, and any legal arguments about whether he is subject to the charges or their sufficiency are properly directed to the Senate. Thus, as in *Larsen*, the Court should deny

Petitioner's extraordinary request for what amounts to prior restraint on the Senate's exclusive power to try impeachment proceedings.

WHEREFORE, Respondents herein respectfully request that this Honorable Court dismiss the second and third claims in the Petition with prejudice for lack of ripeness.

VII. CONCLUSION

Petitioner Krasner seeks a truly extraordinary remedy: he asks this Court to intervene to insulate him from an impeachment trial that has yet to begin; no court has done so in the history of our Commonwealth. He asks this Court to opine on the propriety of the impeachment charges against him and to dictate the Senate's pre-trial procedures in impeachment proceedings that our Constitution commits exclusively to the General Assembly. Even if the Court were to disagree, it is not for the Court to substitute its judgment for that of the policymaking branch responsible for impeachment proceedings. Petitioner Krasner cannot prevail on threshold justiciability requirements, and the Court should not overlook those shortcomings.

SAXTON & STUMP, LLC

Dated: December 12, 2022 By: */s/ Lawrence F. Stengel*

Lawrence F. Stengel (ID No. 32809)
William C. Costopoulos (ID No. 22354)
Robert A. Graci (ID No. 26722)
Carson B. Morris (ID No. 208314)
Emily M. Bell (ID No. 208885)
280 Granite Run Drive, Suite 300
Lancaster, PA 17601
Telephone: (717) 556-1000
Facsimile: (717) 441-3810
lfs@saxtonstump.com
wcc@saxtonstump.com
rag@saxtonstump.com
cbm@saxtonstump.com
emb@saxtonstump.com

Attorneys for Respondents Representative Timothy R. Bonner and Representative Craig Williams

PUBLIC ACCESS POLICY CERTIFICATION

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

CERTIFICATE OF WORD COUNT COMPLIANCE

I, Lawrence F. Stengel, hereby certify that the foregoing brief, excluding the cover page, table of contents, table of citations, proof of service, and signature block, contains 6,000 words, as calculated by the word count function of the word processing system used to prepare the brief, and complies with Pa. R.A.P. 2135.

SAXTON & STUMP, LLC

Dated: December 12, 2022 By: */s/ Lawrence F. Stengel*

Lawrence F. Stengel (ID No. 32809)
280 Granite Run Drive, Suite 300
Lancaster, PA 17601
Telephone: (717) 556-1000
Facsimile: (717) 441-3810
lfs@saxtonstump.com

Attorneys for Respondents Representative Timothy R. Bonner and Representative Craig Williams

CERTIFICATE OF SERVICE

I, Lawrence F. Stengel, certify that, on this date, I filed the foregoing Brief in Support of Preliminary Objections of Respondents Representative Timothy R. Bonner and Representative Craig Williams to Petition for Review in the Nature of a Complaint for Declaratory Judgment electronically and also served a certified true and correct copy upon the following counsel of record by depositing the same in the United States mail, postage prepaid, addressed as follows:

John S. Summers, Esquire
Andrew M. Erdlen, Esquire
HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
Counsel for Petitioner

Michael J. Satin, Esquire
Timothy P. O'Toole, Esquire
Andrew T. Wise, Esquire
MILLER & CHEVALIER CHARTERED
900 16th Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

Matthew H. Haverstick, Esquire
Joshua J. Voss, Esquire
Shohin H. Vance, Esquire
Samantha G. Zimmer, Esquire
Francis G. Notarianni, Esquire
KLEINBARD, LLC
1717 Arch Street
Philadelphia, PA 19103
Counsel for Respondent Senator Kim Ward

Corrie Woods, Esquire
Woods Law Offices PLLC
200 Commerce Drive, Suite 210
Moon Township, PA 15108
Counsel for Proposed Intervenor Senator Jay Costa

Representative Jared G. Solomon
104A East Wing
P.O. Box 202202
Harrisburg, PA 17120-2202

Dated: December 12, 2022

/s/ Lawrence F. Stengel
Lawrence F. Stengel

EXHIBIT
Preliminary Objections

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 CRAIG WILLIAMS, in his official capacity as an impeachment manager; REPRESENTATIVE JARED SOLOMON, in his official capacity as an impeachment manager; and JOHN DOES, in their official capacities as members of the SENATE IMPEACHMENT COMMITTEE; *Respondents.*	Docket No. 563 MD 2022

NOTICE TO PLEAD

YOU ARE HEREBY NOTIFIED to file a written response to the enclosed Preliminary Objections within thirty (30) days of service or within such other Period of time as the Court may direct, whichever is shorter, or a judgment may be entered against you.

Respectfully submitted,

SAXTON & STUMP, LLC

Dated: December 12, 2022 By: */s/ Lawrence F. Stengel*

Lawrence F. Stengel (ID No. 32809)
William C. Costopoulos (ID No. 22354)
Robert A. Graci (ID No. 26722)
Carson B. Morris (ID No. 208314)
Emily M. Bell (ID No. 208885)
280 Granite Run Drive, Suite 300
Lancaster, PA 17601
Telephone: (717) 556-1000
Facsimile: (717) 441-3810
lfs@saxtonstump.com
wcc@saxtonstump.com
rag@saxtonstump.com
cbm@saxtonstump.com
emb@saxtonstump.com

Attorneys for Respondents
Representative Timothy R. Bonner and
Representative Craig Williams

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, *et al*. *Respondents.*	Docket No. 563 MD 2022

[PROPOSED] ORDER

AND NOW, this_____ day of _____, 2022, upon consideration of the Preliminary Objections of Respondents Representative Timothy R. Bonner and Representative Craig Williams to the Petition for Review in the Nature of a Complaint for Declaratory Judgment, the Answer of Petitioner thereto, and all briefs in support thereof or opposition thereto, it is hereby ORDERED that the Preliminary Objections are **SUSTAINED**. The Petition for Review is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED:

_____

, J.

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 CRAIG WILLIAMS, in his official capacity as an impeachment manager; REPRESENTATIVE JARED SOLOMON, in his official capacity as an impeachment manager; and JOHN DOES, in their official capacities as members of the SENATE IMPEACHMENT COMMITTEE; *Respondents.*	Docket No. 563 MD 2022

PRELIMINARY OBJECTIONS OF RESPONDENTS REPRESENTATIVE TIMOTHY R. BONNER AND REPRESENTATIVE CRAIG WILLIAMS TO PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT

Respondents Representative Timothy R. Bonner and Representative Craig Williams, by their counsel, Saxton & Stump, LLC, file these Preliminary Objections to the December 2, 2022 Petition for Review in the Nature of a Complaint for Declaratory Judgment and, in support thereof, state as follows:

INTRODUCTION

On December 2, 2022, Philadelphia District Attorney Larry Krasner ("Petitioner") filed a Petition asking this Court to grant him declaratory relief stopping the impeachment proceedings pending against him in the Pennsylvania General Assembly. Those impeachment proceedings were lawfully initiated when a majority of the members of the Pennsylvania House of Representatives voted to pursue seven Articles of Impeachment against Petitioner Krasner, determining that he had committed misbehavior in office, which is the Constitutional standard for impeachment, in the course of carrying out his duties as the District Attorney of Philadelphia. Rather than answering the Articles of Impeachment on the merits and in the proper forum, Petitioner Krasner now asks this Court to assist him in making an end run around the impeachment proceedings, which are the legitimate business of the legislative, not judicial, branch; are expressly authorized by our Constitution; and, importantly, have yet *to even be conducted*.

This Court should decline Petitioner Krasner's request to enter into this process, as the only issues he raises are nonjusticiable, involving political questions or matters that are neither ripe nor the basis of any case or controversy that presently could be adjudicated by this Court. Petitioner Krasner's request for declaratory relief should be seen for what it is: a misguided effort to circumvent

his impeachment trial and avoid answering the Articles of Impeachment pending against him.

To be sure, Petitioner Krasner will have every opportunity to answer for and defend his conduct in the impeachment trial, but he must do so in *that* forum, and not through this tribunal.

The Court should dismiss Mr. Krasner's Petition in its entirety.[1]

FACTUAL BACKGROUND

1. On November 16, 2022, the Pennsylvania House of Representatives passed House Resolution 240, as amended, which contains the following seven Articles of Impeachment ("Articles") against Petitioner Krasner:

> Article I: Misbehavior in Office In the Nature of Dereliction of Duty and Refusal to Enforce the Law
>
> Article II: Misbehavior in Office In the Nature of Obstruction of House Select Committee Investigation
>
> Article III: Misbehavior in Office In the Nature of Violation of the Rules of Professional Conduct and Code of Judicial Conduct; specifically Rule 3.3 Candor Toward the Tribunal, Rule 8.4 Professional Misconduct, and Canon 2 of the Code of Judicial Conduct Impropriety and Appearance of Impropriety in the Matter of *Robert Wharton v. Donald T. Vaughn*

[1] Although it is Respondents' position that there are ample grounds for dismissing the Petition as nonjusticiable, Respondents also intend, in accordance with the schedule set forth in this Court's Order of December 6, 2022, to address the merits of Petitioner Krasner's arguments, which he also raises in his related Application for Summary Relief. It is respectfully submitted, however, that the Court need not reach the merits and, indeed, should refrain from doing so for the reasons set forth herein.

> Article IV: Misbehavior In Office In the Nature of Violation of the Rules of Professional Conduct; specifically Rule 3.3 Candor Toward the Tribunal, Rule 8.4 Professional Misconduct, and Canon 2 of the Code of Judicial Conduct Impropriety and Appearance of Impropriety in the Matter of *Commonwealth v. Pownall*
>
> Article V: Misbehavior in Office In the Nature of Violation of the Rules of Professional Conduct and Code of Judicial Conduct; specifically Rule 3.3 Candor to Tribunal, Rule 8.4 Professional Misconduct, and Canon 2 of the Code of Judicial Conduct Impropriety and Appearance of Impropriety In the Matter In re: Conflicts of Interest of Philadelphia District Attorney's Office
>
> Article VI: Misbehavior in Office in Nature of Violation of Victims [sic] Rights
>
> Article VII: Misbehavior In Office In the Nature of Violation of the Constitution of Pennsylvania By Usurpation of the Legislative Function

See Petition ¶¶ 24-26, 28, including Exhibit C, House Resolution No. 240, as amended (Nov. 16, 2022) ("HR 240").[2]

2. On November 18, 2022, consistent with the requirements of HR 240, Speaker of the House of Representatives Bryan D. Cutler appointed House Representatives Timothy R. Bonner, Craig Williams, and Jared Solomon to the committee responsible for managing the impeachment trial against Petitioner Krasner. *See* Petition ¶¶ 27, 30.

[2] The Constitution of the Commonwealth of Pennsylvania confers on the House of Representatives "the sole power of impeachment." Pa. Const. art. VI, § 4.

3. On November 29, 2022, the Pennsylvania Senate adopted a resolution establishing rules of practice and procedure for impeachment trials and a second resolution providing for the appointed House floor managers (Representatives Bonner, Williams, and Solomon) to exhibit the Articles to the Senate the following day. *See* Petition ¶¶ 31-32, including Exhibit D, Senate Resolution No. 386, Printer's No. 2020 (Nov. 29, 2022) ("SR 386") and Exhibit E, Senate Resolution No. 387, Printer's No. 2021 (Nov. 29, 2022).

4. On November 30, 2022, the Pennsylvania Senate adopted a resolution directing that a Writ of Impeachment Summons be issued and served on Petitioner Krasner by December 7, 2022 (if possible) and that the Writ command that Petitioner Krasner file an Answer to the Articles by December 21, 2022 and appear before the Senate on January 18, 2023 to answer to the Articles. *See* Petition ¶ 33, including Exhibit F, Senate Resolution No. 388, Printer's No. 2023 (Nov. 30, 2022).

5. On November 30, 2022, the Writ of Impeachment Summons was signed by the President Pro Tempore of the Senate, Jacob D. Corman, III, and the Secretary of the Senate, Megan L. Martin, for service on Petitioner Krasner. *See* Petition ¶ 36, including Exhibit G, Precept to the Sergeant-at-Arms and Writ of Impeachment Summons (Nov. 30, 2022).

6. In accordance with the Writ of Impeachment Summons, Petitioner Krasner's Answer to the Articles is not due until December 21, 2022, and the start of trial in the Senate[3] is more than a month away.

7. Instead of proceeding in accordance with the lawfully issued Writ of Impeachment Summons, Petitioner Krasner now asks this Court to intervene to stop the impeachment proceedings on his behalf.

8. Petitioner Krasner advances three main arguments: (1) the impeachment trial cannot proceed because impeachment proceedings do not carry over from the 206th General Assembly in which the Articles were passed and exhibited to the Senate (and which ended on November 30, 2022) to the current 207th General Assembly; (2) Article VI, § 6 of the Pennsylvania Constitution, which provides for impeachment of "civil officers," does not authorize the impeachment of a district attorney, and (3) the Articles do not allege impeachable conduct constituting "misbehavior in office" under Article VI, § 6.

9. Respondents herein, Representatives Bonner and Williams, submit that the Petition is not properly before this Court because: (1) Petitioner Krasner challenges matters or actions that are within the exclusive jurisdiction and province of the General Assembly, such that the Court's intervention would violate the

[3] Pennsylvania's Constitution provides that "[a]ll impeachments shall be tried by the Senate." Pa. Const. art. VI, § 5.

separation of powers doctrine; (2) Petitioner Krasner lacks standing, as he has suffered no harm to date (and, indeed, has not even alleged any redressable harm); and/or (3) Petitioner's claims are not (and may never be) ripe for judicial review.

PRELIMINARY OBJECTION I
(CLAIMS I AND III)
NONJUSTICIABLE POLITICAL QUESTIONS

10. Respondents herein incorporate by reference the foregoing paragraphs as if set forth fully herein.

11. Challenges raising the foundational matters of political questions, standing, and ripeness arise under the body of caselaw governing "the general notions of case or controversy and justiciability." *Rendell v. Pennsylvania State Ethics Comm'n*, 983 A.2d 708, 717 (Pa. 2009).[4]

12. Because they call into question the Court's jurisdiction and authority to act, "[i]ssues of justiciability are a threshold matter" to be "resolved before addressing the merits" of any dispute. *Robinson Twp., Washington Cnty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013) (citing *Council 13, Am. Fed. of State, Cnty. & Mun. Emps., AFL-CIO v. Com.*, 986 A.2d 63, 74 n.10 (Pa. 2009)).

13. Justiciability questions are properly raised in preliminary objections "to a petition for review filed in the original jurisdiction of the Commonwealth Court." *Robinson Twp.*, 83 A.3d at 917.

[4] Unless otherwise indicated, all additional citations are omitted.

14. "The political question doctrine derives from the principle of separation of powers which . . . is implied by the specific constitutional grants of power to, and limitations upon, each co-equal branch of the Commonwealth's government." *Id.* at 926-27.

15. The separation of powers "is essential to our triparte governmental framework"—consisting of the legislative, executive, and judicial branches—as it "prevents one branch of government from exercising, infringing upon, or usurping the powers of the other two branches." *Renner v. Ct. of Common Pleas of Lehigh Cnty.*, 234 A.3d 411, 419 (Pa. 2020); *see also Zemprelli v. Daniels,* 436 A.2d 1165, 1168 (Pa. 1981) (quoting *Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977) for the principle that "no branch should exercise the functions exclusively committed to another branch").

16. Although, as this Court has observed, "nonjusticiable cases do not come already labeled with a 'Keep Off' sign to keep the courts at a distance," *Larsen v. Senate of Pennsylvania,* 646 A.2d 694, 700 (Pa. Commw. 1994), the political question doctrine is implicated when, among other triggers, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards

for resolving it[.]"[5] *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); *see also Robinson Twp.*, 83 A.3d at 928 (citing and relying on *Baker*, 369 U.S. at 217).

17. "Courts will not review actions of another branch of government where political questions are involved because the determination of whether the action taken is within the power granted by the constitution has been entrusted exclusively and finally to political branches of government for self-monitoring." *Blackwell*, 684 A.2d at 1071.

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[5] In *Baker v. Carr*, the Court set forth the following factors to guide the political question analysis:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). The presence of any one *Baker* factor has warranted abstention under the political question doctrine. *Id.*; *Blackwell v. City of Philadelphia*, 684 A.2d 1068, 1071 (Pa. 1996); *Zemprelli*, 436 A.2d at 1169. Our Supreme Court has recognized, however, that "prudential" concerns inform Pennsylvania law on the political question doctrine and that each case must be considered anew. *See William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 463 (Pa. 2017) ("[T]he political question doctrine in Pennsylvania is of wholly prudential cloth, and hence must be considered anew each time it is invoked.").

18. Accordingly, where—as Petitioner Krasner has here—a party presents "a challenge to legislative power which the Constitution commits exclusively to the legislature," the matter constitutes a "non-justiciable political question" that is not properly before a court of law. *Id.*

19. Petitioner Krasner raises political questions in his pleas for declaratory relief challenging both the continuation of the impeachment proceedings against him from one General Assembly to the next (Claim I) and whether he has committed impeachable conduct constituting "misbehavior in office" (Claim III).

I. It is exclusively for the General Assembly to decide, as a procedural matter, whether impeachment proceedings are continuing in nature.

20. The Commonwealth's Constitution vests legislative power in the General Assembly, which comprises the Senate and the House of Representatives, Pa. Const. art. II, § 1, and grants each of those bodies the "power to determine the rules of its proceedings." *Id.* § 11.

21. The General Assembly's legislative power is both exclusive and, unless limited by the Constitution, plenary. *See Killam v. Killam*, 39 Pa. 120, 123 (Pa. 1861) (where "our constitution is silent on [a] subject the legislative power is plenary"); *see also Com. v. Keiser*, 16 A.2d 307, 310 (Pa. 1940) ("[P]owers not

expressly withheld from the Legislature inhere in it, and this is especially so when the Constitution is not self-executing.").

22. Especially relevant here, the Constitution confers on the House of Representatives "the **sole** power of impeachment," Pa. Const. art. VI, § 4 (emphasis added), and provides that "[a]ll impeachments shall be **tried** by the Senate." *Id.* § 5 (emphasis added).

23. Impeachment proceedings are thus clearly the domain of the General Assembly, and absent any provision in our Constitution prohibiting such proceedings from carrying over from one General Assembly to the next (there is none), it is within the rulemaking power of the House and Senate to prescribe how such proceedings are to be carried out. *See id.* art. II, § 11.

24. Accordingly, it is not for this Court to offer or substitute its own judgment. *See Maurer v. Boardman*, 7 A.2d 466, 472-73 (Pa. 1939) ("There is no appeal to the courts from the judgment of the legislature as to the wisdom or policy which the Commonwealth shall adopt.").

25. While the foregoing, without more, is sufficient to end the inquiry on Petitioner's first claim, it is worth noting that a rule in fact exists that permits impeachment proceedings to carry over from one General Assembly to the next.

Jefferson's Manual[6]— which the House Rules explicitly endorse as authoritative[7]—unequivocally provides that "**impeachment proceedings are not discontinued by a recess**" (*i.e.,* adjournment). Jefferson's Manual, § 620 (emphasis added) (attached hereto as Exhibit 1).[8]

26. While Petitioner Krasner cites other provisions of Article II and Pennsylvania regulations on the length of General Assembly sessions, *see* Petition ¶¶ 42-44, he merely cobbles them together, providing a strained reading designed to support his own narrative. On review, nothing in those provisions prohibits the continuation of impeachment proceedings from one General Assembly to the next or limits the impeachment and procedural rulemaking powers that the Constitution confers on the General Assembly.

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[6] Jefferson's Manual was prepared by Thomas Jefferson during his Vice Presidency from 1797 to 1801 for his own guidance as President of the Senate.

[7] Pennsylvania House Rule 78, Parliamentary Authority, provides: "Mason's Manual supplemented by Jefferson's Manual of Legislative Procedure shall be the parliamentary authority of the House, if applicable and not inconsistent with the Constitution of Pennsylvania, the laws of Pennsylvania applicable to the General Assembly, the Rules of the House, the established precedents of the House and the established customs and usages of the House." *See* https://www.house.state.pa.us/rules/DisplayRules.cfm?Rules=2013HouRules.htm (last visited December 12, 2022).

[8] Section 620 cites five examples of impeachment proceedings that have carried over from one United States Congress to the next. Although they involve federal impeachments, Jefferson's Manual is relevant to state impeachment proceedings by operation of House Rule 78.

27. Further, the *absence* of statutory authority permitting impeachment proceedings from carrying over from one General Assembly to the next, *see* Petition ¶ 45, likewise fails to advance Petitioner's position. There is ample affirmative authority—first in the Constitution's bestowal of impeachment power on the General Assembly, and second in Jefferson's Manual—to support the conclusion that the continuation of impeachment proceedings is a matter to be taken up (if at all) within the legislative branch.

28. Simply put, impeachment is a political process constitutionally committed to the General Assembly, which the courts should not review. *See Nixon v. U.S.*, 506 U.S. 224, 228-38 (1993) (holding that challenge to federal impeachment trial received by Senate committee rather than full Senate was a nonjusticiable question); *Dauphin Cnt'y Grand Jury Investigation Proceeding (No 2)*, 2 A.2d 802, 803 (Pa. 1938) ("[T]he courts have no jurisdiction in impeachment proceedings, and no control over their conduct, so long as actions taken are within constitutional lines. . . . The courts cannot stay the legislature[.]"); *Larsen*, 646 A.2d at 703-04 (noting that state and federal constitutional provisions are nearly identical and concluding that it is "within the exclusive power of the Senate to conduct impeachment trial proceedings" and that impeachment procedures employed by the Senate "cannot be invaded by the courts").

29. Consistent with the United States Supreme Court's opinion in *Nixon*, which turned on a detailed and thorough analysis of the federal Constitution's analogous and unquestionable assignment of impeachment powers to the legislature, this Court should decline to intervene in this matter. *See Nixon,* 506 U.S. at 228-38.

30. For these reasons, Petitioner Krasner's challenge to the continuing nature of the impeachment proceedings against him should be dismissed.

II. It is likewise exclusively for the General Assembly to determine whether Petitioner has committed impeachable conduct constituting "any misbehavior in office."

31. As set forth above, the plain text of Article VI confers the power of impeachment exclusively to the General Assembly. *See* Pa. Const. art. VI, § 4 (bestowing the "sole" power of impeachment on the House), § 5 (committing all impeachments to trial by the Senate).

32. Implicit in this grant of authority is the political question of whether a civil officer's conduct rises to the level of "any misbehavior in office" warranting impeachment. *See id.* § 6 ("The Governor and all other civil officers shall be liable to impeachment for any misbehavior in office[.]").

33. That question, as to what constitutes "misbehavior in office," is for the General Assembly, and it alone; whether a civil officer has committed impeachable conduct constituting "any misbehavior in office" is a political

question that this Court also should decline to review. *See Nixon*, 506 U.S. at 228-38; *Dauphin Cnt'y Grand Jury Investigation Proceeding (No 2)*, 2 A.2d at 803; *Larsen*, 646 A.2d at 703-04.

34. Determining what conduct rises to the level of "any misbehavior in office" warranting impeachment is a policy question that courts are ill-equipped to define. *See Baker*, 369 U.S. at 217 (noting political question factors, including lack of judicially discoverable and manageable standards for resolving it, the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion, and the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government).[9]

[9] Indeed, what conduct rises to the level of an impeachable offense is widely regarded as a political question reserved for the legislature. *See* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 795 (1833) ("Again, there are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offences are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it."); *see also* Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 Duke L.J. 231, 263-64 (1994) ("The question in . . . [an impeachment] proceeding is whether an impeachable officer is fit to preserve the public trust and therefore to remain in office. In other words, impeachment is a special disciplinary mechanism for special officials. The specific procedural protections given to the subjects of an impeachment are spelled out in the Constitution, including the division of impeachment authority between the House and the Senate and the requirements that senators act under oath, … and that at least two-thirds of the senators present agree in order to convict. Treating

35. For these reasons, Petitioner Krasner's challenge to whether he has been accused of impeachable conduct constituting "any misbehavior in office" is a political question not appropriately before this Court.

WHEREFORE, Respondents herein respectfully request that this Honorable Court dismiss with prejudice as nonjusticiable the first and third claims in the Petition.

PRELIMINARY OBJECTION II
(ALL CLAIMS)
LACK OF CASE OR CONTROVERSY: LACK OF STANDING FOR FAILURE TO ALLEGE LEGALLY COGNIZABLE HARM

36. Respondents herein incorporate by reference the foregoing paragraphs as if set forth fully herein.

37. "In seeking judicial resolution of a controversy, a party must establish as a threshold matter that he has standing to maintain the action." *Stilp v. Com., Gen. Assembly*, 940 A.2d 1227, 1233 (Pa. 2007).

38. "A challenge to the standing of a party to maintain the action raises a question of law." *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009).

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impeachments as sui generis is consistent with the absence of any evidence that the Fifth [or Fourteenth] Amendment, including the Due Process Clause, was ever intended to apply to the impeachment process.") (footnotes omitted).

39. To establish standing, a party must "demonstrate that he has been aggrieved" by the matter at hand, and to do this, the party must establish, *inter alia,* that "he has a . . . direct . . . interest in the outcome of the litigation." *Id.*

40. An interest is "direct" only where the party demonstrates that the conduct complained of caused him legally cognizable harm. *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005).

41. Stated differently, "[t]he keystone to standing . . . is that the person must be negatively impacted in some real and direct fashion." *Id.*

42. Consistent with this, a plaintiff seeking relief under the Declaratory Judgments Act, 42 Pa. C.S. § 7531, *et seq.*, must demonstrate direct or imminent harm. *See Cnty. Comm'rs Ass'n of Pennsylvania v. Dinges*, 935 A.2d 926, 931 (Pa. Commw. 2007).

43. While Petitioner Krasner generally alleges that the impeachment proceedings against him are "unlawful," nowhere does he actually assert that he has been aggrieved, let alone describe how. Indeed—while speculation about future harm would be insufficient to confer standing, *see Kauffman v. Osser*, 271 A.2d 236, 239 (Pa. 1970)—he does not even allege how he *might* suffer any possible harm.[10]

[10] In fact, it is difficult to imagine how Petitioner Krasner *could* suffer legally cognizable harm with regard to some of the points that he challenges. On the matter of the continuation of impeachment proceedings from one General

44. All that has happened to date is that Petitioner Krasner has been timely served with Articles of Impeachment and given the opportunity to answer to those Articles (first in writing, later this month, and then again during his impeachment trial scheduled to begin January 18, 2023)—nothing more.

45. To the extent that Petitioner Krasner believes that the proceedings against him are "unlawful," he will have the opportunity to make his case, defend himself, and avail himself of the various protections offered in the context of the trial before the Senate.[11]

46. As the Constitution requires, it is in the Senate, and not in this Court, that Petitioner Krasner must seek redress. *See Larsen,* 646 A.2d at 703-04 (it is "within the exclusive power of the Senate to conduct impeachment trial proceedings" and "courts cannot intervene with respect to procedure internal to the

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Assembly to the next, for example, it is hard to conceive any possible harm. If the perceived "harm" (and, again, Petitioner Krasner has articulated none) is that Petitioner Krasner must defend himself in the impeachment trial (should he so choose), that is no harm at all; it is simply the operation of a legitimate process that is enshrined in our Constitution to serve as a check against abuses by government officials. To the extent conviction and removal is the harm he might suffer, that outcome is neither direct or imminent; it is speculative, and inadequate to confer standing.

[11] For example, Petitioner Krasner will have the opportunities, *inter alia*, to appear and be heard; to be represented by counsel of his choosing; to seek and obtain rulings on procedural and trial-related matters; to make opening and closing statements; and to examine and cross-examine witnesses. *See* SR 386, Petition at Exhibit D.

legislative body"); *cf. GGNSC Clarion LP v. Kane*, 131 A.3d 1062, 1069 (Pa. Commw. 2016), *aff'd*, 152 A.3d 983 (Pa. 2016) (where issues complained of in a declaratory judgment action could be raised and addressed in the context of a pending enforcement action by the Office of Attorney General, the declaratory judgment action was moot).[12]

WHEREFORE, Respondents herein respectfully request that this Honorable Court dismiss the Petition with prejudice in its entirety for lack of standing.

PRELIMINARY OBJECTION III
(CLAIMS II AND III)
LACK OF CASE OR CONTROVERSY: LACK OF RIPENESS

47. Respondents herein incorporate by reference the foregoing paragraphs as if set forth fully herein.

48. "A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic." *Gulnac v. S. Butler Cnty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991). *See also Pennsylvania State Lodge of Fraternal Ord. of Police by Bascelli v. Com.*, 571 A.2d 531, 533 (Pa. Commw. 1990), *aff'd,* 591 A.2d 1054 (Pa. 1991)

[12] While *GGNSC Clarion* was decided in the context of a motion to dismiss for mootness, the point is essentially the same: Petitioner Krasner's concerns are amenable to resolution and should be addressed in the impeachment forum, not by this Court.

("Declaratory judgment is not appropriate to determine rights in anticipation of events which may never occur; it is an appropriate remedy only where a case presents antagonistic claims indicating imminent and inevitable litigation.").

49. Under the doctrine of ripeness, "[w]here no actual controversy exists, a claim is not justiciable and a declaratory judgment action cannot be maintained." *Cherry v. City of Philadelphia*, 692 A.2d 1082, 1085 (Pa. 1997).

50. Even if this Court were inclined to consider the breadth of the definition of "civil officer" (Claim II) or the scope of the phrase "any misbehavior in office" (Claim III) in Article VI, § 6, those issues are not ripe for resolution.

51. No Pennsylvania Court has ever intervened in an ongoing impeachment proceeding to preemptively rule on questions that the Senate has not yet adjudicated.

52. At this stage in the proceedings, the only questions fairly before this Court are whether the General Assembly has authority for the power it has exercised, and whether it has exercised that authority within the bounds of the Constitution. *See Larsen,* 646 A.2d at 703.

53. As an initial matter, this Court has already ruled that the impeachment process "is committed by the Constitution to the Senate of Pennsylvania to an extent which clearly bars the courts from intervening with prior restraint." *Id.* at 705.

54. Therefore, "regardless of whatever powers the courts may have to interpret actions of the legislative body, by way of review, after they have been taken," courts have no power to intervene "in advance of legislative action, any more than a court would have any power to enjoin, in advance, the enactment of a law appearing (to the courts) to be constitutionally invalid."[13] *Id.*; *cf. Sweeney*, 375 A.2d at 708 (noting the question of justiciability was a close call, but reviewing the expulsion of a member of the state House of Representatives on a claim of due process rights violation *after* the contested action had occurred).

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[13] With respect to his third claim, Petitioner Krasner's heavy reliance on *In re Braig*, 590 A.2d 284 (Pa. 1991) is misplaced. That case did not involve impeachment under Article VI. Rather, *Braig* addressed the phrase "convicted of misbehavior in office" under Article V, § 18(*l*); thus, the *Braig* Court's commentary on the language of other Constitutional provisions is dicta, and it is not binding on this Court. *See In re Braig*, 590 A.2d at 287-88 (comparing language of Article V, § 18(*l*) to removal provision in Article VI, § 7 and summarizing prior cases on the removal provision, involving *ex post* challenges to whether an officer's removal was based on a conviction that constituted a "conviction of misbehavior in office"). The same is true for all the cases Petitioner Krasner cites on this issue, which largely involve challenges to removal proceedings. Whatever persuasive value those cases might have in construing convictions under Article VI's removal provision, those cases did not involve impeachment proceedings, and the Court had no occasion to consider the serious nonjusticiability issues addressed herein.

Importantly, *Larsen* is the only recent Pennsylvania case involving an impeachment proceeding. As Petitioner Krasner acknowledges, *Braig* was decided three years prior to this Court's decision in *Larsen*, yet the *Larsen* Court does not rely on it. *See id.* at 702 (noting petitioner's proposed definition of "misbehavior in office," which the Court did not adopt, and concluding that it "finds no support in judicial precedents"). That is because impeachment and removal are two distinct processes under Article VI.

55. Although courts decline to review the actions of another branch in cases involving political questions, the Supreme Court has explained that "[a] political question is not involved when a court concludes that another branch acted within the power conferred upon it by the Constitution," reasoning:

> In such cases . . . the court does not refuse judicial review; it exercises it. It is not dismissing an issue as nonjusticiable; it adjudicates. It is not refusing to pass upon the power of the political branches; it passes upon it, only to affirm that they had the power which had been challenged and that nothing in the Constitution prohibited the particular exercise of it.

Sweeney, 375 A.2d at 705 (quoting Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 606 (1976)).

56. Thus, at this stage, the sole questions before the Court are: (1) whether the House has the authority to initiate impeachment proceedings, and (2) whether the Senate has the authority to try Petitioner's Krasner's impeachment proceedings.

57. In accordance with Article VI, §§ 4-5, the answer to both questions is undoubtedly yes: the House has the sole authority to impeach; and the Senate has the sole authority to try the impeachment proceeding.

58. Petitioner is not entitled to ex ante judicial determinations on whether the district attorney's office is beyond the reach of impeachment or on the sufficiency of the impeachment charges or the likelihood of conviction. *See People ex rel. Robin v. Hayes*, 143 N.Y.S. 325, 330 (Sup. Ct. 1913) ("[A court] has

no jurisdiction to inquire into the sufficiency of charges for which a Governor may be impeached, nor, I take it, whether the proceedings looking to that end were properly conducted, unless at their foundation, in their exercise, constitutional guaranties are broken down or limitations ignored.") (citing Story on Const. Law, §§ 374 and 379)); *see also Larsen*, 646 A.2d at 696, 704 (rejecting the petitioner's request to intervene and order the Senate to rule on pretrial motions, which included a motion for dismissal, arguing that articles of impeachment failed to state an impeachable offense).

59. Indeed, Petitioner cites no case to support his unprecedented claim that this Court should insert itself in an ongoing impeachment proceeding.

60. This Court in *Larsen* expressly cautioned courts against intervening ex ante to rule on impeachment matters that the Senate has not had the opportunity to adjudicate. *See Larsen*, 646 A.2d at 695, 705 (considering "first-impression question as to whether there can be judicial intervention in advance, to bar the state Senate from proceeding with the impeachment trial, on the basis that violations of constitutional rights are threatened," and concluding that the impeachment process "is committed by the Constitution to the Senate of Pennsylvania to an extent which clearly bars the courts from intervening with prior restraint"). In that regard, this case is no different: Petitioner's impeachment proceeding is ongoing, and any

legal arguments about whether he is subject to the charges or their sufficiency are properly directed to the Senate.

61. Thus, as in *Larsen*, the Court should deny Petitioner's extraordinary request for what amounts to prior restraint on the Senate's exclusive power to try impeachment proceedings.

WHEREFORE, Respondents herein respectfully request that this Honorable Court dismiss the second and third claims in the Petition with prejudice for lack of ripeness.

SAXTON & STUMP, LLC

Dated: December 12, 2022 By: */s/ Lawrence F. Stengel*

Lawrence F. Stengel (ID No. 32809)
William C. Costopoulos (ID No. 22354)
Robert A. Graci (ID No. 26722)
Carson B. Morris (ID No. 208314)
Emily M. Bell (ID No. 208885)
280 Granite Run Drive, Suite 300
Lancaster, PA 17601
Telephone: (717) 556-1000
Facsimile: (717) 441-3810
lfs@saxtonstump.com
wcc@saxtonstump.com
rag@saxtonstump.com
cbm@saxtonstump.com
emb@saxtonstump.com

Attorneys for Respondents
Representative Timothy R. Bonner and
Representative Craig Williams

PUBLIC ACCESS POLICY CERTIFICATION

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

SAXTON & STUMP, LLC

Dated: December 12, 2022 By: */s/ Lawrence F. Stengel*

Lawrence F. Stengel (ID No. 32809)
280 Granite Run Drive, Suite 300
Lancaster, PA 17601
Telephone: (717) 556-1000
Facsimile: (717) 441-3810
lfs@saxtonstump.com
wcc@saxtonstump.com
rag@saxtonstump.com
cbm@saxtonstump.com
emb@saxtonstump.com

Attorneys for Respondents Representative Timothy R. Bonner and Representative Craig Williams

CERTIFICATE OF SERVICE

I, Lawrence F. Stengel, certify that, on this date, I filed the foregoing Preliminary Objections of Respondents Representative Timothy R. Bonner and Representative Craig Williams to Petition for Review in the Nature of a Complaint for Declaratory Judgment electronically and also served a certified true and correct copy upon the following counsel of record, by depositing the same in the United States mail, postage prepaid, addressed as follows:

John S. Summers, Esquire
Andrew M. Erdlen, Esquire
HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
Counsel for Petitioner

Michael J. Satin, Esquire
Timothy P. O'Toole, Esquire
Andrew T. Wise, Esquire
MILLER & CHEVALIER CHARTERED
900 16th Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

Matthew H. Haverstick, Esquire
Joshua J. Voss, Esquire
Shohin H. Vance, Esquire
Samantha G. Zimmer, Esquire
Francis G. Notarianni, Esquire
KLEINBARD, LLC
1717 Arch Street
Philadelphia, PA 19103
Counsel for Respondent Senator Kim Ward

Corrie Woods, Esquire
Woods Law Offices PLLC
200 Commerce Drive, Suite 210
Moon Township, PA 15108
Counsel for Proposed Intervenor Senator Jay Costa

Representative Jared G. Solomon
104A East Wing
P.O. Box 202202
Harrisburg, PA 17120-2202

Dated: December 12, 2022

/s/ Lawrence F. Stengel
Lawrence F. Stengel

EXHIBIT 1

The Constitution of the United States (art. I, sec. 3, cl. 7) limits the judgment to removal and disqualification. The order of judgment following conviction in an impeachment trial is divisible for a separate vote if it contains both removal and disqualification (III, 2397; VI, 512; Apr. 17, 1936, p. 5606), and an order of judgment (such as disqualification) requires a majority vote (VI, 512; Apr. 17, 1936, p. 5607). Under earlier practice, after a conviction the Senate voted separately on the question of disqualification (III, 2339, 2397), but no vote is required by the Senate on judgment of removal from office following conviction, because removal follows automatically from conviction under article II, section 4 of the Constitution (Apr. 17, 1936, p. 5607). Thus, the presiding officer directs judgment of removal from office to be entered and the respondent removed from office without separate action by the Senate where disqualification is not contemplated (Oct. 9, 1986, p. 29873). A resolution impeaching the President may provide for only removal from office (H. Res. 1333, 93d Cong., Aug. 20, 1974, p. 29361) or for both removal and disqualification from holding any future office (H. Res. 611, 105th Cong., Dec. 19, 1998, p. 27828; H. Res. 755, 116th Cong., Dec. 18, 2019, p. __; H. Res. 24, 117th Cong., Jan. 13, 2021, p. __).

§ 620. Impeachment not interrupted by adjournments.

Continuance. An impeachment is not discontinued by the dissolution of Parliament, but may be resumed by the new Parliament. ***T. Ray 383; 4 Com. Journ., 23 Dec., 1790; Lord's Jour., May 15, 1791; 2 Wood., 618.***

In Congress impeachment proceedings are not discontinued by a recess (III, 2299, 2304, 2344, 2375, 2407, 2505, see also § 592, *supra*). The following impeachment proceedings extended from one Congress to the next: (1) the impeachment of Judge Pickering was presented in the Senate on the last day of the Seventh Congress (III, 2320), and the Senate conducted the trial in the Eighth Congress (III, 2321); (2) the impeachment of Judge Louderback was presented in the Senate on the last day of the 72d Congress (VI, 515), and the Senate conducted the trial in the 73d Congress (VI, 516); (3) the impeachment of Judge Hastings was presented in the Senate during the second session of the 100th Congress (Aug. 3, 1988, p. 20223) and the trial in the Senate continued into the 101st Congress (Jan. 3, 1989, p. 84); (4) the impeachment of President Clinton was presented to the Senate after the Senate had adjourned sine die for the 105th Congress (Precedents (Wickham), ch. 1, § 8.2), and the Senate conducted the trial in the 106th Congress (Jan. 7, 1999, p. 272); (5) the impeachment inquiry of Judge Porteous was authorized in the 110th Congress (Sept. 17, 2008) and continued in the next Congress (Precedents (Wickham), ch.

1, § 8.1). Although 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 (Precedents (Wickham), ch. 1, § 8.2).