Received 12/21/2022 1:35:49 PM Commonwealth Court of Pennsylvania

Filed 12/21/2022 1:35:00 PM Commonwealth Court of Pennsylvania
563 MD 2022

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

PETITIONER'S BRIEF IN OPPOSITION TO PRELIMINARY OBJECTIONS OF RESPONDENTS BONNER AND WILLIAMS TO PETITION FOR REVIEW

Michael J. Satin (*pro hac vice*)
Timothy P. O'Toole (*pro hac vice*)
Andrew T. Wise (*pro hac vice*)
Dawn E. Murphy-Johnson (admission *pro hac vice* pending)
MILLER & CHEVALIER CHARTERED
900 16th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 626-6009

John S. Summers (I.D. No. 41854)
Andrew M. Erdlen (I.D. No. 320260)
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
Telephone: (215) 568-6200

Counsel to Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Petitioner Larry Krasner asks this Court to declare that the impeachment proceedings against him are unlawful. *See generally* Pet. for Review in the Nature of a Compl. for Declaratory J. ("Petition"), *Krasner v. Ward*, No. 563 MD 2022 (Pa. Commw. Ct. filed Dec. 2, 2022). Pursuant to Article II, §§ 2, 3, and 4 of the Constitution of the Commonwealth of Pennsylvania, and 101 Pa. Code § 7.21(a), the Amended Articles of Impeachment (the "Articles of Impeachment" or "Articles") against him are dead and cannot be carried over from the 206th General Assembly to the 207th General Assembly. Under the terms of Article VI, § 6 of the Pennsylvania Constitution, he is not subject to impeachment by the General Assembly in the first place. And, in any event, pursuant to Article VI, § 6 of the Constitution, the Articles of Impeachment do not allege conduct that would constitute "any misbehavior in office."

Respondents claim that the Court should not concern itself with these significant questions of constitutional law. Because *they* believe the proceedings against District Attorney Krasner were "lawfully initiated" as part of what *they* consider to be the "legitimate business of the legislative . . . branch," they say the Court has no place in this dispute. *See* Br. in Supp. of Respondents' Prelim. Objections ("Respondents' Br.") at 1-2. In short, because *Respondents* believe their actions were taken "'within constitutional lines,'" *id.* at 2 (quoting *Larsen v.*

Senate of Pennsylvania, 646 A.2d 694, 699 (Pa. Commw. 1994)), they urge this Court to abstain from exercising the judicial function that it is obligated to perform as a co-equal branch of government.

Yet "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). And that is exactly what District Attorney Krasner has asked the Court to do: decide whether the legislature's actions are "constitutionally permissible." *I.N.S. v. Chadha*, 462 U.S. 919, 941 (1983). This Court should reject Respondents' efforts to shield their constitutional violations from judicial review and the Court should overrule their Preliminary Objections in their entirety.[1]

II. COUNTER-STATEMENT OF JURISDICTION

This Court has original jurisdiction over the Petition pursuant to 42 Pa.C.S. § 761(a)(1), which provides that the Commonwealth Court shall have original

[1] In his Petition, District Attorney Krasner named as Respondents all three House impeachment managers: Representative Timothy R. Bonner, Representative Craig Williams, and Representative Jared Solomon. This brief responds to the Preliminary Objections filed on December 12, 2022 by Representatives Bonner and Williams ("Respondents") and to their Opposition to District Attorney Krasner's Application for Summary Relief, also filed on December 12, 2022. That same day, Representative Solomon filed a Notice of Intent Not to Defend, in which he stated that he had "voted against final passage of the Articles of Impeachment that are the subject of this proceeding," and that he "does not wish to dispute the legal claims raised by" District Attorney Krasner in his Petition. Respondent Jared Solomon's Notice of Intent Not to Defend in Lieu of An Answer, *Krasner v. Ward et al.*, No. 563 MD 2022 at 2 (Pa. Commw. Ct. filed Dec. 12, 2022).

jurisdiction over "all civil actions or proceedings . . . [a]gainst the Commonwealth government, including any officer thereof, acting in his official capacity." The Court, "as ultimate interpreter of the Constitution," also has jurisdiction to decide issues of justiciability, *Baker v. Carr*, 369 U.S. 186, 211 (1962), especially when, as Respondents appear to concede, the question is whether the General Assembly's actions were "'taken . . . within constitutional lines.'" *See* Respondents' Br. at 2 (quoting *Larsen v. Senate of Pennsylvania*, 646 A.2d 694, 699 (Pa. Commw. 1994)).

III. COUNTER-STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

District Attorney Krasner challenges, in part, Respondents' statement of the scope and standard of review. He agrees that the Court's review is limited to the pleadings, *Pa. State Lodge, FOP v. Pa. Dep't of Conservation & Nat. Res.*, 909 A.2d 413, 415 (Pa. Commw. Ct. 2006), and that 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. Ct. 2018). Respondents' recitation of the standard of review is otherwise materially incomplete. The Court "*may* sustain preliminary objections *only* when the law makes clear that the petitioner cannot succeed on his claim, and [the Court] *must resolve any doubt in*

favor of the petitioner." *Id.* (emphasis added to terms and phrases omitted by Respondents).

IV. COUNTER-STATEMENT OF QUESTIONS PRESENTED BY RESPONDENTS' PRELIMINARY OBJECTIONS

1. Do Claims I and III of the Petition present non-justiciable political questions precluding the Court's consideration of whether the Amended Articles of Impeachment survive the adjournment *sine die* of the General Assembly's 206th legislative session and whether the conduct alleged in the Amended Articles constitutes an impeachable offense. *Suggested answer: No*.

2. Does Petitioner have standing to raise Claims I, II, and III? *Suggested answer: Yes*.

3. Are Claims II and III ripe for judicial review? *Suggested answer: Yes*.

V. RESPONSE TO RESPONDENTS' STATEMENT OF FACTS

District Attorney Krasner incorporates herein the Statement of Facts set forth in his Petition. Again, the Court must "accept as true all well-pleaded material allegations" in the Petition, as well as "any reasonable inferences that . . . may [be] draw[n] from the averments." *Highley*, 195 A.3d at 1082. District Attorney Krasner opposes all legal conclusions asserted by Respondents in their Statement of Facts.

VI. SUMMARY OF ARGUMENT

The Court should overrule Preliminary Objection I because Claims I and III of the Petition do not present non-justiciable political questions. Whether impeachment proceedings are continuing in nature is not a "procedural matter" for the General Assembly to decide, but a question of law for this Court to resolve. And it is well established that the Court may decide, in the first instance, what conduct rises to the level of "misbehavior in office."

The Court should overrule Preliminary Objection II because District Attorney Krasner has standing to challenge the impeachment proceedings against him. He already has been injured by the Amended Articles of Impeachment and imminently faces further injury if subjected to a trial based on the null and void and otherwise unconstitutional Amended Articles of Impeachment.

The Court should also overrule Preliminary Objection III. District Attorney Krasner has been impeached by the House, and the constitutionality of the Amended Articles is therefore ripe for review. Claims II and III of the Petition are properly before the Court.

VII. ARGUMENT

A. DISTRICT ATTORNEY KRASNER'S CLAIMS THAT THE AMENDED ARTICLES OF IMPEACHMENT DID NOT SURVIVE THE ADJOURNMENT OF THE LEGISLATIVE SESSION *SINE DIE* (CLAIM I) AND THAT THE AMENDED ARTICLES FAIL TO ALLEGE ANY "MISBEHAVIOR IN OFFICE" (CLAIM III) ARE JUSTICIABLE

1. A Nonjusticiable Political Question Arises When There Is a Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Department

"[T]he mere fact that [a] suit seeks protection of a political right does not mean it presents a political question." *Baker v. Carr*, 369 U.S. 186, 209 (1962). And the "[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded . . . because the issues have political implications." *Chadha*, 462 U.S. at 943. The "legitimacy of [judicial] abstention" is context-specific, and it is the Court's mandate "to insure that government functions within the bounds of constitutional prescription." *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 333 (Pa. 1986). "Indeed . . . the exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers, and *abstention under the political-question doctrine is implicated in limited settings*." *Robinson Twp., Washington Cnty. v. Commonwealth*, 83 A.3d 901, 927-28 (Pa. 2013) (emphasis added).[2]

[2] Between 1962 and 2003, the U.S. Supreme Court "found a case nonjusticiable on the basis of the political question doctrine only twice." *See Doe v. Bush*, 323 F.3d

One of the limited settings in which a non-justiciable political question might arise is when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217; *see Sweeney v. Tucker*, 375 A.2d 698, 706-07 (Pa. 1977) (adopting *Baker*'s standards).[3] Respondents direct their assertion of non-justiciability of Claims I and III of the Petition to this factor, claiming that the General Assembly has plenary power over "[i]mpeachment proceedings" writ large. Respondents' Br. at 13.

But determining "whether a complaint involves a non-justiciable political question requires making an inquiry into the precise facts and posture of that complaint, since such a determination cannot be made merely by semantic cataloguing." *Blackwell v. City of Philadelphia*, 684 A.2d 1068, 1071 (Pa. 1996). What District Attorney Krasner has challenged here is whether the General Assembly "has chosen a constitutionally permissible means of implementing" its impeachment power, which is a matter of constitutional interpretation for the

---

133, 140 (1st Cir. 2003). In 2019, the Supreme Court added a third case to the list. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019).

[3] Following its adoption of *Baker*'s textual inquiry, the Pennsylvania Supreme Court has regularly cited justiciability decisions of the United States Supreme Court. *See*, *e.g.*, *William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 437 (Pa. 2017) (citing *Nixon v. United States*, 506 U.S. 224 (1993); *Powell v. McCormack*, 395 U.S. 486 (1969); *Baker*, 369 U.S. at 213); *Zemprelli v. Daniels*, 436 A.2d 1165, 1169 (Pa. 1981); *Sweeney v. Tucker*, 375 A.2d 698, 706 (Pa. 1977) (similar).

courts. *See Chadha*, 462 U.S. at 941-43. The Court must therefore examine the constitutional text in question "and determine whether and to what extent the issue is textually committed." *Nixon v. United States*, 506 U.S. 224, 228 (1993). In other words, the Court must look to the specific constitutional provision invoked and "determine what power the Constitution confers upon [the legislature], before [the court] can determine to what extent, if any, the exercise of that power is subject to judicial review." *Powell v. McCormack*, 395 U.S. 486, 519 (1969).

In *Powell*, for example, the petitioner was duly elected to the U.S. House of Representatives, but pursuant to a House resolution, he was not permitted to take his seat. *Id.* at 489. Powell brought suit in federal court. *Id*. The respondents in that case (the Speaker of the House and others) claimed that Article I, § 5 of the U.S. Constitution, which states that "Each House shall be the Judge of the . . . Qualifications of its own Members," gave them broad power to determine which qualifications were necessary for membership. 395 U.S. at 519-20. Powell countered that the Constitution provides that an elected representative may be denied his seat only if the House finds he does not meet the standing requirements of age, citizenship, and residence contained in Article I, § 2. *Id.* at 520.

The United States Supreme Court agreed with Powell. The court examined Article I, § 5 of the U.S. Constitution, and concluded that the provision did not give the House authority "to exclude any person, duly elected by his constituents,

who meets all the requirements for membership expressly prescribed in the Constitution." *Id.* at 522 (emphasis omitted). At most, Article I, § 5 textually committed to Congress the power to "judge only the qualifications expressly set forth in the Constitution." *Id.* at 548. In other words, "[t]he decision as to whether a Member *satisfied* the[] qualifications was placed with the House, but the decision as to *what these qualifications consisted of* was not." *Nixon*, 506 U.S. at 237 (explaining *Powell*, emphasis added). As a result, the "'textual commitment' formulation of the political question doctrine d[id] not bar [the] federal courts from adjudicating [Powell's] claims." *Powell*, 395 U.S. at 548.

In contrast, *Nixon* involved a political question that could not be resolved by the courts. Nixon was a federal judge who had been convicted of federal crimes and sentenced to prison. 506 U.S. at 226. The U.S. House of Representatives subsequently adopted articles of impeachment against him and presented the articles to the Senate. *Id.* at 226-27. Nixon then asked the federal courts to determine the constitutionality of a U.S. Senate Rule, pursuant to which a committee of Senators, not the Senate as a whole, would receive impeachment evidence and report that evidence to the full Senate. *Id*.

There, too, the Supreme Court began its analysis with the text of the constitutional provision in question, Article I, § 3, cl. 6, which grants authority to the Senate to "try" all impeachments. *Id.* at 228. The court carefully reviewed the

three sentences of clause 6, and, based on their "language and structure," rejected Nixon's argument that the word "try" required the Senate proceedings to be "in the nature of a judicial trial." *Id.* at 229. The court concluded that Nixon's petition was non-justiciable because "opening the door of judicial review *to the procedures used by the Senate in trying impeachments* would 'expose the political life of the country to months, or perhaps years, of chaos.'" *Id.* at 236 (quoting Court of Appeals) (emphasis added). The court distinguished its decision in *Powell*, which "was based on the fixed meaning of 'qualifications' set forth in Article I, § 2," and held that, by contrast, the word "try" in Article I, § 3, cl. 6 "does not provide an identifiable textual limit on the authority which is committed to the Senate." *Id.* at 237-38.

Nixon's scope is extremely narrow, in that it hinged on the non-justiciability of the Senate's impeachment *procedures* and nothing more. Indeed, over the last 30 years, the courts have made clear time and time again *Nixon*'s limited reach. *See*, *e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (*Nixon* involved a challenge to "procedures" used in Senate impeachment proceedings); *Doe v. Bush*, 323 F.3d 133, 140 (1st Cir. 2003) (Nixon implicated Senate "procedures" for impeachment of a federal judge); *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 681 (E.D. La. 2006) (in *Nixon*, the court found constitutional commitment of impeachment "procedures" to the legislative branch); *In re Lupron Mktg. & Sales*

Pracs. Litig., 295 F. Supp. 2d 148, 162 (D. Mass. 2003) (*Nixon* involved a challenge to the Senate's authority to determine impeachment "trial procedures"); *Mesnard v. Campagnolo*, 489 P.3d 1189, 1199 (Ariz. 2021) ("in *Nixon*, the Court held that the Constitution vested sole authority in the Senate to choose impeachment procedures").

2. Claims I and III Do Not Present Non-Justiciable Political Questions

In this case, Respondents seek to avoid a "bona fide controversy as to whether some action . . . exceeds constitutional authority" by labeling the action "political." *Chadha*, 462 U.S. at 943; *see* Respondents' Br. at 15 ("Simply put, impeachment is a political process constitutionally committed to the General Assembly, which the courts should not review."). *Baker*, *Powell*, and *Nixon* require much more than that, however. The long-standing text-based inquiry established by that line of cases shows that the Pennsylvania Constitution does not affirmatively commit to the General Assembly the power to carry over impeachment proceedings "from one General Assembly to the next." *Cf.* Respondents' Br. at 13. And the Constitution does not demonstrably commit to the General Assembly the power to decide what conduct constitutes "any misbehavior in office." *Cf. id.* at 16. Claims I and III of the Petition are therefore properly before the Court.

(a) The Pennsylvania Constitution does not textually commit to the General Assembly the power to carry over business from the second session of one General Assembly to the first session of an entirely different General Assembly.

Respondents claim that the General Assembly has the unreviewable authority not only to "prescribe how [impeachment] proceedings are carried out," but also to decide, supposedly as a "procedural matter," whether impeachment proceedings "are continuing in nature." Respondents' Br. at 12-13. Respondents' arguments (which Respondent Ward does not even raise in her opposition to District Attorney Krasner's Application for Summary Relief) are not persuasive.

In their attempt to establish that the General Assembly's actions are unassailable, Respondents point to Article VI, §§ 4-5 of the Pennsylvania Constitution. *See id.* at 13. Article VI, § 4 states in full: "The House of Representatives shall have the sole power of impeachment." Pa. Const. Art. VI § 4. And section 5 states in full: "All impeachments shall be tried by the Senate. When sitting for that purpose the Senators shall be upon oath or affirmation. No person shall be convicted without the concurrence of two-thirds of the members present." *Id.* § 5. Respondents assert that these constitutional provisions mean that "[i]mpeachment proceedings," in their entirety, are the "domain of the General Assembly" and that, as a result, all impeachment-related decisions are judicially unreviewable. Respondents' Br. at 13.

In no way do these provisions actually establish that this Court is barred from adjudicating District Attorney Krasner's claim that the Amended Articles of Impeachment are dead. Other than a brief nod to *Nixon*, *see id.* at 15, Respondents make no attempt to grapple with the text of Article VI, § 4 or § 5. As a result, Respondents have identified nothing that textually commits to the General Assembly the power to carry over impeachment proceedings from one General Assembly to the next — because there is no such textually demonstrable constitutional commitment.

At most, Section 4's reference to the House's "sole power of impeachment" is "a grant of authority" to the House, indicating that the authority to impeach "is reposed in the [House] and nowhere else." *See Nixon*, 506 U.S. at 229. Similarly, Section 5's use of the phrase "shall be tried by the Senate" reflects that it is the Senate's job to "determine whether an individual should be acquitted or convicted," to the exclusion of the House or any other body. *Id.* at 231. Neither Section 4 nor 5 demonstrably commits to either the House or the Senate, through text, the power to carry over an impeachment from one General Assembly to another.

Sidestepping the textual analysis altogether, Respondents assert that "*absent any provision* in our Constitution *prohibiting* such proceedings from carrying over from one General Assembly to the next . . . , it is within the rulemaking power of

the House and Senate to prescribe how such proceedings are to be carried out." Respondents' Br. at 13 (emphasis added). Respondents' position turns U.S. Supreme Court precedent and Pennsylvania Supreme Court precedent on its collective head. Together, those authorities demand that, for a claim to be non-justiciable, the particular "issue" in dispute must be affirmatively textually committed to a coordinate political department. *Baker*, 369 U.S. at 217. The broad *absence* of a provision *prohibiting* an action does not suffice.

As the Pennsylvania Supreme Court has explained, the judiciary may "abstain from reviewing cases only where the determination whether the action taken is within the power granted by the Constitution *has been entrusted exclusively and finally to the political branches of government for 'self-monitoring*.'" *William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 439 (Pa. 2017). Stated differently, "the issue in the political question doctrine is not whether the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches. . . . Rather, the issue is whether the Constitution has given one of the political branches final responsibility for *interpreting the scope and nature of such a power*." *Nixon*, 506 U.S. at 240 (White, J., concurring) (emphasis added).

Having dodged *Baker*'s textual inquiry, Respondents claim that "Jefferson's Manual" purports to permit the impeachment proceedings against District Attorney

Krasner "to carry over from one General Assembly to the next." Respondents' Br. at 13-15. This argument is wholly misplaced.

First, although "[t]he constitution empowers each house to determine its rules of proceedings," neither house may "by its rules ignore constitutional restraints or violate fundamental rights." *United States v. Ballin*, 144 U.S. 1, 5 (1892). In other words, a procedural "Manual" adopted by the House and Senate cannot act as an "override" button on the Constitution, meaning that any such Manual is irrelevant to the constitutional question before the Court.

Second, Jefferson's Manual does not even govern parliamentary practice here — *Mason's* Manual of Legislative Procedure does.[4] Notably, Mason's Manual does not "unequivocally provide that impeachment proceedings are not discontinued by a recess." *Cf.* Respondents' Br. at 14 (citing Jefferson's Manual § 620). Instead, Mason's Manual provides that upon adjournment *sine die*, *all* business "expires with the session" — full stop. *See* Mason's Manual § 445.4 ("A motion to adjourn sine die has the effect of closing the session and *terminating all*

[4] *See* Pa. House Res. 243 (Nov 16, 2022), Rule 78 ("Mason's Manual supplemented by Jefferson's Manual of Legislative Procedure shall be the parliamentary authority of the House"); Pa. Sen. Res. 3 (Jan. 5, 2021), Rule 26 ("The Rules of Parliamentary Practice comprised in Mason's Manual of Legislative Procedure shall govern the Senate in all cases to which they are applicable").

unfinished business before the house, and all legislation pending upon adjournment sine die expires with the session.") (emphasis added).

Third, Respondents admit that the examples of impeachments listed in Jefferson's Manual are federal. Respondents' Br. at 14 n.8. As the American Civil Liberties Union of Pennsylvania and Power Interfaith have explained, the Pennsylvania Constitution's *sine die* adjournment principle has no analogue in the federal constitution, so it should come as no surprise that federal impeachments might carry over from one legislative session to another. Br. of [Proposed] Amici Curiae American Civil Liberties Union of Pennsylvania and Power Interfaith in Support of Petitioner at 8-9 (Dec. 16, 2022).

Fourth, should the Court entertain Respondents' invitation to review Jefferson's Manual, District Attorney Krasner respectfully points the Court to the very last sentence of the excerpt appended to Respondents' Preliminary Objections. There, the Manual states unambiguously: "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." *See* Exhibit 1 to Preliminary Objections at the page marked 342 (emphasis added). To the extent the Manual is of any relevance here, it obliterates the authority of Respondents Bonner and Williams, as the House impeachment managers, to proceed against District Attorney Krasner in any respect whatsoever.

Respondents' single-paragraph string cite to *Nixon*, *Dauphin*, and *Larsen* does not rehabilitate their position on the justiciability of Claim I. *Cf.* Respondents' Br. at 15. Those cases stand for the non-controversial idea that the courts have no control over the minutiae of impeachment proceedings — so long as the proceedings are conducted within constitutional bounds. *See*, *e.g.*, *Nixon*, 506 U.S. at 238 ("whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself *a delicate exercise in constitutional interpretation*, and is a responsibility of this Court as ultimate interpreter of the Constitution.") (emphasis added); *In re Investigation by Dauphin Cnty. Grand Jury*, 2 A.2d 802, 803 (Pa. 1938) ("the courts have no jurisdiction in impeachment proceedings, and no control over their conduct, *so long as actions taken are within constitutional lines*") (emphasis added); *Larsen v. Senate of Pennsylvania*, 646 A.2d 694, 703 (Pa. Commw. Ct. 1994) ("this court cannot declare to be unlawful a procedure which the Senate has constructed *within the borders of its constitutional discretion* to do so") (emphasis added).

Respondents' reliance on *Nixon*, and their related attempt to paint District Attorney Krasner's Petition as implicating nothing more than "procedural" matters, is particularly misplaced. Respondents' Br. at 12, 14-15, 25. Carrying over an impeachment from one legislative session to another is not a mere procedural issue. District Attorney Krasner is not asking the Court to "scrutinize a

legislature's choice of, or compliance with, internal rules and procedures," *Blackwell v. City of Philadelphia*, 684 A.2d 1068, 1071 (Pa. 1996), nor has he requested that the Court delve into "the procedures used by the Senate in trying impeachments," such as the selection of a subset of Senators to take evidence during his impeachment trial. *See Nixon*, 506 U.S. at 236. Instead, he has raised serious constitutional concerns with the purported effort to continue House Resolution 240 from the 206th General Assembly to the 207th, and he challenges whether an impeachment trial should take place at all. Application for Summary Relief at 8-16. When looking at the "precise facts and posture" of District Attorney Krasner's Petition, as opposed to "semantic cataloguing," *Blackwell*, 684 A.2d at 1071, it is clear that Claim I does not assert a non-justiciable political question.

(b) The Pennsylvania Constitution does not textually commit to the General Assembly the power to determine what conduct constitutes "any misbehavior in office."

Next, Respondents rather summarily claim that sections 4 and 5 of Article VI grant to the General Assembly the unfettered discretion to decide what *constitutes* "any misbehavior in office" *as well as* whether an individual has *committed* "any misbehavior in office." *See* Respondents' Br. at 16-17. They say that Claim III therefore presents a "political question that this Court . . . should decline to review." Respondents' Br. at 16. Respondents, however, spend little

time making their case, likely because a body of established caselaw forecloses their position.

Respondents first cite *Nixon*, *Dauphin*, and *Larsen* without explanation. *Id*. Respondents then baldly assert that "[d]etermining what conduct rises to the level of 'any misbehavior in office' warranting impeachment is a policy question that courts are ill-equipped to define." Respondents' Br. at 16-17. They fail to acknowledge, however, that the Supreme Court of Pennsylvania did precisely that, 30 years ago, in *In re Braig*. In that case, the Supreme Court interpreted "misbehavior in office" to mean conduct that would amount to the common law criminal offense of "misbehavior in office." *In re Braig*, 590 A.2d 284, 286 (Pa. 1991). And the Court held that a public official has engaged in "misbehavior in office" only if he "fail[ed] to perform a positive ministerial duty of the office or the performance of a discretionary duty with an improper or corrupt motive." *Id*. And *Braig* is not an isolated example; in several other cases, it has been "uniformly understood that the reference to 'misbehavior in office' was to the criminal offense as defined at common law." *Id*.; *see* Application for Summary Relief at 26-36 (citing cases). These decisions beg the question: if Respondents are right and the interpretation of constitutional provisions regarding "misbehavior in office" is non-justiciable, then how could the courts in seminal cases like *Braig* have possibly addressed these issues in the first place?

The United States Supreme Court's decision in *Powell* further forecloses Respondents' position. Respondents conflate the authority to decide whether an individual has *committed* "any misbehavior in office," with the authority to decide what *constitutes* "any misbehavior in office" in the first instance. In *Powell*, however, the court distinguished between "[t]he decision as to whether a Member *satisfied* the[] qualifications [for membership]" (which was "placed with the House"), and "the decision as to *what these qualifications consisted of*" (which was not). *Nixon*, 506 U.S. at 237 (explaining *Powell*, emphasis added). That distinction applies here: whether an individual has committed misbehavior could be for the Senate to decide in the appropriate circumstances; what constitutes misbehavior in the first instance is a question for the courts. Because Count III of the Petition raises the latter, it is properly before the Court.

***

"[C]hallenges to . . . legislative wisdom" are not the same as "challenges asserting an abuse of legislative power," and the courts may not "ignore a clear violation because of a false sense of deference to the prerogatives of a sister branch of government." *Consumer Party of Pa. v. Commonwealth*, 510 Pa. 158, 179-80 (1986). This case asks whether a constitutional violation has occurred. Claims I and III are therefore justiciable, and the Court should overrule Respondents' Preliminary Objection I.

B. DISTRICT ATTORNEY KRASNER HAS STANDING TO CHALLENGE THE IMPEACHMENT PROCEEDINGS AGAINST HIM (ALL CLAIMS)

In his Petition, District Attorney Krasner seeks a declaratory judgment that the "Amended Articles [of Impeachment] are null and void, and that there is no authority to pursue them," Petition ¶ 4, and a declaration that he is not subject to impeachment, *id.* ¶ 9. Respondents, sued in their official capacities as the House impeachment managers, assert that District Attorney Krasner lacks standing to seek this declaratory relief. Respondents adopt the untenable position that District Attorney Krasner is not aggrieved by his impeachment by the House of Representatives simply because he has not already been subject to trial and removal in the Senate. As set forth below, District Attorney Krasner already has been injured by the Amended Articles of Impeachment and imminently faces further injury if subjected to a trial based on the null and void and otherwise unconstitutional Amended Articles of Impeachment.

Justiciability doctrines, such as standing and ripeness, ensure that courts do not issue inappropriate advisory opinions. *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 481 (Pa. 2021) (citing *Stuckley v. Zoning Hearing Bd. of Newtown Twp.*, 621 Pa. 509, 79 A.3d 510, 516 (Pa. 2013)). Here, District Attorney Krasner seeks a declaration that the Amended Articles of Impeachment became null and void on November 30, 2022, upon the adjournment *sine die* of the 206th

General Assembly's legislative session, and a declaration that he is not subject to impeachment under Article VI of the Constitution because, as the District Attorney of Philadelphia, he is not a "civil officer" subject to impeachment by the General Assembly and because the Amended Articles do not allege he engaged in any conduct that constitutes impeachable "misbehavior in office." Petition ¶ 9. Far from asking for an advisory opinion, District Attorney Krasner is seeking review of a "real and concrete," not "abstract," controversy that arose when the House of Representatives voted to impeach him and continued when the Senate decided to carry over the impeachment proceedings and proceed with the trial even after the adjournment *sine die* of the 206th General Assembly. *See Firearm Owners Against Crime*, 261 A.3d at 481 ("The doctrine of standing 'stems from the principle that judicial intervention is appropriate only where the underlying controversy is real and concrete rather than abstract.'") (quoting *City of Phila. v. Commonwealth*, 838 A.2d at 566, 577 (Pa. 2003)).

The touchstone of standing is "protect[ing] against improper plaintiffs." *In re Application of Biester*, 409 A.2d 848, 851 (Pa. 1979); *accord Firearm Owners Against Crime,* 261 A.3d at 481. To do so, courts require a plaintiff to demonstrate that he or she has been "aggrieved" by the conduct he or she challenges. *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003). "To determine whether the plaintiff has been aggrieved, Pennsylvania courts traditionally examine whether the plaintiff's

interest in the outcome of the lawsuit is substantial, direct, and immediate." Firearm Owners Against Crime, 261 A.3d at 481. A party's interest is *substantial* when it "surpasses the interest of all citizens in procuring obedience to the law." *Id.* (quoting *Commonwealth, Office of Governor v. Donahue*, 98 A.3d 1223, 1229 (Pa. 2014)). A party's interest is *direct* when "the asserted violation shares a causal connection with the alleged harm." *Id.* A party's interest is *immediate* "when the causal connection with the alleged harm is neither remote nor speculative." *Id.* (quoting *Donahue*, 98 A.3d at 1229).

It is self-evident that District Attorney Krasner is a proper plaintiff. This is not a case in which the Court must consider whether associations, special interest groups, taxpayers or other parties who are not directly subject to the challenged action have standing. Here, District Attorney Krasner is challenging the constitutionality of the Amended Articles of Impeachment, which accuse ***him*** of misbehavior in office, and of the Respondents' efforts to subject ***him*** to an impeachment trial in the Senate. Nor can there be any dispute that there is a causal connection between the asserted violation (the unconstitutionality of the Articles of Impeachment and impending trial) and the alleged harm (being impeached by the House of Representatives and subject to trial in the Senate, both in violation of the Constitution). Finally, District Attorney Krasner's interest in the outcome of the lawsuit is immediate because the alleged harm is neither remote nor speculative.

The Pennsylvania House of Representatives impeached District Attorney Krasner on November 16, 2022. It is certain, not speculative, that, in violation of Article VI of the Constitution, he has been impeached even though he is not a "civil officer" and has not engaged in "any misbehavior in office." That harm has materialized. Nor is it speculative that he will be subject to trial, even though the Articles of Impeachment became null and void with the adjournment *sine die* of the legislative session.

Respondents' assertion that District Attorney Krasner has not been injured because "[a]ll that has happened to date is that Petitioner Krasner has been timely served with Articles of Impeachment," Respondents' Br. at 19, is unsupportable. The Amended Articles of impeachment accuse District Attorney Krasner, among other things, of contributing to an increase in violent crime in Philadelphia. His impeachment and associated accusations of "misbehavior in office" have been widely publicized in Philadelphia, throughout the state, and even nationally, with stories from, among others, the Washington Post and New York Times.[5] In

[5] *See*, *e.g.*, Jacey Fortin, *Pennsylvania House Votes to Impeach Philadelphia's Progressive D.A.*, N.Y. Times (Nov. 16, 2022), https://www.nytimes.com/2022/11/16/us/krasner-impeached-pennsylvania.html; Kelly Kasulis Cho, *Philadelphia District Attorney Krasner impeached amid violent crime spike*, Washington Post (Nov. 17, 2022), https://www.washingtonpost.com/nation/2022/11/17/larry-krasner-impeachment-trial-philadelphia/; Mark Scolforo, *Pennsylvania House impeaches Philadelphia's prosecutor over policies*, L.A. Times (Nov. 16, 2022), https://www.latimes.com/world-nation/story/2022-11-16/pennsylvania-house-

addition to the immediate reputational harm caused by the inflammatory claims in the Amended Articles, the impeachment imminently threatens to interfere with the important public safety functions of District Attorney Krasner's office. He already is required to divert attention from his work as District Attorney to prepare for a trial that should never take place. Accusations by the House of Representatives that he has engaged in misbehavior in office have a direct and immediate impact on his office's interactions with witnesses, law enforcement, defense counsel, and his constituents.

Moreover, Respondents' assertion that the Amended Articles of Impeachment have no adverse impact on District Attorney Krasner is disingenuous. He was impeached by a Republican majority, who disagree with his policies, in a lame duck session, on the eve of an election in which the Republicans expected to lose control of the House of Representatives. The Republican majority impeached him knowing there would unlikely be sufficient votes in the Senate to remove him from office. They evidently believed that the mere fact of impeachment, standing alone, served some function in weakening District Attorney

---

impeaches-philly-prosecutor-over-policies; Scott Calvert, *Philadelphia District Attorney Larry Krasner Impeached by Pennsylvania House*, Wall Street Journal (Nov. 16, 2022), https://www.wsj.com/articles/philadelphia-district-attorney-larry-krasner-faces-impeachment-vote-in-pennsylvania-house-11668604729.

Krasner, hampering the effectiveness of his office, and chilling his criminal justice reform initiatives.

Finally, District Attorney Krasner's impeachment is a matter of historical record, and his reputation will forever be tarnished by the mere fact of his impeachment, without regard to whether he is ultimately removed. President Clinton's impeachment had a material impact on his presidency and will forever define his tenure in office even though he was acquitted by the Senate. President Nixon resigned rather than face impeachment proceedings. For a publicly elected official, the mere fact of impeachment causes an injury. In sum, District Attorney Krasner has been sufficiently injured to have standing to seek a declaratory judgment that his impeachment is unconstitutional.

In the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531-7541, the General Assembly vested in courts the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." 42 Pa.C.S. § 7532. "Significantly, the legislature provided that the Declaratory Judgments Act is 'remedial,' and 'its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered.'" *Firearm Owners Against Crime*, 261 A.3d at 482 (quoting 42 Pa.C.S. § 7541(a)). Moreover, unlike the federal court system, where standing has Constitutional underpinnings in Article III's case or

controversy requirement, "[u]nder Pennsylvania law, the doctrine of standing is a prudential, judicially-created tool, affording discretion to courts." *Id.* at 481-82 (internal citation and quotation omitted). Here, given the remedial nature of the Declaratory Judgments Act, and immediate, individualized, and concrete nature of District Attorney Krasner's injury, the Court should overrule Respondents' Preliminary Objection II and review District Attorney Krasner's Petition.

C. WHETHER DISTRICT ATTORNEY KRASNER, AS A LOCALLY ELECTED OFFICIAL, IS SUBJECT TO IMPEACHMENT (CLAIM II) AND WHETHER THE ARTICLES OF IMPEACHMENT ALLEGE ANY CONDUCT THAT CONSTITUTES "MISBEHAVIOR IN OFFICE" (CLAIM III) ARE ISSUES RIPE FOR THIS COURT'S REVIEW

Respondents also object to the second and third claims in the Petition as unripe for judicial review. Respondents' Br. at 20. They make no such argument as to the first claim regarding the non-carryover of the Amended Articles of Impeachment to a new legislative session. *See id.* Therefore, there is no dispute that Claim I is ripe for judicial review. Respondents assert that whether District Attorney Krasner is a "civil officer" subject to impeachment (Claim II) and whether the Amended Articles allege conduct that constitutes "any misbehavior in office" (Claim III) are issues "not ripe for resolution." *Id.* at 21. As the Pennsylvania Supreme Court has explained, the justiciability doctrines of standing and ripeness are "closely related because both may encompass allegations that the plaintiff's harm is speculative or hypothetical and resolving the matter would

constitute an advisory opinion." *Firearm Owners Against Crime*, 261 A.3d at 482. District Attorney Krasner's harm from being impeached is neither speculative nor hypothetical for the reasons set forth in Part B above. He has been impeached, and the constitutionality of the Amended Articles is therefore ripe for review.

Although there is some overlap between ripeness and the imminence aspect of the standing inquiry, the Pennsylvania Supreme Court has characterized ripeness as "distinct from standing as it addresses whether the factual development is sufficient to facilitate a judicial decision." *Id.* This inquiry leads to the obvious conclusion that Claims II and III are ripe for judicial review. Here, the Petition presents a purely legal question that requires no factual development to facilitate a judicial decision. District Attorney Krasner is not asking the Court to review whether, as a factual matter, he engaged in the conduct alleged in the Amended Articles. To the contrary, Claim II seeks a declaratory judgment that District Attorney Krasner, as a locally elected official, is not, as a matter of law, a "civil officer" subject to impeachment under Article VI. There is no factual dispute about District Attorney Krasner's status as a locally elected official or that he serves as the District Attorney for the City of Philadelphia. Similarly, Claim III seeks a declaratory judgment that, as a matter of law, the conduct alleged in the Amended Articles does not constitute "any misbehavior in office" for purposes of Article VI.

Notably, Respondents do not assert that the legal issues raised in District Attorney Krasner's Petition are not ripe because the Senate has yet to determine whether District Attorney Krasner is an impeachable "civil officer" or whether the Amended Articles allege "misbehavior in office." In fact, Respondents have asserted the Senate has no role in making that determination. In a "Fact Sheet" on the Impeachment Process as it relates to District Attorney Krasner, published by the House Republican Caucus, of which Respondents Bonner and Williams are members, the Caucus states that the House of Representatives "has the sole power of impeachment" and, "[a]s a body, the House decides what is, or is not, an impeachable offence; the House also decides what would be 'misbehavior in office.'"[6] The parties are not awaiting any determination by the Senate of the legal issues raised in the Petition.

Even leaving aside the unique features of impeachment, where the mere fact of impeachment creates an injury, it is well established that a party need not await prosecution, trial and conviction to challenge the constitutionality or legality of the enforcement action. "Applying the traditional substantial-direct-immediate test for standing," the Pennsylvania Supreme Court "has afforded standing to plaintiffs

[6] House Republican Caucus, Fact Sheet: Impeachment Process in PA, *Impeachment is the Legislature's most powerful tool for holding any Pennsylvania elected official to account*, (Oct. 25, 2022) available at: https://www.pahousegop.com/Display/SiteFiles/1/2022/ImpeachProcess.pdf

in pre-enforcement declaratory judgment actions challenging the legality or constitutionality of statutes." *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 482 (Pa. 2021). In *Yocum v. Commonwealth*, 161 A.3d 228, 231 (Pa. 2017), for example, the Supreme Court held that an attorney employed by the Pennsylvania Gaming Control Board had standing to bring an action for declaratory and injunctive relief challenging the constitutionality of restrictions the Pennsylvania Race Horse Development and Gaming Act imposed on the Board's employees. The Court concluded the attorney's claim was ripe because she presented a constitutional question of law and "additional factual development of petitioner's claims that might result from awaiting her actual application to or recruitment by a possible future gaming industry employer 'is not likely to shed more light upon the constitutional question of law' she has presented [. . ., which was] 'particularly well-suited for pre-enforcement review.'" *Id.* at 237 (quoting *Robinson Twp.*, 83 A.3d at 925).[7]

---

[7] *See also*, *e.g.*, *Cozen O'Connor v. City of Phila. Bd. of Ethics*, 13 A.3d 464, 466 (Pa. 2011) (law firm had pre-enforcement standing to bring declaratory judgment action to challenge Philadelphia Board of Ethics advisory opinion interpreting the City Code's campaign contribution limitation); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 913 (Pa. 2013) (physician had standing to bring pre-enforcement declaratory judgment action challenging state statute restricting his ability to obtain and share information with other physicians); *Commonwealth v. Donahue*, 98 A.3d 1223, 1230 (Pa. 2014) (Office of the Governor had standing to bring declaratory judgment action to challenge the Office of Open Records' statutory interpretation, and noting that "[o]ur position in this respect is consistent

The U.S. Supreme Court has come to the same conclusion. For purposes of the more rigorous U.S. Constitution Article III standing analysis, a "recurring issue in [the Supreme Court's] cases is determining when the threatened enforcement of a law creates an Article III injury. When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014). A credible threat of prosecution suffices. *Id.* at 159. Accordingly, just as arrest and prosecution are not a prerequisite to challenging the constitutionality of a law, a trial in the Senate and a verdict of removal are not a prerequisite for judicial review of the constitutionality of the Amended Articles.

Ripeness is best understood as having two aspects: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Where the issue presents a purely legal question, it is fit for judicial review. *Id.* at 149. Here, the Petition presents purely legal questions regarding the Constitutionality of the Amended Articles. As to the second factor, the hardship to District Attorney Krasner of withholding court consideration until after the Senate trial is substantial.

---

with similar decisions where we have recognized the justiciability of declaratory judgment actions seeking pre-enforcement review of an administrative agency's interpretation and enforcement of a governing statute").

In *Abbott Labs.*, the U.S. Supreme Court held that pharmaceutical companies could bring a pre-enforcement challenge to an FDA regulation because "petitioners deal in a sensitive industry, in which public confidence in their drug products is especially important. To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily." *Id.* at 153. Here, District Attorney Krasner is a publicly elected official who serves as the chief law enforcement officer for the City of Philadelphia. Public confidence in his integrity and commitment to public safety is imperative to the performance of his duties. District Attorney Krasner and the functions of his office would be severely and unnecessarily harmed by him standing trial in the Senate as the result of Articles of Impeachment that should be nullified and declared unconstitutional.

Because they have no explanation for why the Amended Articles are not ripe for judicial review, most of Respondents' "ripeness" argument restates their first objection, namely that separation of powers and the political question doctrine prohibit judicial review of an ongoing impeachment proceeding. Respondents' Br. at 21-24. Those arguments are addressed in Part A above. Because Claims II and III are ripe for judicial review, the Court should overrule Respondents' Preliminary Objection III.

VIII. CONCLUSION

Respondents have not met their burden of showing that District Attorney Krasner cannot succeed on the claims set forth in his Petition. *Highley v. Dep't of Transportation*, 195 A.3d 1078, 1082 (Pa. Commw. Ct. 2018). His claims are justiciable and ripe, and he has standing to bring them. The Court should therefore overrule Respondents' Preliminary Objections in their entirety.

***

Respectfully submitted,

Dated: December 21, 2022

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
By: /s/ *John S. Summers*
John S. Summers (I.D. No. 41854)
Andrew M. Erdlen (I.D. No. 320260)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Telephone: (215) 568-6200
jsummers@hangley.com
aerdlen@hangley.com

Counsel for Petitioner

MILLER & CHEVALIER CHARTERED
Michael J. Satin (*pro hac vice*)
Timothy P. O'Toole (*pro hac vice*)
Andrew T. Wise (*pro hac vice*)
Dawn E. Murphy-Johnson (admission *pro hac vice* pending)
900 16th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 626-6009
msatin@milchev.com
totoole@milchev.com
awise@milchev.com
dmurphyjohnson@milchev.com

Counsel for Petitioner admitted pro hac vice

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

In compliance with Pennsylvania Rule of Appellate Procedure 127, I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: December 21, 2022

/s/ John S. Summers
John S. Summers

WORD COUNT CERTIFICATION

I hereby certify that the foregoing brief complies with any applicable word count limitation. The brief contains 7,541 words, as determined by the word count feature of the word processing system used to prepare this brief, exclusive of the cover page, tables, and signature block.

Dated: December 21, 2022

/s/ John S. Summers
John S. Summers

CERTIFICATE OF SERVICE

I, John S. Summers, hereby certify that on this 21st day of December, 2022, I am serving the foregoing Petitioner's Brief in Opposition to Preliminary Objections of Respondents Bonner and Williams to Petition for Review upon the following persons by the Court's electronic filing service, which service satisfies the requirements of Pa. R. App. P. 121:

Matthew H. Haverstick, Esquire
Joshua J. Voss, Esquire
Shohin H. Vance, Esquire
Samantha G. Zimmer, Esquire
Francis G. Notarianni, Esquire
Kleinbard LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
jvoss@kleinbard.com
svance@kleinbard.com
szimmer@kleinbard.com
fnotarianni@kleinbard.com

Attorneys for Senator Kim Ward

Lawrence F. Stengel, Esquire
William C. Costopoulos, Esquire
Robert A. Graci, Esquire
Carson B. Morris, Esquire
Emily M. Bell, Esquire
Saxton & Stump
280 Granite Run Drive, Suite 300
Lancaster, PA 17601
lfs@saxtonstump.com
rag@saxtonstump.com
wcc@saxtonstump.com
cbm@saxtonstump.com
emb@saxtonstump.com

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

Lam D. Truong, Esquire
Office of Chief Counsel,
Democratic Caucus
Pennsylvania House of Representatives
Room 620 Main Capitol Building
Harrisburg, PA 17120
ltruong@pahouse.net

Attorney for Representative Jared Solomon

/s/ John S. Summers
John S. Summers