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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

PETITIONER'S CONSOLIDATED OPPOSITION TO RESPONDENT WARD'S CROSS-APPLICATION FOR SUMMARY RELIEF AND REPLY IN SUPPORT OF HIS APPLICATION FOR SUMMARY RELIEF

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I. INTRODUCTION

District Attorney Krasner's opening brief provides compelling grounds — founded in the text and structure of the Constitution, statutes, and court decisions — supporting three fundamental ways in which the Amended Articles of Impeachment are unlawful: the Amended Articles of Impeachment do not carry-over from the adjournment *sine die* of the General Assembly; he is not a "civil officer" subject to impeachment; and the Amended Articles of Impeachment do not allege any conduct that constitutes "misbehavior in office." Yet, despite the length of Senator Kim Ward's opposition — nearly double District Attorney Krasner's brief — she does not refute the sound bases supporting the three core contentions. Her lengthy brief comes up not only short but, as shown below, demonstrates that District Attorney Krasner is entitled to a declaration that the Articles of Impeachment are unlawful.

With respect to District Attorney Krasner's claim that the Amended Articles of Impeachment do not carry-over from the adjournment *sine die* of the General Assembly's legislative session (Claim I), Senator Ward's chief argument is that the *sine die* provision grounded in Article II of the Constitution does not apply to Article VI, which governs the General Assembly's impeachment power. Part A below demonstrates that this argument cannot be reconciled with the plain text and structure of the Constitution. Article II applies to "The Legislature" generally,

without regard to a particular function. Senator Ward might have the seeds of an argument if the *sine die* provision were derived from Article III, which governs "Legislation," but that is not the case. Moreover, Senator Ward ignores entirely the fact that the clear language in the Pennsylvania Code and the Senate's own rules further demonstrate the applicability of *sine die* to impeachment. Instead, Senator Ward focuses on five Pennsylvania impeachment proceedings that apparently spanned two sessions of the General Assembly, but those impeachment proceedings occurred between 1794 and 1825, long before the *sine die* adjournment principle was codified in the Pennsylvania Constitution in 1967.

Part B below shows that Senator Ward's opposition to Claim II, which alleges that District Attorney Krasner is not a civil officer subject to impeachment, also misses the mark. Her position that Article VI, § 6 defines "civil officer" by reference to the individual's function rather than whether the individual holds a state or local office is flawed. That argument is not grounded in the text or structure of Article VI, § 6; it erroneously relies on a series of decisions that do not interpret Article 6; and it conflates different terms with different meanings. Additionally, rather than squarely address the Pennsylvania Supreme Court's discussion of the meaning of "civil officer" in *Burger v. School Board of McGuffey School District*, 923 A.2d 1155 (Pa. 2007), she offers a distorted and cabined reading of that decision. No matter how hard the opposition tries, it cannot escape

the conclusion that four members of the Supreme Court found cogent Justice Saylor's conclusion that a "civil officer" is one who holds statewide office only. And the opposition further fails to demonstrate that District Attorney Krasner is wrong in highlighting that the allocation of constitutional power to the General Assembly to regulate local officers — through legislation — confirms that the District Attorney of the City of Philadelphia is not a statewide "civil officer" who can be impeached under Article VI, § 6.

With respect to District Attorney Krasner's third claim — that the Amended Articles of Impeachment do not allege any conduct that constitutes "misbehavior in office" — Senator Ward's primary argument is not that they do (she fails to even engage directly on that issue), but rather that "misbehavior in office" under Article VI, § 6 somehow means something different than what the Pennsylvania Supreme Court has interpreted that identical phrase to mean in other parts of the Constitution. Part C demonstrates that her arguments do not stand, and that the Amended Articles of Impeachment do not come close to alleging conduct that meets the standard for "misbehavior in office" established by the Supreme Court.

Separately, Senator Ward seeks summary relief on the ground that the Senate and yet-to-be determined Senate Impeachment Committee are indispensable parties. For the reasons stated in Part D below, they are not.[1]

II. ARGUMENT

A. SENATOR WARD'S ARGUMENT THAT THE SENATE IS NOT MERELY PERMITTED BUT REQUIRED TO ACT ON THE ARTICLES OF IMPEACHMENT FROM THE PRECEDING GENERAL ASSEMBLY IS WRONG

District Attorney Krasner's Application for Relief demonstrates that the Pennsylvania Constitution, state statutory law, case law, and Senate rules mandate that the Senate is prohibited from proceeding with the Articles of Impeachment because they do not survive the adjournment *sine die* of the 206th General Assembly on November 30, 2022. *See* Mem. of Law in Supp. of Petitioner's Appl. for Summ. Relief and Expedited Briefing ("Petitioner's Appl.") at 8–15, *Krasner v. Ward*, No. 563 MD 2022 (Pa. Commw. Ct. filed Dec. 2, 2022). Senator Ward concedes, as she must, that legislative matters pending before a General Assembly terminate upon adjournment *sine die* and do not "carry over" from one General

[1] Two of the three House impeachment managers, Representative Timothy R. Bonner and Representative Craig Williams, have also opposed District Attorney Krasner's Application for Summary Relief. Because their opposition arguments are similar to those they made in their brief in support of their preliminary objections, to which District Attorney Krasner is submitting a separate response, and because their opposition arguments largely overlap with Senator Ward's opposition papers, this brief responds primarily to Senator Ward's opposition.

Assembly to the next, and that the Senate has nonetheless carried over the Articles of Impeachment against District Attorney Krasner from the 206th General Assembly to the 207th General Assembly. *See* Br. of Resp't Sen. Kim Ward in Opp'n to Appl. for Summ. Relief and in Supp. of Cross-Appl. for Summ. Relief ("Ward Br.") at 16, *Krasner v. Ward*, No. 563 MD 2022 (Pa. Commw. Ct. filed Dec. 16, 2022) (noting that "terminat[ion] of "legislative matters" upon adjournment *sine die* "is not in serious dispute"). Senator Ward points to no Constitutional provision, statute, or rule that expressly authorizes the Senate to carry over Articles of Impeachment from one General Assembly to the next — because none exists.

Instead, Senator Ward argues that the "text and structure of the Constitution *suggest* a conscious and deliberate intent" to treat the legislature's impeachment power as separate and independent from its law-making powers (Ward Br. at 25) (emphasis added), and then points to a handful of historical practices in the Commonwealth and elsewhere, mostly from hundreds of years ago, that hardly elucidate the Constitutional issue before this Court. *Id*. As set forth below, the text and structure of the Constitution not only "suggest" but, in fact, establish otherwise.

1. The Text and Structure of the Constitution Establish That the *Sine Die* Adjournment Principle Applies to Impeachment

Senator Ward's primary argument is based on the text and structure of the Constitution. *See id*. at 17–25. She agrees with District Attorney Krasner that adjournment *sine die* is "derived from Article II." *Id.* at 20. She then argues that Article II governs only "the exercise of *legislative* authority," which she defines narrowly and incorrectly as "lawmaking" or "the power to 'make, alter, and repeal laws.'" *Id*. (quoting *Blackwell v. Commw., State Ethics Comm'n*, 567 A.2d 630, 636 (Pa. 1989)). And since the Senate's impeachment power is found in Article VI, Senator Ward argues, that must mean that adjournment *sine die* does not apply to the Senate's impeachment power. *See id.* at 17.

The premise of Senator Ward's argument is flawed. When correctly analyzed, the structure of the Constitution actually refutes her position. The parties agree that the *sine die* provision derives from Article II, which is titled "The Legislature," and that article applies to all functions of the legislature, including legislation *and* impeachment. A separate article, Article III, titled "Legislation," is limited to the General Assembly's power to make, alter, or amend laws. But Article II is not so limited. Because the *sine die* provision does not appear in Article III, but rather is grounded in Article II, it applies whether the General

Assembly is enacting legislation pursuant to Article III or exercising its impeachment power under Article VI.

Although Section 1 of Article II vests the "legislative power" in the General Assembly, that term means all powers exercised by the legislature, not just the power to enact legislation. Senator Ward's proposed definition of "legislative authority" as limited to lawmaking, *id.* at 20, rests on an incomplete and misleading quotation from the *Blackwell* case. In fact, the Court said that "[t]he 'legislative power' *in its most pristine form* is the power 'to make, alter and repeal laws." *Blackwell*, *supra*, 567 A.2d at 636 (emphasis added); *see also id*. at 637 (describing lawmaking as the "'legislative power' is its quintessential form"). Implicit in these qualified descriptions is the Pennsylvania Supreme Court's recognition that the "legislative power" encompasses other functions performed by the legislature, not just lawmaking.

In any event, even if Section 1 is focused on enacting legislation, the remaining Sections of Article II, §§ 2–17, plainly apply to the General Assembly without limitation as to its function. For example, Article II includes provisions on the election, qualification, compensation, privileges, and terms of members. *See* Pa. Const. art. II, §§ 2, 3, 5–8, 15. These provisions apply equally when the members are enacting laws or engaged in an impeachment function. Similarly, other Sections encompassed in Article II with broad applicability, including

"Quorum" (§ 10), "Journals; yeas and nays" (§12), and "Legislative districts" (§ 16), confirm that the *sine die* adjournment principle derived from Article II does not relate solely to General Assembly's law-making powers.

In contrast, Article III, titled "Legislation," does focus on the Legislature's power to "make, alter, and repeal laws." Article III, Part A, sets forth the "Procedures" for the enactment of legislation, including, in Sections 1–8, passage of laws, reference to committee, form of bills, consideration of bills, concurring in amendments, conference committee reports; revival and amendment of laws, notice of local and special bills, and signing of bills. Because the *sine die* provision appears in Article II, which applies to the "Legislature," and not in Article III, which applies to "Legislation," the structure of the Constitution squarely supports District Attorney Krasner's position that the *sine die* provision applies to all acts of the Legislature, including impeachment, and is not limited to the enactment of legislation.

To be sure, the General Assembly's impeachment powers are not specifically discussed in Article II. But that does not mean that the *sine die* adjournment principle found in Article II, which "is not in serious dispute," *see* Ward Br. at 16, does not apply to the General Assembly's exercise of its impeachment power under Article VI. The General Assembly's power to enact legislation is not specifically discussed in Article II either. The other provisions of

Article II surely apply to impeachment proceedings. For example, members of the House and Senate receive compensation, pursuant to Article II, § 8 ("Compensation"), in connection with their impeachment work. The House's debate and vote on the Articles of Impeachment were "open" to the public, pursuant to Article II, § 13 ("Open sessions"). And, both the House and Senate kept a "journal of its proceedings" related to the Articles of Impeachment, pursuant to Article II, § 12 ("Journals, yeas and nays"), just as they do for law-making business. In sum, Article II's *sine die* adjournment principle applies to the General Assembly's exercise of its impeachment power, just as other provisions and principles in Article II do.

The "placement," "structure," and "text" of Article VI further reinforce the notion that *sine die* applies to impeachment. Specifically, the consecutive placement of Sections 4, 5, and 6 in Article VI indicates that the impeachment process is a bicameral undertaking, not unlike traditional law-making by the General Assembly. Section 4 establishes the House of Representatives' authority to impeach; Section 5 establishes the Senate's authority to try impeachments; and Section 6 establishes the officers liable to impeachment. *See* Pa. Const. art. VI, § 4 ("The House of Representatives shall have the sole power of impeachment."); art VI, § 5 ("All impeachments shall be tried by the Senate."); art. VI, § 6 ("The Governor and all other civil officers shall be liable to impeachment . . . .").

Clearly, the drafters of the Constitution recognized that the full impeachment process (i.e., impeachment and removal) could be completed only by both the House and the Senate playing their parts. There is therefore no reason to think that the drafters intended for the *sine die* adjournment principle established in the Constitution not to apply to impeachment.

Senator Ward ignores the consecutive placement of Sections 4, 5, and 6 in Article VI, choosing instead to home in on the word "shall" in Section 5. *See* Ward Br. at 25 (noting that this provision states that "[a]ll impeachments *shall* be tried by the Senate"). According to Senator Ward, the word "shall" means that the Senate has a "mandatory duty" to conduct a trial once the House has passed articles of impeachment, and as such, that articles of impeachment "cannot be extinguished by adjournment sine die." *Id*. This argument is wrong on multiple levels.

First, that "[a]ll impeachments shall be tried by the Senate" means simply that the Senate, and not the House or any other body, has the power to conduct an impeachment trial. *See McGinley v. Scott*, 164 A.2d 424, 430-431 (Pa. 1960) (distinguishing between the House's and Senate's power with respect to impeachment). Second, the Pennsylvania Supreme Court and courts throughout the United States have routinely held that "shall" does not always mean "must," and in some circumstances is intended to mean "should," "will," or "may." *See*

MERSCOPR, Inc.. v. Delaware Cnty., 207 A.3d 855, 865 (Pa. 2019) ("we are aware that the word 'shall' has also been interpreted to mean 'may' or as being merely directory as opposed to mandatory") (internal quotations omitted); *Gutierrez de Martinez v. Lamango*, 515 U.S. 417, 432 n.9 (1995); *English v. Trump*, 279 F. Supp. 3d 307, 323 (D.D.C. 2018) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* § 11, at 113 (2012)) ("*Shall* is, in short, a semantic mess. *Black's Law Dictionary* records five meanings for the word."); *McReady v. White*, 417 F.3d 700, 702 (7th Cir. 2005) ("'Shall' is a notoriously slippery word that careful drafters avoid."); *Ford v. Hunnicutt*, Nos. 10-1253, 11-0033, 2012 WL 13081443, at *4 (D.N.M. Feb. 17, 2012) ("As recognized by the Supreme Court, the term 'shall' can mean 'is authorized to' depending on the context in which it is used . . ."); *United States v. 1993 Bentley Coupe*, No. 93-cv-1282, 1997 WL 803914, at *1 (D.N.J. Dec. 30, 1997) (finding that "shall" in the context of 28 U.S.C. § 1355(c) does not mean that courts "must" grant a stay upon an appellant's request); *Black's Law Dictionary* (11th ed. 2019) (defining "shall" in relevant part as "will" or "may").

Finally, and most importantly, even if "shall" is interpreted to mean "must" in this context, that does not mean that the Senate is obligated to conduct a trial of an unlawful or unconstitutional impeachment. Courts, including the United States Supreme Court, have routinely held that any mandatory obligation supposedly

imposed by "shall" can be overridden by other concerns. *See*, *e.g.*, *Lamango*, 515 U.S. at 419 (holding courts can review Attorney General's removal determinations, notwithstanding statutory phrase stating "certification of the Attorney General *shall* conclusively establish scope of office or employment for purposes of removal") (emphasis added). Undoubtedly, the Senate would not be obligated to conduct an impeachment trial where the House had impeached a civil officer for, say, wearing a New York Yankees hat in the office, or for being Black, gay, or Muslim. As these examples illustrate, the Senate is not, and cannot be, required to conduct an impeachment trial where the impeachment itself is unlawful, whether because it violates the *sine die* adjournment principle or some other constitutional provision. The use of the word "shall" simply describes an expectation that in normal circumstances — that is, where there is no constitutional impediment — a Senate trial will follow impeachment by the House; it does not operate to override other constitutional provisions. In sum, the Senate's power to conduct impeachment trials does not mean that *sine die* is inapplicable to impeachment.

2. Senator Ward Ignores the Clear Language in the Pennsylvania Code and the Senate's Own Rules That Further Demonstrate the Applicability of *Sine Die* to Impeachment

Senator Ward's textual analysis does not even address the fact that both the Pennsylvania Code and the Senate's own rules state that "all matters" pending at the end of a General Assembly terminate at adjournment *sine die*, which both

reflect the legislature's understanding that the constitutional principle is not limited to lawmaking, as Senator Ward now argues. Section 7.21 of the Pennsylvania Code states that the General Assembly is a "continuing body" for only two years, with the two-year period ending on November 30 of even-numbered years (101 Pa. Code § 7.21(a)), and, importantly for our purposes, that "*[a]ll matters* pending before the General Assembly upon the adjournment sine die or expiration of a first regular session maintain their status and are pending before the second regular session." 101 Pa. Code § 7.21(b) (emphasis added)). This provision does not distinguish between legislative matters and impeachment matters but instead refers to "[a]ll matters." Although it does not expressly state that "all matters" pending at the expiration of *sine die* do not carry over to the next General Assembly, that is the clear implication of this provision.

Senator Ward also does not address the Senate's own rules, which further indicate that impeachment is subject to *sine die*. Specifically, Senate Rule 12(j) states that "[a]ll bills, joint resolutions, *resolutions*, concurrent resolutions, or *other matters* pending before the Senate" do not survive "adjournment sine die or November 30th of [an even-numbered] years, whichever first occurs." Pa. Sen. R. 12(j) (emphasis added). The Articles of Impeachment are a "resolution," specifically, Pennsylvania House Resolution 240 ("HR 240"). To the extent they might be characterized as something other than a resolution, they certainly

constitute an "other matter[] pending before the Senate." Thus, the Senate's own Rules clearly establish that *sine die* applies to impeachment.[2]

Finally, Mason's Manual of Legislative Procedures similarly provides that the constitutional *sine die* rules are not limited to lawmaking activity. In addition to noting that pending legislation expires upon adjournment *sine die*, the manual also provides that a "motion to adjourn *sine die* has the effect of closing the session and terminating *all unfinished business* before the house." *Mason's Manual of Legislative Procedures* § 445.4 (2020) (emphasis added). The Senate Rules provide that the rules in Mason's Manual "shall govern the Senate in all cases to which they are applicable, and in which they are not inconsistent with the Standing Rules, Prior Decisions and Orders of the Senate." Pa. Sen. Res. 3, R. 26 (Jan. 5, 2021); *see also* Pa. Code 101 § 7.32 ("Mason's Manual of Legislative Procedure is the parliamentary authority of the Senate").[3]

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[2] Respondents Bonner and Williams argue that House Rules purportedly permit impeachment proceedings to be carried over from one General Assembly to the next. *See* Mem. of Law of Resp'ts Rep. Timothy R. Bonner and Rep. Craig Williams in Opp'n to Pet'r's Appl. for S. Relief and Expedited Briefing ("Bonner/Williams Br.") at 9, *Krasner v. Ward*, No. 563 MD 2022 (Pa. Commw. Ct. filed Dec. 16, 2022). Even if that were true, it is the Senate, not the House, that has carried the Articles of Impeachment from the 206th General Assembly to the 207th.

[3] The House rule is different in that it provides that "Mason's Manual supplemented by Jefferson's Manual of Legislative Procedure shall be the parliamentary authority of the House," unless it conflicts with other authority. Pa. House Res. 243 (Nov. 16, 2022), Rule 78.

3. Senator Ward's Reliance on Centuries-Old Impeachment Proceedings and an Advisory Opinion That *Precedes* the Amendment of Article II, § 4 in 1967 Is Misplaced

Senator Ward relies heavily on five impeachment proceedings in Pennsylvania that apparently "spanned two sessions of the General Assembly" and an Advisory Opinion from the Attorney General in *Umbel's Case*. Ward Br. at 7, 25–30. Notably, each of these five impeachments occurred between 1794 and 1825. *See id*. at 7–12. And *Umbel's Case* is from 1913. *See id*. at 26–28.

These impeachment proceedings and *Umbel's Case* say little to nothing about the constitutionality of the Senate's actions in this case because they all occurred long before the *sine die* adjournment principle was codified in the Pennsylvania Constitution in 1967. The *sine die* constitutional requirement is derived largely from Article II, § 4, which states, "The General Assembly shall be a continuing body during the term for which its Representatives are elected." That provision was added to the Pennsylvania Constitution by Amendment of May 16, 1967. *See* Pa. L. 1036 (1967). It was approved by Pennsylvanians by a two-to-one margin when it was proposed in a ballot measure in 1967.[4] Prior to 1959, Section 4 read, in relevant part: "The General Assembly shall meet at twelve o'clock,

[4] *See* Gen. Assembly of the Commw. of Pa., *Ballot Questions and Proposed Amendments to the Pennsylvania Constitution* (July 1998), http://jsg.legis.state.pa.us/resources/documents/ftp/publications/1998-75-BALLOT%20QUESTIONS%20REPORT.pdf.

noon, on the first Tuesday of January every second year, and at other times when convened by the Governor, but shall hold no adjourned annual session after the year one thousand eight hundred and seventy-eight."

Thus, the *sine die* adjournment principle did not become codified into the Constitution until 1967. As a result, impeachment proceedings in the 18th and 19th centuries and an Advisory Opinion from 1913 do not inform the constitutionality of the Senate's carry-over of the Articles of Impeachment against District Attorney Krasner in 2022.

Along the same lines, impeachment proceedings in other jurisdictions do not, and cannot, aid this Court in evaluating the constitutionality of the Senate's actions in this case. Senator Ward notes that the *sine die* principle exists in federal law, and that the impeachment proceedings of federal officials, including President Clinton, spanned from one Congress to the next. *See* Ward Br. at 30–32. But, *sine die* is not codified in the U.S. Constitution, like it is in the Pennsylvania Constitution.

Moreover, Senator Ward's assertion that the U.S. Senate "is plainly not a 'continuing body'—despite the fact that, as a practical matter, it may experience less 'turnover'" (*id*. at 32) is wrong. The 1988 U.S. Senate committee that determined that the U.S. Senate could choose to carry over the impeachment proceedings of Judge Alcee L. Hastings from the 100th Congress to the 101st

Congress relied on the fact that "[t]he Senate has been viewed as a 'continuing body' in that at least two thirds of its members (more than a quorum) always held over from one Congress to another." *See* S. Rep. No. 100-542, at 10, *Carrying the impeachment proceedings against Judge Alcee L. Hastings over to the 101st Congress* (Sept. 22, 1988). By contrast, the Pennsylvania Senate is expressly not a continuing body. *See* Pa. Const. art. II, § 4 ("The General Assembly shall be a continuing body during the term for which its Representatives are elected."). Indeed, half of Pennsylvania's Senators (less than a quorum) stand for election every two years.

B. SENATOR WARD'S ARGUMENT THAT DISTRICT ATTORNEY KRASNER IS A "CIVIL OFFICER" UNDER ARTICLE VI, § 6 IS WRONG

Article VI, § 6 provides that "[t]he Governor and all other civil officers shall be liable to impeachment for any misbehavior in office . . . ." Senator Ward departs from the text and structure of Article VI, § 6 — as well as other supporting authorities — by arguing that District Attorney Krasner meets the definition of a "civil officer." *See* Ward Br. at 37–43. She is incorrect.

District Attorney Krasner established in his opening brief that Section 6's reference to "civil officer" means statewide, not local, officers. *See* Petitioner's Appl. at 17–21. The only "civil officer" referenced in Section 6 is the governor, a statewide officer, and thus the phrase several words later — "all *other* civil

officers" — means other civil officers falling within the same general category. *Id*.[5] Section 6 later confirms that a local officer is not a "civil officer" within the meaning of this provision when it dictates that the remedy for impeachment is disqualification from holding "any office of trust or profit under this Commonwealth," namely *statewide office* only. *Id.* at 18. It makes little sense to bar impeached local officers from holding only statewide offices.[6] And, indeed, the Constitution provides that the District Attorney for the City of Philadelphia, a First Class City with its own Home Rule Charter, is subject to impeachment by local process. *See id.* at 21–26.

In response, Senator Ward presents a tangle of baseless arguments.

1. Senator Ward Is Wrong in Arguing That Whether an Official Is a "Civil Officer" Under Article VI, § 6, Turns on the Nature of His Office, Not the Level of Government of His Office

Senator Ward argues that District Attorney Krasner is a "civil officer" pursuant to Article VI, § 6, because civil officers are characterized by the duties

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[5] *See Burns v. Coyne*, 144 A. 667, 668 (Pa. 1928) (ejusdem generis); *Northway Vill. No. 3, Inc. v. Northway Props., Inc.*, 244 A.2d 47, 50 (Pa. 1968) (noscitur a sociis).

[6] *See Commonwealth ex rel. Woodruff v. Joyce*, 139 A. 742 (Pa. 1927) (holding that an office "under this commonwealth" was a state and not a local office). When interpreting Constitutional provisions, text is paramount and words must be construed in their context. *See Perry Cnty. Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 108 A. 659, 660 (Pa. 1919) ("[T]he general principles governing the construction of statutes apply also to the interpretation of Constitutions.").

and powers of their office, not by whether they hold a statewide or municipal office. *See* Ward Br. at 37–43. That is incorrect for several reasons.

First, Senator Ward's argument is untethered to the text and structure of the Constitution. Her argument starts on the false premise that District Attorney Krasner was elected to exercise power pursuant to Article IX, § 4 ("County officers shall consist of commissioners, controllers or auditors, district attorneys . . ."). Ward Br. at 37–38. In fact, because he is the City of Philadelphia's District Attorney, Article IX, § 4 does not apply to him. And nothing in the text of Article VI, § 6, suggests that the powers of an office are determinative of whether it is covered by that impeachment provision.

Second, Senator Ward relies on a series of cases that do not interpret Section 6; instead, those decisions interpret terms other than "civil officer," sections and articles of the Constitution other than Section 6 (or even Article VI), and irrelevant statutes. *E.g.*, *Richie v. City of Phila.*, 74 A. 430 (Pa. 1909) (Article III, "public officer"); *Alworth v. Cnty. of Lackawanna*, 85 Pa. Super. Ct. 349 (Pa. Super. Ct. 1925) (same); *Commw. ex rel. Foreman v. Hampson*, 143 A.2d 369, 373 (Pa. 1958) (Article XIV, "public officer"); *In re Ganzman*, 574 A.2d 732 (Pa. Commw. Ct. 1990) (statute declaring "election officers" ineligible from "civil office" being

voted for at the election at which he is serving). None of these cases shed light on the meaning of "civil officer" in Article VI.[7]

Third, Senator Ward errs by conflating Section 6's term "civil officer" with (now) Article III, § 27's use of the term "public officer." Essentially, Senator Ward argues that since courts appear to determine whether someone is a "public officer" by examining "the nature and inherent authority of the office," that must also be the test for determining whether an officeholder is a "civil officer." Her premise for equating these two terms is a nearly half-century old Attorney General Opinion. *See* Ward Br. at 39 n.29 (citing *Opinions of the Attorney General of Pennsylvania, 1974*, Official Opinion No. 49 (Sept. 18, 1974)). Article VI, however, uses the term "public officers" as well as the term "civil officers," so they cannot mean the same thing. *See PECO Energy Co. v. Commw.*, 919 A.2d 188, 191 (Pa. 2007) (applying canon of statutory construction that the framers are

[7] Reliance on case law construing statutes can, of course, be helpful in the context of constitutional interpretation where the language and context is sufficiently analogous. For example, *Commw. ex rel. Woodruff v. Joyce*, 139 A. 742 (Pa. 1927) — which Senator Ward also ignores — defined the phrase officers "under this commonwealth" in a statute to mean statewide officeholders only and that the legislature "had it wished to include municipal offices within the [statute], that term could have been used." As analogized to Article VI, § 6, the fact that "civil officers" are barred only from holding an office "under this commonwealth" after removal leads to a strong inference that only statewide officers are subject to impeachment under Article VI, § 6. *See supra* at 17 n.6; *see also* Petitioner's Appl. at 18.

"presumed to understand that different terms mean different things."). Moreover, an Opinion of an Attorney General is not legally authoritative; it is intended simply to provide guidance to state officials. *See DiNubile v. Kent*, 353 A.2d 839, 841 (Pa. 1976) ("[O]pinions of the Attorney General are merely for the guidance of state executive officials acting in their executive capacity. It is the province of courts to adjudicate issues of law.").[8]

2. Senator Ward's Effort to Distinguish *Burger* Fails

The parties appear to agree that the Pennsylvania Supreme Court has not squarely held whether a local official is a "civil officer" within the meaning of Article VI, § 6. Yet, the closely related question of whether a local official is a "civil officer" and subject to removal pursuant to Article VI, § 7 was addressed in 2007 in *Burger v. School Board of McGuffey School District*, 923 A.2d 1155 (Pa. 2007). Petitioner's Appl. at 19–20. As Justice Saylor concluded, a local official

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[8] *Houseman v. Commw. ex rel. Tener*, 100 Pa. 222 (Pa. 1882), cited by all Respondents, does not support their interpretation of Article VI, § 6. In *Houseman*, the Supreme Court concluded that a local official was subject to removal (not impeachment) under the provision of then-Article VI, § 4, which stated: "Appointed officers other than judges of the courts of record and the superintendent of public instruction may be removed at the pleasure of the power by which they shall have been appointed." *Id*. at 229. To reach that conclusion, the Court observed that the "very general" language in the provision included "nothing in it which authorizes a distinction between state, county and municipal officers." *Id.* at 230. *Houseman* did not involve an interpretation of current Article VI, § 6, and the textual differences between that Section, described *supra*, and the provision at issue in *Houseman*, are dispositive. *Houseman* was not cited in any opinion in *Burger*.

could not be a "civil officer" because "state-level officials were almost exclusively in view when then-Section 4 of Article VI was framed . . . ." 923 A.2d at 1167 (Saylor, J., concurring). The four-Justice majority called his theory "cogent," but because the parties did not dispute that particular issue, the majority stated that it would leave ruling on the issue to a future case. *Id.* at 1161 n.6.

Contrary to Senator Ward's assertion, *see* Ward Br. at 45, District Attorney Krasner does not "ignore" the majority opinion; he recognized that the majority did not rule on the meaning of "civil officer," but discussed it in a footnote complimenting the cogency of Justice Saylor's analysis. It is Senator Ward who ignores the majority opinion in stating that "*Burger* supports that the District Attorney of Philadelphia is a civil officer," Ward Br. at 47, when the majority opinion lends no support at all to that proposition.

Despite the detailed and probative analysis of Justice Saylor — only fifteen years ago, and focused on interpreting the very term at issue here — Senator Ward inexplicably states that Justice Saylor's opinion "does not support [District Attorney Krasner's] argument." *Id*. at 45. While of course there are factual differences from this case — *Burger* involves Section 7 removal not Section 6 impeachment, and also concerns a school superintendent, not a district attorney — Justice Saylor's opinion plainly "supports" the conclusion that the "civil officer" described in Section 6 must be a statewide official. And while both Justice Saylor

and the majority noted a tension between his opinion and some prior decisions, his conclusion notwithstanding (described by four other Justices as "cogent") was that only a statewide official, not a local one, could be a "civil officer."

Thus, there can be no doubt that Justice Saylor's analysis in *Burger* that garnered essentially the support of five Justices — the most relevant and on-point analysis from the Pennsylvania Supreme Court — supports District Attorney Krasner's interpretation that only a statewide official can be a "civil officer" covered by Section 6.[9]

[9] Senator Ward also repeatedly misreads history to support her position. For example, she attempts to divine the framers' intent concerning the meaning of Article VI, § 6, from a single statement by a single legislator in the constitution's legislative history. *See* Ward Br. at 45. That provides no support, *Indem. Ins. Co. of N. Am. v. Bureau of Workers' Comp. Fee Rev. Hearing Off.*, 245 A.3d 1158, 1168 (Pa. Commw. Ct. 2021) (noting that "the statement of a single legislator is not entitled any weight"), and is contrary to the fuller history discussed in District Attorney Krasner's Brief. Petitioner's Appl. at 20–21.

Further, Senator Ward's description of historical impeachment practice of the General Assembly demonstrates that impeachment was directed at statewide, not local officers. Not one of the twelve historical impeachments cited in Senator Ward's brief was of a local official. *See* Ward Br. at 5–6. Instead, they include state officers such as judges, justices, and one state Comptroller General. *See Joyce*, 139 A. at 743 ("We think no one would gainsay that [county] judges are state officers in Pennsylvania.") (citing *Commonwealth v. Conyngham*, 65 Pa. 76 (Pa. 1870)).

3. Senator Ward Incorrectly Argues That the First Class City Government Law and Article IX, § 13, Do Not Support the Conclusion That District Attorney Krasner Is Not a "Civil Officer" Subject to Impeachment Under Article VI, § 6

As District Attorney Krasner explained in his opening brief, amendments to the Pennsylvania Constitution in the 1950s and 1960s gave Philadelphia broad power to self-govern while expressly authorizing the General Assembly to regulate local Philadelphia officers, including as it relates to their impeachment and removal. *See* Petitioner's Appl. at 21–26.[10] Article IX, § 13(f) subjected Philadelphia officers to statutory law "in effect at the time this amendment becomes effective [1951]," (*id.* at 24), including, as is relevant here, the impeachment provisions of the First Class City Government Law, *codified*, 53 Pa. Stat. § 12199, *et seq.* *See Lennox v. Clark*, 93 A.2d 834, 839 (Pa. 1953) (under Section 13(f), Philadelphia officers "automatically became subject thereby to the laws then in effect governing and regulating city officers and employees . . . ."); *see also Burger*, 923 A.2d at 1167 (Saylor, J., concurring). Article IX, § 13, must be read together with Article VI, § 1, which states, "[a]ll officers, whose selection is not provided for in this Constitution, shall be elected or appointed as may be

[10] *See*, *e.g.*, Pa. Const. art. IX, § 2; 53 Pa. Stat. § 13131; 53 Pa. Cons. Stat. § 2961; *Delaware Cnty. v. Middletown Twp.*, 511 A.2d 811, 813 (1986) ("[A] home rule municipality's exercise of power . . . is valid absent a limitation found in the Constitution, the acts of the General Assembly, or the charter itself, and we resolve ambiguities in favor of the municipality.").

directed by law." The allocation of constitutional power to the General Assembly to regulate local officers — through legislation — confirms that the District Attorney of the City of Philadelphia is not a statewide "civil officer" who can be impeached under Article VI, § 6.

Senator Ward, however, argues that the Philadelphia District Attorney is a "constitutionally created county officer" subject to the constitutional impeachment procedures of Article VI. She cites Article IX, § 4, which enumerates a list of "county officers" that includes "district attorneys." Ward Br. at 51; *see also* Bonner/Williams Br. at 26–27. Yet Article IX, § 4, is *expressly* inapplicable to home rule jurisdictions like Philadelphia and thus does not apply to the Philadelphia District Attorney: Section 4's "[p]rovisions for county government . . . shall apply to every county *except a county which has adopted a home rule charter* . . . ." The exclusion of Philadelphia officers from Section 4 was part of a 1968 amendment. Senator Ward refers to this provision as a "threshold matter," but she ignores this crucial text.[11] At base, the import of the

[11] Authority that the Philadelphia District Attorney is a "constitutional officer" or "state officer" cited by all Respondents pre-dates the 1968 amendment to Section 4, and therefore is irrelevant. *See, e.g., McGinley v. Scott*, 164 A.2d 424, 431 (Pa. 1960); *Commw. ex rel. Specter v. Martin*, 232 A.2d 729 (Pa. 1967); *Commw. ex rel. Specter v. Freed*, 228 A.2d 382, 386 (Pa. 1967). Senator Ward misstates that the Philadelphia District Attorney "does not occupy a statutorily created office." In fact, the Office of the Philadelphia District Attorney was created by legislation in May 1850, so District Attorney Krasner does "occupy a statutorily created office."

1968 amendment is clear: because Section 4 does not apply to Philadelphia, the Philadelphia District Attorney is not an officer whose selection is provided for in the Constitution, and the constitutional impeachment provision should not be applicable to him. Instead, Article IX, § 13, and Article VI, § 1 apply, which authorize legislative regulation of non-constitutional officers' conditions of tenure, including removal.[12]

Next, Senator Ward argues that, beginning with the enactment of Article IX, § 13(f) in 1951, existing Philadelphia officers would continue to perform their duties until the General Assembly "provided otherwise," and it has not yet so provided with respect to the District Attorney of Philadelphia. But any inaction by the General Assembly since 1951 concerning removal of the Philadelphia District Attorney is irrelevant. Senator Ward ignores the full text of Section 13(f), which

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See P.L. 654, No. 385 (May 3, 1850), An Act Providing for the Election of District Attorneys.

Though they do not focus on the amendment to Article IX, § 4, cases decided after 1968 conclude that the District Attorney of Philadelphia is not a statewide officer, but is instead a local city officer subject to local law. That is true even if district attorneys exercise powers in the name of the state and "carry out delegated sovereign functions" in the performance of their duties. *See Carter v. City of Phila.,* 181 F.3d 339, 350 (3d Cir. 1999); *Chalfin v. Specter*, 233 A.2d 562, 565 (Pa. 1967) (Bell, C.J., concurring).

[12] *See Watson v. Pennsylvania Tpk. Comm'n*, 125 A.2d 354, 356–57 (Pa. 1956); *Weiss v. Ziegler*, 193 A. 642, 644–45 (Pa. 1937); *In re Marshall*, 62 A.2d 30, 32 (Pa. 1948); *In re Marshall*, 69 A.2d 619, 625 (Pa. 1949). *Cf. Lennox*, 93 A.2d at 839.

states that "the provisions of this Constitution and the laws of the Commonwealth *in effect at the time this amendment becomes effective*" apply to Philadelphia officers. Statutes governing impeachment of municipal officers in the First Class City Government Law, 53 Pa. Stat. §§ 12199–205, were enacted in 1919, and they encompass the District Attorney as a "municipal officer."[13] The framers of Article IX, § 13(f) would have known about the statutory process for impeachment of local officers, and in choosing the constitutional language they did, preserved that law and constitutionally bound Philadelphia officers to it.

Senator Ward further asserts that the First Class City Government Law is not the "sole method" of impeachment for the Philadelphia District Attorney. Ward Br. at 54; *see also* Bonner/Williams Br. at 25–26. That is incorrect. As previously explained, the Article VI, § 6, impeachment procedure does not apply to District Attorney Krasner because he is not a "civil officer" within the meaning of the Section. The establishment of the First Class City Government Law impeachment procedure is strongly confirmatory of that reading of Article VI. The Pennsylvania Supreme Court stated in *Burger*, 923 A.2d at 1163, that "the constitutional power of removal must be read in conjunction with other constitutional provisions, a

[13] There can be no serious doubt that the Philadelphia District Attorney is a "local officer," not a statewide officer, *see Carter*, 181 F.3d at 350; *Chalfin*, 233 A.2d at 565, and thus he is a "municipal officer" potentially subject to impeachment under 53 Pa. Stat. § 12199.

reading which makes clear that the General Assembly may enact limitations on the constitutionally conferred power to remove a civil officer at least where the office at issue was created by the General Assembly." Similarly here, the constitutional power of impeachment in Article VI should be read in conjunction with the other provisions of the constitution providing for removal of local officers. That the Constitution expressly provides for the regulation of local Philadelphia officers through the legislative process further confirms that the Constitution treats the terms of tenure for those local officers differently from statewide officers, emphasizing local control.

Lastly, Senator Ward asserts that 53 Pa. Stat. § 12199 — a century-old statute — might conflict with the Constitution and therefore "cannot stand." Ward Br. at 56. But this statute has been applied by the Supreme Court before without raising any constitutional problems, *see In re Marshall*, 62 A.2d 30 (Pa. 1948) and 69 A.2d 619 (Pa. 1949), and courts have long upheld statutory removal provisions for legislatively created offices like the Philadelphia District Attorney. *See In re Georges Twp. Sch. Dirs.*, 133 A. 223, 225 (Pa. 1926); *see also Watson v. Pennsylvania Tpk. Comm'n*, 125 A.2d 354, 356–57 (Pa. 1956); *Weiss v. Ziegler*, 193 A. 642, 644–45 (Pa. 1937).[14]

[14] Decisions striking down removal or recall statutes, *see In re Petition to Recall Reese*, 665 A.2d 1162 (Pa. 1995), *S. Newton Twp. Electors v. S. Newtown Twp.*

C. DISTRICT ATTORNEY KRASNER IS NOT SUBJECT TO IMPEACHMENT BECAUSE THE AMENDED ARTICLES OF IMPEACHMENT DO NOT ALLEGE "ANY" CONDUCT THAT CONSTITUTES "MISBEHAVIOR IN OFFICE"

District Attorney Krasner's Application for Summary Relief also demonstrated that the Amended Articles of Impeachment fail for a third independent reason: they do not allege "any" conduct that falls within the scope of "misbehavior in office" as set forth in Article VI, § 6 of the Pennsylvania Constitution. Petitioner's Appl. at 26-39. District Attorney Krasner's argument has three foundational pillars: (1) For more than 150 years, the Pennsylvania Supreme Court has construed the identical term — "misbehavior in office" — in Article VI, § 7 and Article V, § 18(d)(3) of the Pennsylvania Constitution to refer to the common law criminal offense of the same name (Petitioner's Appl. at 27–30); (2) Read in the light most favorable to the House, the Amended Articles of Impeachment do not allege "any" conduct that comes close to meeting this settled definition of "misbehavior in office" (Petitioner's Appl. at 30–36); and (3) The Pennsylvania Supreme Court's decisions construing the identical phrase "misbehavior in office" should control this Court's analysis of the issue, rather than six words of unreasoned *dicta* from the sole case cited by the House in the impeachment proceedings, *Larsen*

Sup'r, 838 A.2d 643 (Pa. 2003), and *Birdseye v. Driscoll*, 534 A.2d 548 (Pa. Commw. Ct. 1987) did not involve Philadelphia officers subject to Article IX, § 13, and therefore do not control here.

v. Pennsylvania, 646 A.2d 694 (Pa. Commw. Ct. 1994) (Petitioner's Appl. at 36–39).

In her Opposition Brief, Senator Ward fails to rebut these arguments. Indeed, while she disputes that the common law definition of "misbehavior in office" properly defines the scope of Article VI, § 6, Senator Ward does not effectively challenge the other two pillars of District Attorney Krasner's position: 1) settled case law has construed identical language in the Pennsylvania Constitution as co-extensive with the common law offense; and 2) the Amended Articles of Impeachment do not allege conduct that falls within the common law definition of "misbehavior in office."

Nonetheless, Senator Ward argues that relief is not warranted because, she contends, the identical constitutional phrase used in Article VI, § 6 ("misbehavior in office") means something entirely different than the same language in other provisions of the Pennsylvania Constitution, namely Article VI, § 7 and Article V, §§ 18(d)(3) & (5). Given the well-established principle that the same constitutional language is generally construed to have the same meaning in different parts of the Constitution, *Cavanaugh v. Davis*, 440 A.2d 1380, 1381 (Pa. 1982); *In re Humane Soc'y of the Harrisburg Area, Inc.*, 92 A.3d 1264, 1271 (Pa. Commw. Ct. 2014), Senator Ward's position faces an extremely high bar, and, as we discuss below, she fails to even come close to clearing it.

1. Senator Ward's Opposition Fails to Substantively Address District Attorney Krasner's Principal Arguments in His Application for Summary Relief as to Claim III

Before addressing the sole merits argument raised by Senator Ward, we pause briefly to consider two of the express and/or implicit concessions contained in her Opposition papers. First, despite the fact that the Amended Articles of Impeachment relied on *Larsen v. Senate of Pennsylvania* as its sole source of authority as to the definition of "misbehavior in office," Senator Ward now concedes in her Opposition that "*Larsen's* pronouncement [about the "misbehavior in office" language] is *dicta.*" Ward Br. at 62. Moreover, although Senator Ward fails to acknowledge this fact, even this *dicta* in *Larsen* does not purport to "interpret" the language in question; it merely makes an (incorrect) observation about whether the interpretation proffered by former Justice Larsen had been ruled upon in prior precedents.

Senator Ward's *dicta* concession is undoubtedly correct, for the reasons described at pages 37–39 of District Attorney Krasner's opening brief: *Larsen*'s six-word aside rejecting the argument that the constitutional phrase "misbehavior in office" in Article VI, § 6, is defined by the common law offense of the same name, was completely unnecessary to the judgment. In *Larsen* the Court had already (correctly) determined that former Justice Larsen's criminal conviction would satisfy *any* definition of "misbehavior in office," and thus the precise definition of the

term did not matter to the outcome of the *Larsen* case. As a result, any discussion in *Larsen* about the meaning of the phrase was not binding on this Court or any other. *Commonwealth v. Singley*, 868 A.2d 403, 409 (Pa. 2005) (citing *Hunsberger v. Bender*, 180 A.2d 4, 6 (Pa. 1962) (finding that a statement in prior opinion, which clearly was not decisional but merely *dicta,* "is not binding upon us")). *See generally Storch v. Landsdowne,* 86 A. 861, 861 (Pa. 1913) ("Courts only adjudicate issues directly raised by the facts in a case or necessary to a solution of the legal problems involved."); *Cohens v. Virginia,* 19 U.S. 264, 399-400 (1821) (Marshall, C.J.) (explaining why *dicta* is not binding in subsequent cases).

Despite this concession, Senator Ward goes on to argue that *Larsen's* "wisdom" is worthy of consideration as the "only interpretation of 'misbehavior in office' as used in Section 6 by any Pennsylvania Court." Ward Br. at 62. But while *Larsen* might be the "only" decision to have specifically addressed this language in that particular constitutional provision, it was not (as we demonstrated in the opening brief and expand on below) the only decision to examine the same constitutional language, and *Larsen* did not even acknowledge these other decisions, much less credibly distinguish them. As a result, its discussion cannot credibly be described as "wisdom" or as persuasive. The entirety of the "analysis" consisted of a claim that, although Larsen's proffered interpretation of the term

"misbehavior in office" might find support in the legislative history, it "finds no support in judicial precedents." But even these six words — conclusory as they were — were demonstrably incorrect, given the multitude of judicial precedents (including some from the Pennsylvania Supreme Court) that had interpreted the identical phrase as synonymous with the common law crime. *In re Braig*, 590 A.2d 284, 286 (Pa. 1991) ("In the several cases where interpretation of these provisions came before the appellate courts, it was uniformly understood that the reference to 'misbehavior in office' was to the criminal offense as defined at common law."); *see also Commonwealth v. Davis*, 149 A. 176, 178 (Pa. 1930) (constitutional provision requiring removal "on conviction of misbehavior in office" to be interpreted "exactly the same way" as the criminal statute); *Commonwealth v. Shaver*, 3 Watts & Serg. 338, 340 (Pa. 1842) (finding no basis to remove officer for "misbehavior in office" where "it is perfectly manifest that he has not even been charged with, much less convicted of it").

Senator Ward's concession that this aside is *dicta* means that this Court is free to ignore *Larsen* entirely, and it should do so given that it contains no legal analysis, only six words of "analysis" at all, and even these six words were demonstrably wrong.

Senator Ward also does not dispute District Attorney Krasner's detailed showing as to why the Amended Articles of Impeachment, even viewed in the light

most favorable to the House, do not rise to the level of "misbehavior in office" within the meaning of Article VI, § 6. To be sure, Senator Ward attempts to frame her lack of opposition under the banner of purported "impartiality" — *i.e.*, she claims she "cannot opine on whether the conduct alleged in the Articles of Impeachment are sufficient to remove District Attorney Krasner for misbehavior in office without pre-judging the facts and law, which would be inappropriate." Ward Br. at 74. This impartiality argument — coming from an elected official who spends 83 pages arguing in support of upholding the Amended Articles of Impeachment — is puzzling. Taking a position on whether the Amended Articles, assuming their truth, satisfy the common law definition of "misbehavior in office" would say nothing on any factual issue that might come before the Senate, and certainly would not cast doubt on Senator Ward's impartiality any more than the views already espoused by Senator Ward in the other 83 pages of her brief.

In this context, Senator Ward's silence on this issue (after addressing so many others) speaks volumes: If District Attorney Krasner is correct about the proper definition of the term (and we demonstrate below why he is), the allegations here are plainly insufficient: Alleging "misbehavior in office" requires a very high showing: a public official has engaged in "misbehavior in office" only if he or she "fail[ed] to perform a positive ministerial duty of the office or the performance of a discretionary duty with an improper or corrupt motive." *Braig*, 590 A.2d at 286;

see also Commonwealth v. Peoples, 28 A.2d 792, 794 (Pa. 1942) ("The law is clear that misfeasance in office means either the breach of a positive statutory duty or the performance by a public official of a discretionary act with an improper or corrupt motive."); *Commonwealth v. Green*, 211 A.2d 5, 9 (Pa. Super. Ct. 1965) ("The common law crime of misconduct in office, variously called misbehavior, misfeasance or misdemeanor in office, means either the breach of a positive statutory duty or the performance by a public official of a discretionary act with an improper or corrupt motive."). The Amended Articles here do not come close to making this showing, and it is telling that Senator Ward does not even try to defend them.

2. The Constitutional Phrase "Any Misbehavior in Office" in Article VI, § 6 Incorporates the Common Law Crime of the Same Name, Just as It Indisputably Does in Article VI, § 7 and in Article V, § 18(d)(3)

The only meaningful dispute remaining here is whether the Constitutional impeachment provision, Article VI, § 6, requires an allegation of conduct that falls within the common law offense of "misbehavior in office" in order to force an official to undergo a Senate trial for removal. District Attorney Krasner demonstrates in his opening brief why the scope of the constitutional provision is co-extensive with the common law offense. Nothing in the opposition comes close to refuting this argument.

Three provisions of the Pennsylvania Constitution contain the term "misbehavior in office": Article V, § 18 uses the term twice; subsection (d)(3) provides for automatic removal of a justice, judge or justice of the peace "convicted of misbehavior in office"; a later provision in Section 18 (subsection (d)(5)) cross-references the impeachment provision, noting that "[t]his section is in addition to and not in substitution for the provisions for impeachment for misbehavior in office contained in Article VI."

Article VI then uses the same term twice: Article VI, § 7 provides for removal of civil officers on "conviction of misbehavior in office or of any infamous crime" and Article VI, § 6 provides that the Governor and all other civil officers "shall be liable to impeachment for any misbehavior in office . . ."

The Pennsylvania Supreme Court has construed this identical constitutional language ("misbehavior in office") at least three times, beginning in 1842 in *Commonwealth v. Shaver*, 3 Watts & Serg. 338 (Pa. 1842), when the Court held that removal of a Huntingdon County Sheriff from office under what is now Article VI, § 7 could not properly be based on criminal misconduct *before* the Sheriff took office — bribery during the election. In reaching this result, the Supreme Court construed the constitutional language "misbehavior in office" as co-extensive with the common law offense of "misbehavior in office."

Almost a century later, in *Commonwealth v. Davis*, 149 A. 176, 178 (Pa. 1930), the Supreme Court relied in part on *Shaver* to construe the constitutional removal provision the same way, holding that the Mayor of Johnston was automatically removed from office on conviction of the common law crime of "misbehavior in office" because such a provision satisfied the constitutional removal language.

Against this backdrop, the Pennsylvania Supreme Court considered a similar question in *In re Braig*, 590 A.2d 284, 286 (Pa. 1991), addressing a petition for automatic removal and disqualification from office under Article V, § 18, of a former judge who had been convicted of mail fraud in federal court. The former judge argued that the common law offense of "misbehavior in office" governed the scope of the disqualification provision and that his mail fraud conviction did not satisfy the common law definition of the term. The Supreme Court looked at *Shaver* and *Davis* and agreed that the common law offense of "misbehavior in office" properly defined the scope of the judicial removal provision:

> Based on our reading of all the cases, we must conclude that the language of Article V, Section 18(*l*), like the identical language of present Article VI, Section 7, refers to the offense of "misbehavior in office" as it was defined at common law. This conclusion is not without its difficulties, however. Since the enactment of the Crimes Code effective June 6, 1973, common law crimes have been abolished and "[n]o conduct constitutes a crime unless it is a crime under this title or another statute of this Commonwealth." 18 Pa.C.S. § 107(b). Thus no prosecution on a charge of "misbehavior in office" can now be undertaken. Rather than reach the difficult question whether the

> legislature could effectively nullify the constitutional provision by abolishing the crime referred to therein, we think it prudent to adopt a holding under which the constitutional provision may still be given effect. Therefore, we hold that the automatic forfeiture provision of Article V, Section 18(*l*) applies where a judge has been convicted of a crime that satisfies the elements of the common law offense of misbehavior in office.

Braig, 590 A.2d at 287–88. The Court went on to hold that the automatic disqualification provisions could not be applied, as the offense did not meet the common law definition of "misbehavior in office."

Against this backdrop, Senator Ward faces a huge hurdle in asking this Court to construe the identical language at issue in *Shaver, Davis* and *Braig* differently here. *Braig* expressly held that the term "misbehavior in office" in one constitutional provision should have the same definition already adopted for use in a different constitutional provision with "identical language," and did so despite the fact that the common law offense of "misbehavior in office" had been abolished in the interim. That holding is incompatible with the argument that this Court can now construe the same language differently simply because it is in another part of the Constitution. As we noted in our opening brief, the analysis of *Braig* is so closely on point as to be controlling here.

Senator Ward has two counters to this argument, but each lacks merit. First, she argues that Article VI, § 6 does not contain identical language to the other two provisions because it applies to "any misbehavior in office" while the provisions at

issue in *Braig*, *Shaver* and *Davis* applied to "conviction" for "misbehavior in office." Quite frankly, Senator Ward focuses on the wrong language, as a fair read of all three cases, particularly *Braig*, makes clear that the Supreme Court was construing the language "misbehavior in office" — language identical to that in Article VI, § 6 here. Senator Ward's learned discourse on the meaning of the word "any" (Ward Br. at 63–64) is entirely irrelevant. Putting the word "any" before another word, such as "misbehavior," does not change the meaning of that word, and the dispute in this case is about the meaning of "misbehavior in office," not about the meaning of "any."

While all three cases involved conviction, the Supreme Court's focus was not on the term "conviction," just as the focus here is not on the term "any." To be sure, there is a difference between the impeachment provision of Section 6 and the removal provision of Section 7. The former contemplates a trial and possible conviction by the Senate. The latter builds off a trial and conviction that has already occurred in the judicial system, calling for consequences based on that conviction and not requiring a trial in the Senate because the trial has already occurred. But that difference in who conducts the trial does not suggest that there should be any difference in the scope of the misconduct covered by the two provisions — misconduct that, again, is defined by *exactly the same language*.

The impeachment provision's inclusion of "any" misbehavior in office means that that no "conviction" of the common law offense is required. But District Attorney Krasner is not contending that a conviction is required; his argument is simply that because the operative language construed in *Braig* ("misbehavior in office") is identical to that here, the construction of this identical term should be the same. It is therefore up to the House to allege "any" conduct that plausibly falls within the common law offense of "misbehavior in office." Indeed, "any" indicates that there could be different kinds of conduct that amount to the common law crime of misbehavior in office. The Amended Articles of Impeachment in this case allege none.

Second, Senator Ward argues that the Constitutional Amendment of 1966, (referenced also in *Braig*), which changed the constitutional provision from one that permitted impeachment for any "misdemeanor in office" to one that allowed for impeachment for "misbehavior in office," supposedly evinced an intent by the people and the legislature to expand the grounds for impeachment beyond the common law definition of "misbehavior in office." This argument is puzzling. Why would anyone attempting to move away from the common law definition of "misbehavior in office" adopt the very language ("misbehavior in office") that the Pennsylvania Supreme Court had construed for over a century as synonymous with the common law offense of the same name? Doing so would be irrational, and

Senator Ward articulates no conceivable reason to ignore the obvious counter-explanation for the use of this same language: The change was intended to restrict impeachment to conduct that involved the common law offense of "misbehavior in office," thus reserving impeachment for serious criminal offenses, rather than trivial matters or policy disputes like this one. *See* JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., R46013, IMPEACHMENT AND THE CONSTITUTION 7 (2019) (citing CHARLES L. BLACK, IMPEACHMENT: A HANDBOOK 30 (1974) ("[W]hatever may be the grounds for impeachment and removal, dislike of a president's policy is definitely not one of them, and ought to play *no* part in the decision on impeachment.")).

Senator Ward cites no authority showing any contrary intent. Instead, she speculates as to various motives that "must have" or "presumably" prompted the people and the Legislature to change the constitutional language. There is no merit to any of this speculation. First, the text speaks for itself, and the text adopts language that, as of 1966, had been consistently construed to include the common law offense. Second, a contemporaneous report prepared for use by delegates to the 1966 Constitutional Convention made clear that the amendment was intended to limit the reach of the impeachment provision in this way, not to broaden it as Senator Ward argues (Ward Br. at 73):

> The common law crime of misconduct in office, variously called misbehavior, misfeasance, or misdemeanor in office, means either the

> breach of a positive statutory duty or the performance by a public official of a discretionary act with an improper or corrupt motive. . . . *The multiple usage of the term "misbehavior in office" appears to be a codification of the common law offense* . . . . [I]t seems doubtful whether judges [or other officials subject to these impeachment provisions] can be impeached for simple neglect of non-statutory duties or for misconduct or misbehavior. There is some evidence in the Constitution itself that impeachment is limited to the more serious types of misconduct.

Preparatory Committee Report on the Judiciary, for the Pennsylvania Constitution Convention, 1967-1968, at 160 (1968), https://www.paconstitution.org/wp-content/uploads/2019/09/rm-05.pdf.

This report alone refutes Senator Ward's speculation about reasons for the change in language of the constitutional impeachment provision. The amendment adopted a term with a settled meaning, and its obvious purpose was to adopt that same settled meaning for the new impeachment provision. Any argument to the contrary lacks merit and finds no support in either judicial precedent (beyond Larsen's dicta) or the contemporaneous history.

3. District Attorney Krasner's Claim Is Ripe for Review.

As a final argument, and without citing any meaningful authority, Senator Ward argues that District Attorney Krasner's Application for Summary Relief as to Claim III should be dismissed because it is supposedly "premature, at this pre-trial stage, for this Court to determine whether the Articles of Impeachment are sufficient to establish 'any misbehavior in office' because we do not know what

facts will be presented at trial." Ward Br. at 74. For the reasons stated in Petitioner's Brief in Opposition to Preliminary Objections of Respondents Bonner and Williams, at pages 27 to 32, Claim III is ripe for judicial review because it presents a purely legal question of whether the Amended Articles of Impeachment are an unconstitutional exercise of the House of Representatives' impeachment power because the conduct alleged — even if true — does not constitute "any misbehavior in office." Senator Ward does not argue that the Senate will take up that purely legal question. Instead, she argues that the Senate will act as a jury. There is no legal principle requiring District Attorney Krasner to wait until the conclusion of the trial for a ruling that he should never have been impeached.

Senator Ward's attempt to analogize the Amended Articles to an indictment only proves District Attorney Krasner's point. *See* Ward Br. at 73. If this were a criminal case with a facially invalid indictment, the proper remedy would be a motion to dismiss the indictment, which would properly be subject to pre-trial disposition by the judiciary. Such a remedy exists to prevent the harm caused by forcing an accused to go to a trial based on a defective charge that never should have been brought in the first place.

The issue here is similarly ripe, as the charge is defective on its face and there is nothing for the Senate to properly try. District Attorney Krasner, as a matter of law, has not been accused of "misbehavior in office" as that term is

properly defined in the Pennsylvania Constitution, and as a result his impeachment should be declared invalid and void.

D. THE COURT SHOULD DENY SENATOR WARD'S CROSS-APPLICATION FOR SUMMARY RELIEF BECAUSE THE SENATE AND SENATE IMPEACHMENT COMMITTEE ARE NOT INDISPENSABLE PARTIES

Senator Ward cross-moves for summary relief on the basis that this Court lacks jurisdiction because the Senate and the as-yet-unformed Senate Impeachment Committee are indispensable parties that are not joined. *See* Ward Br. at 75-82. She argues the following: (i) the Senate as a body is indispensable because District Attorney Krasner seeks relief affecting the Senate's right to try impeachments; and (ii) the Senate Impeachment Committee, which does not exist (yet) and thus has no members, is indispensable. Neither argument has merit.

1. The Senate Is Not an Indispensable Party

Senator Ward argues that because District Attorney Krasner seeks an order "declaring the rights of the non-party Senate," this Court cannot adjudicate this matter unless and until the body itself is joined. *See* Ward Br. at 76–79. Fundamentally, Senator Ward's argument ignores longstanding Pennsylvania precedent holding that government bodies are not indispensable parties when their interests are adequately represented by individual members who *are* parties. *See*

City of Philadelphia v. Commonwealth, 838 A.2d 566, 582-84 (Pa. 2003) (citing *Leonard v. Thornburgh*, 467 A.2d 104, 105 (Pa. Commw. Ct. 1983) (en banc)).[15]

In *City of Philadelphia v. Commonwealth*, the Supreme Court rejected a similar argument to Senator Ward's. There, the Court concluded that even if a constitutional challenge to legislation "centers, not upon any substantive aspect of the legislation at issue, but upon the procedure by which it was adopted" — a procedure that necessarily implicates the core constitutional powers and duties of the legislature — the General Assembly is not an indispensable party if legislative

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[15] While District Attorney Krasner does not disagree with the basic legal standard cited by Senator Ward, her recitation of the standard ignores that the question of indispensability in the context of disputes involving arms of the Commonwealth government is "considerably more complex than simply considering rules of civil procedure and decisional law as adopted and developed within traditional concepts of parties to actions at law." *Ross v. Keitt*, 308 A.2d 906, 908 (Pa. Commw. Ct. 1973) (immunity context).

A nonparty is indispensable "when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights. The basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of him or her. In undertaking this inquiry, the nature of the claim and the relief sought must be considered." *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 581 (Pa. 2003) (citations and punctuation omitted). The necessity of joining such parties does not mean that any party whose interests may be affected by a judgment must be joined. *See id.* District Attorney Krasner recognizes that in an action for a declaratory judgment, in general, "all persons having an interest that would be affected by the declaratory relief sought ordinarily must be made parties to the action." *Id*. at 581-82. Nevertheless, "[w]hile this joinder provision is mandatory, it is subject to limiting principles," including "where a person's official designee is already a party" and additional parties would result in duplicative litigation. *See id*.

officers are joined who "are capable of representing the interests of the Legislature as a whole." *Id.* at 584. Senator Ward's brief fails to acknowledge this principle.[16]

Clearly, Senator Ward, as the interim President Pro Tempore, can adequately represent the interests of the Senate in this matter. District Attorney Krasner seeks a declaration that, *inter alia*, the impeachment proceedings against him cannot proceed and any attempts to take up the Articles of Impeachment against him are unlawful. *See* Petitioner's Appl., at (A)-(E).

In her official capacity, Senator Ward exercises primary control over the impeachment process in the Senate. *See* Pennsylvania Senate Resolution 386 (Nov. 29, 2022) ("S.R. 386"). Specifically, pursuant to Senate Resolution 386, which purports to establish "special rules of practice and procedure in the Senate when sitting on impeachment trials," Senator Ward, as President Pro Tempore, is empowered to control the fundamental aspects of the impeachment proceedings,

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[16] Senator Ward cites cases for general principles of indispensability, but they do not bolster her arguments that the Senate and Committee are indispensable. Two of her cases found no indispensability. Of the three cases that did find indispensability, none involve the interest of a nonparty Commonwealth entity, much less one already represented by the entity's presiding officers. *See HYK Constr. Co. v. Smithfield Twp.*, 8 A.3d 1009, 1016 (Pa. Commw. Ct. 2010) (in zoning action, neighbors found indispensable); *Polydyne, Inc. v. City of Phila.*, 795 A.2d 495, 496 (Pa. Commw. Ct. 2002), as amended (Apr. 30, 2002) (bidder for government contract indispensable in action by competitor); *Bucks Cnty. Servs., v. Phila. Parking Auth.*, 71 A.3d 379, 388 (Pa. Commw. Ct. 2013) (certain private actors indispensable). Larsen, upon which Senator Ward leans heavily, does not address indispensability at all.

including "direct[ing] . . . necessary preparations [for impeachment proceedings] in the Senate Chamber [and directing] the form of proceedings." S.R. 386, Section 6. Further, unless otherwise ordered by the Senate, she "*may* appoint a committee of Senators . . . to receive evidence and take testimony . . ." *Id.* Section 10 (emphasis added). Moreover, "[t]he President pro tempore shall be an ex officio member [of the committee] and may vote in case of a tie on any question before the committee." *Id.* The President Pro Tempore is further responsible for setting the first meeting of the committee. *Id.* at Section 10(c).

In other words, the Senate has designated its President Pro Tempore with significant authority and control over Senate impeachment proceedings, including the proceedings against District Attorney Krasner. Senator Ward is therefore an adequate representative of the Senate in this matter.[17]

For similar reasons, a judgment in the absence of the Senate will not impair its "right" to try impeachments. Ward Br. at 77-78. As explained in *City of Philadelphia*, even if a declaratory judgment squarely affects the constitutional functions of a government body, that body is not necessarily indispensable, even though "[i]t could reasonably be argued . . . that the Legislature's participation is

[17] In the event the Court has any concerns that Senator Ward, standing alone, is an adequate representative of the Senate, Senator Jay Costa, leader of the Senate Democrats, seeks leave to intervene. District Attorney Krasner does not oppose Senator Costa's intervention; neither does Senator Ward.

necessary, as it has a general interest in defending the procedural regularity of the bills that it approves." *City of Phila.*, 838 A.2d at 584. Joinder of the body is not necessary where, like here, it is adequately represented by an existing party. *See also Stilp v. Commonwealth*, 910 A.2d 775, 785–86 (Pa. Commw. Ct. 2006) ("Because the Attorney General is participating and because the legislative leaders of both chambers are participating, we conclude jurisdiction is sufficiently established under the Declaratory Judgments Act [in a constitutional challenge to legislation]."), *aff'd sub nom. Stilp v. Commw., Gen. Assembly*, 974 A.2d 491 (Pa. 2009); *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1215 (Pa. Commw. Ct. 2018) (rejecting Senate Pro Tem's argument that Commonwealth and Attorney General were necessary parties in challenge to legislation); *MCT Transp. Inc. v. Phila. Parking Auth.*, 60 A.3d 899, 904 (Pa. Commw. Ct. 2013) (joinder of legislature not necessary in constitutional challenge to legislation), *aff'd*, 81 A.3d 813 (Pa. 2013), and *aff'd*, 83 A.3d 85 (Pa. 2013).[18] Requiring District Attorney Krasner to join the Senate as a body in addition to Senator Ward would be an exercise in unnecessary formalism.

[18] That the Senate was named as a party in Larsen is irrelevant. Joinder of a party in prior litigation regarding a similar subject matter says nothing about its indispensability in a different litigation between different parties.

2. The Impeachment Committee Is Not an Indispensable Party

Senator Ward also argues that the Senate Impeachment Committee, which has not yet been formed, is an indispensable party. Ward Br. at 79-82. But she fails to acknowledge that, as interim President Pro Tempore of the Senate, she is empowered by the Senate to create or *not* create that Committee, in her discretion. *See* S.R. 386, at Section 10(a) ("In an impeachment trial, unless otherwise ordered by the Senate, the President pro tempore *may* appoint a committee of Senators, no more than half of whom must be members of the same political party. The President pro tempore shall be an ex officio member and may vote in case of a tie on any question before the committee.") (emphasis added). A declaratory judgment would prevent her from creating the committee; if the committee never comes into existence, it can never be, and is not now, an indispensable party.

Senator Ward advances a patchwork of arguments that the Court cannot enter summary relief as long as the John Doe designees — members of the yet-to-exist committee — remain unidentified. *See* Ward Br. at 79–81. Notably, Senator Ward does not appear to argue that the John Does themselves are indispensable. What Senator Ward's Brief misses is that the John Doe designees are joined in the Petition for Review for a later day as members of a committee that may or may not come into existence. In the present Application, District Attorney Krasner is pursuing claims against Senator Ward and the Respondent House Managers, not

yet the John Does. *See* Petitioner's Appl., at Proposed Order #2. If the Court grants the requested relief, there is no need for further future relief against the John Does because the committee of which they would be members will never exist.

Alternatively, if the Court does not grant District Attorney Krasner's Application for Summary Relief, and this matter proceeds, the Committee may eventually exist, at which time its members will be identifiable and will be designated in this litigation, *see* Pa. R. Civ. P. 2005. Thus, Senator Ward's request for immediate dismissal for lack of subject matter jurisdiction is premature and inappropriate. Indeed, even if the Senate or committee were indispensable (which they are not), the Court should allow District Attorney Krasner leave to amend the Petition to join any such party in subsequent proceedings.

3. The Senate and Its Party Caucuses Have Notice of This Matter But Did Not Seek Leave to Intervene

Senator Ward's remaining argument — that proceeding in the Senate's absence deprives the Court of jurisdiction — is also meritless. The Senate has had ample opportunity to join this litigation, which is a public matter of public concern. Both Pennsylvania law and this Court specifically encourage interested parties to seek leave to intervene. *Stilp*, 910 A.2d at 786 ("Intervention will be liberally granted to past or current state legislators who wish more personal involvement."). The sole person to seek leave is Senator Costa.

The Senate also had actual notice of this matter. On December 2, the day this action was commenced, undersigned counsel for District Attorney Krasner furnished copies of the Petition and Application for Summary Relief to counsel for both House and Senate party caucuses. Such counsel were also notified of the Court's December 6 scheduling Order, which set a deadline for applications to intervene. If it were so critical for the Senate to be a party, and if its rights would be impaired in its absence, representatives of the Senate comprising a majority of Senators surely would have sought leave to intervene. They did not.

III. CONCLUSION

For the reasons stated above, District Attorney Krasner's Application for Summary Relief should be granted. Senator Ward's Cross-Application for Summary Relief should be denied.

***

Respectfully submitted,

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Dated: December 21, 2022

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

Dated: December 21, 2022

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WORD COUNT CERTIFICATION

I hereby certify that the foregoing brief complies with any applicable word count limitation. The brief contains 12,714 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
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CERTIFICATE OF SERVICE

I, John S. Summers, hereby certify that on this 21st day of December, 2022, I am serving the foregoing Petitioner's Consolidated Reply in Support of His Application for Summary Relief and Opposition to Respondent Ward's Cross-Application for Summary Relief upon the following persons by the Court's electronic filing service, which service satisfies the requirements of Pa. R. App. P. 121:

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