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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

2, 3, & 4 EAP 2023

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

v.

SENATOR KIM WARD, in her official capacity as Interim President Pro Tempore of the Senate, REPRESENTATIVE TIMOTHY R. BONNER, in his official capacity as an impeachment manager; REPRESENTATIVE CRAIG WILLIAMS, in his official capacity as an impeachment manager; REPRESENTATIVE JARED SOLOMON, in his official capacity as an impeachment manager; SENATOR JAY COSTA, in his official capacity as Minority Leader of the Senate; and JOHN DOES, in their official capacities as members of the SENATE IMPEACHMENT COMMITTEE

APPEAL OF: REPRESENTATIVE TIMOTHY R. BONNER and REPRESENTATIVE CRAIG WILLIAMS

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

v.

SENATOR KIM WARD, in her official capacity as Interim President Pro Tempore of the Senate, REPRESENTATIVE TIMOTHY R. BONNER, in his official capacity as an impeachment manager; REPRESENTATIVE CRAIG WILLIAMS, in his official capacity as an impeachment manager; REPRESENTATIVE JARED SOLOMON, in his official capacity as an impeachment manager; SENATOR JAY COSTA, in his official capacity as Minority Leader of the Senate; and JOHN DOES, in their official capacities as members of the SENATE IMPEACHMENT COMMITTEE,
Appellees

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

v.

SENATOR KIM WARD, in her official capacity as Interim President Pro Tempore of the Senate, REPRESENTATIVE TIMOTHY R. BONNER, in his official capacity as an impeachment manager; REPRESENTATIVE CRAIG WILLIAMS, in his official capacity as an impeachment manager; REPRESENTATIVE JARED SOLOMON, in his official capacity as an impeachment manager; SENATOR JAY COSTA, in his official capacity as Minority Leader of the Senate; and JOHN DOES, in their official capacities as members of the SENATE IMPEACHMENT COMMITTEE,

APPEAL OF: SENATOR KIM WARD

SECOND BRIEF FOR INTERVENOR SENATOR JAY COSTA

Appeals from the December 30, 2022 Order of the Commonwealth Court (Ceisler, J.), Docketed at 563 M.D. 2022

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Other Authorities

SUMMARY OF ARGUMENT

The 206th General Assembly's impeachment of District Attorney Krasner became null and void when the General Assembly adjourned *sine die*. Preliminarily, the question is not a political question committed to the Senate; it is a constitutional one justiciable by this Honorable Court. Unlike in federal court, in Pennsylvania, political-question doctrine is discretionary, prudential, and narrower: a litigant urging that a question is a political question must establish that not only the power in question, but also the power *to review the power in question*, is clearly, expressly exclusively committed to a political branch, or implicitly committed as evidenced by a lack of judicially manageable standards. Here, the Constitution clearly commits the powers of impeachment to the political branches, but it does not, clearly or otherwise, commit the power to review the powers of impeachment to them. Moreover, there are clearly judicially administrable and manageable standards, as this Honorable Court has previously addressed a substantially similar claim that a committee's investigative activity became null and void when the General Assembly adjourned *sine die*. *See Brown v. Brancato,* 184 A. 89 (Pa. 1936).

On the merits, all of the General Assembly's business becomes null and void when it adjourns *sine die*, and that includes impeachments. This is

because the requirement is part of Article II, which organizes the General Assembly and empowers it to act as a body, and its chambers to act as bodies, in the exercise of all their powers, not just lawmaking, not just powers expressed or referred to in Article II, and not just powers that are "legislative" in character. Cross-Appellees' offer a gauntlet of unpersuasive and inapposite historicolegal materials, including an administrative letter-opinion, extrajurisdictional cases from over a century ago, and historical impeachments from the Jacksonian era, to the contrary, none of which are binding, and none of which are persuasive, and all of which ultimately stand for the proposition that this Honorable Court is deciding a question of first impression. Finally, Cross-Appellees advance a series of public policy arguments, such as one that enforcing Article II's requirements will lead public officials to engage in gamesmanship to avoid impeachment, which ignores that said officials are powerless to slow down the process, all of which are, at best, misplaced.

At bottom, the Constitution requires that the 206th General Assembly's business was done when it adjourned, regardless of the kind of business, and regardless of what a smattering of officials in relative antiquity believed. This Honorable Court should apply its meaning and reverse the lower court's refusal to grant relief on this basis.

ARGUMENT

1. Whether the 206th General Assembly's pending impeachment proceedings became null and void when it adjourned *sine die* is not a political question committed to the Senate; it is a constitutional question justiciable by this Honorable Court.

Preliminarily, two of Cross-Appellees, Representatives Bonner and Williams ("Representatives") argue that Senator Costa's first claim – *i.e.*, that the impeachment proceedings became null and void upon adjournment *sine die* – is a political question not justiciable by this Honorable Court. They do so based on a broader proposition that the Constitution "confers impeachment matters exclusively to the General Assembly," citing provisions that the House has the "sole power" of impeachment, that the Senate is to try "all" impeachments, and that the House and Senate have the power to determine the rules governing their own proceedings, which they claim subsumes the question of whether the impeachment became null and void upon adjournment.[1]

Respectfully, Representatives' argument is meritless. As an initial matter, Representatives ignore that federal and Pennsylvania political-question doctrine differs in genesis and, concomitantly, breadth. Federal

[1] Remarkably, this latter provision is part of Article II, which Representatives later argue does not apply to impeachments at all. Additionally, they offer no rule that the Senate has adopted to address the question of whether the impeachment became null and void upon adjournment.

political-question doctrine is constitutional and jurisdictional, whereas Pennsylvania political-question doctrine is discretionary and prudential. *See William Penn Sch. Dist. v. Pa. Dept. of Educ.*, 170 A.3d 414, 437 (Pa. 2017) (noting that although the doctrines involve similar considerations, this Honorable Court "mine[s]" the doctrine from a different seam[.]").

Given this difference, this Honorable Court is less circumspect about answering what federal courts might view as political questions, particularly when they are constitutional questions. Indeed, it requires a litigant asserting that a question is a political question to demonstrate either that the Constitution clearly, explicitly commits not only a power, but also all constitutional assessment of the exercise of that power, to a political branch, or that it implicitly does so as illuminated by a lack of judicially discoverable and manageable standards. *See id.* at 439 ("The question is whether our Constitution, explicitly or impliedly, can be read as reflecting the clear intent to entrust the legislature with the sole prerogative to assess the adequacy of its own effort to satisfy that constitutional mandate."); *id.* at 446 (noting implied commitment "must lie in the close relationship" between textual commitment of a power and "the lack of judicially discoverable and manageable standards" for judicial constitutional assessment of its exercise). Furthermore, this Honorable Court has recognized that its

prudential deference is tempered by its own constitutional duty to interpret the Constitution, as refusing to address a legal question out of deference to the political branches invites legislative tyranny. *See id.* at 438 (noting Constitutional duty to interpret the law); *id.* at 438-39 (quoting *Smyth v. Ames*, 169 U.S. 466, 527 (1898) ("The idea that any legislature can conclusively determine [the constitutionality of its acts] is in opposition to the theory of our institutions.").[2] In short, in Pennsylvania, "[i]t is settled beyond peradventure that constitutional promises must be kept," and this Honorable Court is "skeptical of calls to abstain from a . . . constitutional dispute." *Id.* at 418. *Compare, e.g., Rucho v. Common Cause*, 139 S.Ct. 2484 (2019) (holding question of partisan gerrymandering is a political question); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (citing *William Penn Sch. Dist.* and holding emphatically that it is not and establishing a framework for evaluating partisan gerrymanders that has since been adopted in numerous states).

Representatives do not satisfy this standard or overcome this skepticism. First, the fact that the Constitution gives the House the "sole

[2] Senator Costa notes that this Honorable Court's comfort in addressing constitutional questions is no slight to its coequal branches, but, rather, reflects a commitment to the rule of law and our fundamental legal principles even when they may lead to unpopular, but constitutionally required, results, that all three branches should share.

power" to impeach, the Senate the power to try impeachments, and both chambers the power to make rules for their proceedings, may clearly, explicitly entrust those powers themselves to those chambers, but it does not, clearly or otherwise, explicitly entrust all constitutional assessment of the exercise of those powers to them.[3] Representatives in this regard make the precise argument that *William Penn Sch. Dist.* identified as insufficient. *Accord William Penn Sch. Dist.*, 170 A.3d at 439 ("It will not suffice to prevent our review to observe that the constitutional provision has directed the General Assembly, not the courts, to [exercise the power in question].")

[3] Representatives do sketch out that the Supreme Court held in *Nixon v. U.S.*, 506 U.S. 224 (1993), that federal political-question doctrine, applied to a federal constitutional provision giving the Senate the "sole" power to try impeachment, rendered the issue a political question. Yet, that was federal political-question doctrine, and, unlike the federal constitutional provision therein, the Pennsylvania constitution does not use the word "sole" in relation to trying impeachments. *See* Pa. Const., art. VI, § 5. Moreover, Representatives omit that *Nixon*'s holding in this regard was buttressed by a lengthy discussion of the provision's history and policy, which Representatives do not offer relative to the Pennsylvania constitution, and its linguistic rationale drew significant criticism from a near-majority of the court. *See Nixon*, 506 U.S. 228-38; 38 (Stevens, J., concurring and viewing linguistic rationale as "far less significant" than the historical rationale); *id.* at 239-252 (White, J., joined by Blackmun, J.) (rejecting the majority's political-question analysis and concurring on the merits); *id.* at 252 (Souter, J., concurring) (embracing a tempered view of the linguistic rationale). And this Honorable Court has essentially embraced the concurrence rejecting its political-question analysis. *See generally William Penn Sch. Dist.*, 170 A.3d at 439 (explaining Pennsylvania's narrower doctrine and citing Justice White's concurrence). In all events, this Honorable Court is not obliged to agree with the dubious proposition that merely indicating that the House has the "sole" power to impeach means that this Honorable Court cannot review whether the impeachment proceedings were constitutionally properly before the Senate. *Accord generally State ex rel. Workman v. Carmichael,* 819 S.E.2d 251 (W.Va. 2018) (rejecting *Nixon*'s holding in its entirety on state law grounds).

Moreover, the question at issue in this case has more to do with the requirement that legislative business becomes null and void when the General Assembly adjourns, which arises from provisions of Article II that clearly do not commit evaluation of whether they are being complied with to any branch in particular. *See* Pa. Const., art. II, §§ 2, 3, 4, 5.

As for implicit commitment based on "the close relationship" between textual commitment of a power and "the lack of judicially discoverable and manageable standards" for judicial constitutional assessment of its exercise, Representatives advance no argument. Indeed, they could not. Because whether legislative business becomes null and void upon adjournment is clearly a question with readily ascertainable and appliable standards: indeed, this Honorable Court ascertained and applied them in another context nearly a century ago. *See generally*, *e.g.*, *Brown v. Brancato*, 184 A. 89 (Pa. 1936) (involving House committee conduct after adjournment); *Frame v. Sutherland*, 327 A.2d 623 (Pa. 1974); *see also Commonwealth v. Costello*, 1912 WL 3913 (Pa. Quar. Sess. Mar. 15, 1912) (involving committee investigation potential impeachment). The only additional question here is whether that business includes impeachments, a question this Honorable Court is surely capable of answering.

Indeed, it is notable that this Honorable Court has drawn the dividing line in the impeachment context between ordinary matters and constitutional ones. *See In re Investigation by Dauphin Cnty. Grand Jury*, 2 A.2d 802, 803 (Pa. 1938) (holding a court could not preclude testimony and evidence from an impeachment and noting that courts have no jurisdiction in impeachment proceedings or control over their conduct "so long as actions are taken within constitutional lines").[4]

At bottom, the question involved here – whether the impeachment proceedings became null and void when the 206th General Assembly adjourned – is substantially the same as every other constitutional question of legislative procedural authority this Honorable Court has not hesitated to answer. *See*, *e.g.*, *Stewart v. Hadley*, 193 A. 41 (Pa. 1937) (involving legislation violating single-subject rule); *Scudder v. Smith*, 200 A. 601 (Pa. 1938) (involving legislation violating requirement that law be passed by bill); *Sweeney v. Tucker*, 375 A.2d 698, 708-12 (Pa. 1977) (involving expulsion

[4] Representatives claim this language is *dicta*. It is not, but, at worst, it is considered, judicial dicta that is entitled to precedential value, and, in any event, is consistent with this Honorable Court's formulation of its political-question doctrine as exceedingly narrow in the context of constitutional issues. Additionally, and relative to Representatives' reliance in *Larsen v. Senate of Pa.*, 646 A.2d 694 (Pa. Cmwlth. 2014), it suffices to say that the case scrupulously adhered to this distinction, reviewing the plaintiff's constitutional claims, but not the others. In any event, *Larsen* is in no way binding on this Honorable Court.

challenged as violative of due process); *Zemprelli v. Daniels*, 436 A.2d 1165, 1169 (Pa. 1981) (involving challenge to appointment as violative of constitutional requirements); *Commonwealth v. Neiman*, 84 A.3d 603 (Pa. 2013) (finding legislation violated single-subject rule). In short, whether the impeachment proceedings became null and void when the 206th General Assembly adjourned is not a political question committed to the Senate; it is a constitutional question justiciable by this Honorable Court.

2. The General Assembly's business includes impeachment proceedings.

In his initial briefs, Senator Costa argued that the General Assembly's business, which is rendered null and void by its adjournment, includes impeachment proceedings. *See* Senator Costa's Initial Brief at 10-23. In their responsive briefs, Cross-Appellees disagree and offer a series of rationales. First, they argue that Article II's grant of the "legislative" power to the General Assembly refers solely to lawmaking, and, thus, that its restrictions apply only to that power. Second, they argue that Article II's restrictions cannot apply to powers granted elsewhere, relying principally on *Commonwealth ex rel. Atty. Gen. v. Griest*, 46 A. 505 (Pa. 1900) (holding presentment requirement set forth in Article III of Constitution of 1874 did not apply to constitutional amendment authorized by Article XVIII of same). Third, tracing the Commonwealth Court, they argue that Article II's

requirements apply only to the General Assembly's legislative-in-character business, and, somehow, that impeachment is judicial in character.[5] And finally, in support of one, some, or all of these rationales, or at least a favorable holding, they offer a gauntlet of purportedly persuasive historicolegal materials that stand ultimately for the proposition that this is a question of first impression and public policy arguments that are, at best, misplaced. As detailed hereinbelow, each rationale, each cited authority, and each policy argument, is unavailing.

a. Article II requirements apply to the General Assembly as a body, and, thus, all of its business, not just lawmaking.

As explained in greater detail in Senator Costa's initial brief, the Constitution divides the sovereignty of the Commonwealth into three branches, and Article II, titled "The Legislature," vests one third of that sovereignty – "the legislative power of the Commonwealth" in "The Legislature": "a General Assembly," which it divides into "a House" and "a Senate." *See* Pa. Const., art. II, § 1. Consistent with its establishment of the General Assembly and its subsidiary chambers, Article II goes on to establish when and how members are to be elected to the bodies, when and how they

[5] One imagines they maintain these positions serially, and not all at once, such that the requirement impacts only lawmaking specifically authorized by Article II and which cannot be viewed as judicial in character, of which there are none.

are to serve as members of the bodies, and when and how they are to act collectively as the bodies – *i.e.*, via official action at session. *See* Pa. Const., art. II, §§ 2 (providing for general elections, member terms, and special elections); 3 (providing for member terms); 4 (providing for official action at session);[6] 5 (providing minimum qualifications for members); 6 (providing for disqualification of members for certain reasons); 7 (providing for ineligibility of membership for certain reasons); 8 (providing for member compensation); 9 (providing for election of officers); 10 (providing for quorum for official action); 11 (providing rulemaking authority and for expulsion of members); 12 (providing for recordation of deliberation); 13 (providing for open sessions); 14 (providing for temporary adjournments on consent); 15 (providing members privilege from arrest and immunity from suit regarding deliberative process); 16–17 (providing for legislative districts). In other words, Section 1 creates the General Assembly, House, and Senate, and the ensuing sections explain how they are peopled and how they act.

Against this backdrop, it is obvious that Section 1's vesting of the "legislative power of this Commonwealth" connotes the legislative power in

[6] Importantly, Section 4 does not refer to a "legislative" session, and although session is sometimes colloquially referred to as such, session is the only mechanism whereby the General Assembly conducts any business, lawmaking or otherwise.

its broadest constitutional sense, including all the General Assembly's, all the House's, and all the Senate's powers, duties, and privileges, not simply the lawmaking power. Again, the Article is titled "The Legislature," suggesting that it applies to the comprising bodies themselves, and it organizes and empowers the General Assembly to operate. By way of analogy, Article II is to the General Assembly and its subsidiary houses what articles of incorporation are to a private company. Its authority and requirements must necessarily extend to all of the General Assembly's business, including non-lawmaking powers and duties, such as investigation, confirmation of appointees, proposal of constitutional amendments,[7] and, yes, impeachment of public officials.

Indeed, adopting Cross-Appellees' contrary construction leads to utter nonsense. For example, Article II identifies how members are to be elected, and when their terms are to be. *See* Pa. Const., art. II, §§ 2, 3. If Cross-Appellees' view is correct, these provisions apply only to the General Assembly's power to make law, and there is no constitutional mechanism for determining how members are to be elected, and when their terms are to be,

[7] Senator Costa notes that it is the longstanding practice of the General Assembly that incomplete actions in this vein, such as the General Assembly's "executive" functions such as advice and consent, or unadopted joint resolutions proposing constitutional amendments, becomes null and void upon the General Assembly's adjournment *sine die*.

to the extent they engage in other functions. Similarly, if the provision for official action at session applies only to lawmaking, there is no constitutional mechanism to take action with respect to other functions. By the same token, there would be no rules made, quorums required, recordation of, or public access to, the exercise of any of these functions. In short, there would be no other functions.

By way of illustration, Cross-Appellees' interpretation falls apart when applied to impeachment proceedings. Who is empowered to impeach a public official? Article VI provides that the House has the power to impeach. But the House is established by Article II, which applies only to lawmaking. So, there is no House as it pertains to impeachment. Assuming Cross-Appellees can somehow avoid that difficulty, who are the members of the House? Again, who is a member and when is established by Article II, which Cross-Appellees claim applies only to lawmaking. So anyone, or nobody, is a member. And supposing some kind of ersatz House can be established, how is it to act? The only provision for sessions is in Article II. And under what rules? The authority to adopt rules is also provided by Article II.[8] And

[8] Indeed, it is notable that Representatives earlier rely on this power in support of their political-question argument, and now claim it does not apply to impeachments. Similarly, Cross-Appellees later cite Jefferson's Manual in support of their position, but, putting aside for the moment that the Senate uses Mason's Manual, without Article II, the Senate has no right to adopt any rules at all for impeachments.

even if these foundational shortfalls were somehow overlooked, the same problems would obtain in the Senate when it attempted to try the impeachment. Its membership, authority to act, and ability to adopt rules likewise arise from Article II. In short, Article II is the General Assembly's, and the House's and Senate's, ontological basis, and unless it applies to business beyond making law, the General Assembly can conduct no such business.

And even if Cross-Appellees could somehow avoid that problem, the absence of Article II restrictions would still lead to bizarre consequences. By way of illustration, the present impeachment was commenced during the 206th General Assembly. Who is to try it now? Instinct suggests it should not be the old Senate, because some of the members are no longer seated. But only Article II provides a constitutional basis to say so. How many Senators are required to take action? Generally, a majority of Senators, 26, constitutes a quorum, but that is also provided for by Article II. Need the proceeding be recorded or public? Again, instinct says yes, but those are Article II requirements.[9] And finally, most salient herein, does the Senate ever lose the ability to try the case? Absent Article II's adjournment principle,

[9] One surmises that Cross-Appellees are not suggesting that they are not immune from arrest or suit in connection with their activities in this impeachment, a privilege likewise granted by Article II's provisions.

the answer is simply no, and every public official in Pennsylvania is subject to the prospect of baseless accusation and impeachment, and the concomitant damage to his reputation and other constitutional interests and rights, without hope of finality, forever.

Indeed, Cross-Appellees' position, taken to its logical conclusion, is that a single, retired House member can impeach any Pennsylvania public official, alone, in a secret meeting in his office, and, after the official weathers 10 years of reputational harm, a single, expelled former Senator can try and convict him in a secret trial in his rec room. And similar anarchy would reign over the General Assembly's other non-lawmaking powers. Obviously, this cannot be the law.

Finally, that Article II relates to the General Assembly as a body and to all of its business, not just lawmaking, is further evidenced by the fact that it is instead Article *III* of the Constitution that sets forth specific powers, duties, and restrictions regarding legislation. *See generally* Pa. Const., art. III. Indeed, unlike Article II, Article III establishes mandatory procedures for lawmaking, *see* Pa. Const., art. III, §§ 1-13 , and requires, authorizes, and/or prohibits making certain kinds of laws, *see*, *e.g.*, Pa. Const., art. III, §§ 14 (requiring provision for a thorough and efficient public school system); 18 (authorizing workers' compensation laws); 28 (prohibiting law moving the

state capital). In short, Article II's "legislative power of the Commonwealth" encompasses the legislative third of the Commonwealth's sovereignty, and all that the General Assembly does, not just making law.

b. Article II requirements apply to the General Assembly as a body, regardless of whether it exercises powers under other articles.

Apart from their argument that Article II's grant of "the legislative power of this Commonwealth" includes only lawmaking, Cross-Appellees advance a second argument that Article II's provisions apply only to powers set forth therein. To that end, they rely on decontextualized passages from *Griest* in support of a broad proposition that where one Article establishes restrictions, they apply only to the powers granted or referenced in that Article.

Without retreading the above discussion, the argument is wrong. First, there is absolutely no authority for the proposition that restrictions in one article apply only to powers granted or referenced in that article. Indeed, the very first article of the Constitution sets forth a series of restrictions in the nature of individual rights that limit virtually every power expressed in the remainder of the document. *See* Pa. Const., art. I, §§ 1-29 . And putting Article II to the side for a moment, as noted, Article III provides a series of procedural requirements for all legislation, including legislation pursuant to powers set forth elsewhere in the Constitution. *See* Pa. Const., art. III, §§ 1-

13 ; *see also*, *e.g.*, Pa. Const., art. VII (providing for regulation of elections); Pa. Const., art. VIII (providing for taxation and finance); Pa. Const., art. XI (providing for regulation of local government).

Contrary to Cross-Appellees' argument, *Griest* says nothing approaching what they claim. In *Griest*, the Attorney General sought to compel the Secretary of the Commonwealth to place a proposed constitutional amendment on the ballot, but the Secretary resisted, arguing that it was not presented to the governor, arguing this was required by Article III of the Constitution of 1871. *See Griest*, 46 A. at 506-07. This Honorable Court kindly noted that presentment, and all requirements of Article III, were expressly applicable only to ordinary legislation authorized under Article III, whereas the proposal of constitutional amendments was provided for by Article XVIII. *See id.* Although the court did explain that nothing in Article III referred to Article XVIII, the holding was simply that Article III, by its express terms, did not apply. *See id.* In other words, nothing in *Griest* stands for the proposition that each article of the Constitution is to be read as hermetically sealed off from the others.

And at the risk of beating the proverbial deceased equine, again, Article II is different. Article II organizes, empowers, and restricts the General Assembly, the House, and the Senate, as bodies. Without it, there is no

General Assembly, no House, and no Senate, and without it, they can take no action whatsoever. Accordingly, its provisions are inextricably intertwined with everything the General Assembly, House, and Senate do, no matter what provision authorizes it or where the provision is placed in the charter. In short, Article II requirements apply to the General Assembly as a body, regardless of whether it exercises powers under other articles.

c. Article II requirements apply to the General Assembly as a body, regardless of whether it exercises powers that are "legislative" or "judicial" in character.

Cross-Appellees' third rationale, tracking the Commonwealth Court's decision below, is that Article II's provisions apply only to powers that are "legislative" in character, and that impeachment is "judicial" in character. Senator Costa has already addressed the bulk of this argument in his initial brief, *see* Senator Costa's Initial Brief at 16-20 (noting the Commonwealth Court's holding had no basis in, and likely violated, the Constitution's text and structure, particularly its vesting of all judicial power in this Honorable Court), and above.[10] Again, Article II applies to the General Assembly, and its constituent chambers, as bodies, and governs all that they do.

[10] Senator Costa additionally notes that Cross-Appellees insistence that impeachment is somehow "judicial" in nature creates significant tension between their argument that all questions about impeachment are political questions and this Honorable Court plenary authority over judicial proceedings and the Pennsylvania constitutional right to appeal.

d. Cross-Appellees' gauntlet of purportedly persuasive historicolegal materials stand ultimately for the proposition that this is a question of first impression.

Lacking any quarter with the Constitution's text and structure, Cross-Appellees are left with an appeal to their view of history and policy. Specifically, Cross-Appellees advance arguments that impeachments do not become null and void when the General Assembly adjourns based on the following:

- A Pennsylvania Attorney General's letter-opinion to a House member chairing an impeachment-investigation committee and concluding that the investigation could continue notwithstanding the General Assembly's adjournment;

- A series of federal and Pennsylvania impeachments that continued notwithstanding legislative adjournment.

- A series of extrajurisdictional decisions concluding that impeachments could continue notwithstanding legislative adjournment; and

- Congressional practice, Jefferson's Manual and the practice of the British House of Lords.

None are binding; and none are persuasive. Preliminarily, of course, this Honorable Court is obliged to apply the Pennsylvania Constitution, which is not necessarily well-informed by the opinion of a random elected official, several judges dating back to the Civil War interpreting different constitutions, the practice of legislators who may or may not have considered the issue, or Jefferson's Manual, much less the practice of English nobles.

But taking these items in turn, they are all in some measure inapposite, ill-considered, and irrelevant to this Honorable Court's interpretive task.

First, Cross-Appellees rely upon *Umbel's Case*, 1913 WL 5269 Pa. Atty. Gen. Jun. 26, 1913), in which then-Representative Samuel A. Whitaker, chairman of a special House committee tasked with investigating the potential impeachment of two judges, wrote the Attorney General to inquire as to whether he could continue to hold meetings after the General Assembly adjourned *sine die* in the summer of 1913. *See id.* at *1. The Attorney General responded that an earlier case, *Costello*, *supra*, had held that a Senate committee authorized to investigate public-official wrongdoing lost its authority to issue subpoenas when the General Assembly adjourned *sine die* because the General Assembly and its constituent parts lacked the authority to take any action, but found *Costello* was distinguishable, somehow, because the House was independently authorized to impeach public officials, and did not require the General Assembly or Senate to concur, and impeachment, in his view, was not legislative in character:

> It is stated in the opinion that the functions of the legislature are terminated by the adjournment, and that the conclusion of the session puts an end to all pending proceedings of a legislative character, and the court concludes that if the powers of the senate ended with the adjournment, the powers of its committee necessarily ended at the same time.

> I am of the opinion that the present case is distinguishable from the case cited, and that the decision above referred to furnishes no precedent for the guidance of your committee in the present situation.
>
> **The purpose for which your committee was appointed, viz., to investigate whether grounds for impeachment exist, is clearly within the separate and distinct functions of the house of representatives**; for, Sec. 1, of Art. VI, of the Constitution [of 1878], expressly provides that "the house of representatives shall have the sole power of impeachment."
>
> **In the next place, the institution of proceedings for the impeachment of a civil officer, is not a joint power or duty, nor is it a legislative function within the ordinary acceptation of that word.** Each branch of the legislature has a separate and distinct function to perform in such proceedings. . . .
>
> The writer of . . . *Costello* . . . bases his second conclusion upon the consideration that the legislature as a unit is vested with legislative power, but that its constituent houses are not severally thus vested with legislative power through any specific provision of the Constitution.
>
> With relation to the present inquiry, i**t is to be observed that the house of representatives is specifically vested with the sole power of instituting impeachment proceedings.**

Id. at *3. In other words, the Attorney General found that the General Assembly's, and derivatively, the House's loss of the authority to act at all was countervailed by the grant to the House of the power of impeachment.

Umbel's Case is, again, not binding, and valuable only insofar as it is persuasive. And it is not persuasive. Preliminarily, it interpreted a different Constitution, the Constitution of 1874, and conducted absolutely no textual analysis of the provisions at issue. Moreover, its reasoning distinguishing *Costello* is specious. Again, if the General Assembly loses authority to act at all when it adjourns, it cannot be that the House can go on as if a zombie chamber. *Accord Costello*, 1912 WL 3912 at *6 (quoting *Ex Parte Caldwell*, 55 S.E. 910, 911 (W.Va. 1906) (explaining that if the powers of the legislature are at an end, the powers of its subsidiary bodies are also at an end and noting, poetically, "[t]he limb cannot exist after the body has perished.").[11] Finally, it bears noting that Rep. Whittaker's term, and the terms of all the House members and committee members with him, would not expire for roughly another year and a half, on December 1, 1914. *See generally* Pa. House Archives, Samuel A. Whitaker, Official Website - PA House Archives Official Website, https://archives.house.state.pa.us/people/member-biography?ID=4200 (last visited Aug. 24, 2023). Thus, to the extent *Costello* is viewed as distinguishable from *Umbel's Case*, the fact that the latter involved only proceedings persisting after adjournment within the same

[11] Indeed, one wonders whether the Attorney General's opinion might have been colored by his audience.

General Assembly, and therefore no risk that the committee's work would continue until a time that only half the Senate's members were elected, sworn, and seated, is sufficient to distinguish *Umbel's Case* from this one. Indeed, nothing in *Umbel's Case* stands for the proposition that Rep. Whittaker's committee could have continued into 1915 and the next General Assembly. All in all, one official's underanalyzed view of what a different constitution meant under significantly different circumstances is not a compelling basis upon which to ignore our current Constitution's text and structure.

Cross-Appellees also rely on a series of five impeachments from 1793, 1802, 1804, and 1825, which they contend amount to a "long-standing practice of survival of impeachment across legislative sessions" in Pennsylvania. It is neither long, having lasted a mere 32 years (albeit life expectancy was shorter at the time), nor standing, as it was a feature of a different constitutional structure. Indeed, there is no evidence that anyone ever considered the question of whether an impeachment was null and void after the General Assembly adjourned *sine die*, much less determined the issue. And these impeachments all occurred under the Constitution of 1790, which governed during a time when transportation was onerous, and pursuant to which members of the House served only 1-year terms, there

was a shortened legislative session, three-fourths of the Senate were elected, sworn, and seated at any given time, and the General Assembly was not a "continuing body" during Representatives' terms, as it is today, *see* Pa. Const., art. II, § 4, all making it much more impractical to complete an impeachment and trial within a single General Assembly. All of which is to say that this Honorable Court should not be persuaded that a legally untested 5-time-employed practice of the General Assembly during the Jacksonian Democracy era amounts to a tradition of legislative practice warranting its solicitude in interpreting the Constitution of 1968. Indeed, this Honorable Court has not hesitated to reject much longer-standing legislative practices repugnant to the Constitution. *Accord League of Women Voters*, *supra*.

Leaving the Commonwealth, Cross-Appellees' go on to rely on four extrajurisdictional cases between the Lincoln and Coolidge Administrations: *Ferguson v. Maddox*, 263 S.W. 888 (Tex. 1924); *People ex rel. Robin v. Hayes*, 143 N.Y.S. 325 (N.Y. Sup. Ct. 1913); *In re Opinion of Justs.*, 14 Fla. 289 (1872); and *State ex rel. Adams v. Hillyer*, 2 Kan. 17 (1863). Each is nonbinding, and each is inapposite.

In *Ferguson*, the Texas House of Representatives impeached Governor James "Pa" Ferguson at one special "called" session of Texas' 35th Legislature, but the impeachment was tried at another, and he was convicted

and barred from public office. *See Ferguson*, 263 S.W. 888 at 891.[12] [13] Ferguson nevertheless sought another office, and, in an ensuing legal proceeding, argued the bar was void because the impeachment spanned two called sessions. *See id.* The Texas Supreme Court held essentially that the impeachment was valid because the House continued to exist and continued to have the impeachment power throughout both called sessions, ostensibly until the end of the members' terms. *See id.* ("At the end of a legislative session the House does not cease to exist, and its power, so far as its proper participation in a pending impeachment proceeding is concerned, is not affected[.]"); *id.* ("[T]he same reasoning applies to the Senate.").

Ferguson involved a different constitutional regime that expressly vests the Legislature with judicial power, unlike the Pennsylvania Constitution. Moreover, it stands for the unremarkable proposition that a House called

[12] It bears noting that the Texas legislature is extremely part-time, only meeting in the year following a general election, for 60 days; as a result, much of its work is done at called sessions. *Accord* Tex. Const., art. III, § 24.

[13] Notably, although "Pa" was prohibited from holding state office in Texas, his wife, Miriam "Ma" Ferguson later won the governorship. Ma was the second female governor in the United States, and the first female governor of Texas. *See generally* Texas State Library and Archives Commn., Portraits of Texas Governors, "The Politics of Personality Part 1, 1915-1927, https://www.tsl.texas.gov/governors/personality /index.html#MaFerguson (last visited Aug. 24, 2023) (detailing their service).

back into session regains its authority to act. Indeed, this is similar to the Pennsylvania House impeaching a public official at the first regular session, and the Senate trying the impeachment at the second regular session, as the General Assembly is a continuing body throughout that period. It does not suggest what Cross-Appellees argue, which is that a House that has adjourned forever and been replaced by a new House, may go on acting with legislative authority.

Next, in *Robin*, a habeas corpus case, an inmate attempted to enforce a pardon issued by the governor while he was under impeachment via a special session of the legislature and thus incompetent to exercise the duties of his office, arguing the subject was (as one would imagine) beyond the subject the governor called the special session to address. *Robin*, 143 N.Y.S. 325-28. The court found that the impeachment power was of a judicial character, and so was not capable of limitation by the special session's identified subject, ultimately quashing the inmate's previously issued writ of habeas corpus. *See id.* at 28.

Like *Ferguson*, *Robin* interprets materially different constitutional provisions that identify the impeachment power as judicial in nature, again, distinct from the Pennsylvania Constitution. And like both *Umbel's Case* and *Ferguson*, it again involves multiple sessions of a single legislature within all

relevant members' terms, not an attempt to bridge multiple legislative bodies. Indeed, that adjournment *sine die* did not meaningfully figure into the decision is further evidenced by the fact that the ensuing appellate court decision did not mention it at all. *See People ex rel. Robin v. Hayes*, 149 N.Y.S. 250 (N.Y. App. Div. 1914).

Further back in time, *Opinion of Justs.* is similarly ill-fitting. In that matter, an impeached governor sought the Florida Supreme Court's advisory opinion as to whether the fact that the Senate trying his impeachment adjourned until the next legislature. The Court, characterizing the Senate sitting in an impeachment as a "court of high and transcendent jurisdiction," and employing a lengthy analogy to courts, held that the impeachment could proceed. *See Opinion of Justs.*, 1872 WL 2446 at *6.

Again, the court interpreted a different constitution, which, as District Attorney Krasner has already argued, contains provisions that would support the Court's holding, and, again, conceives of the House as a part of the judicial branch. But in all events, the Court's reasoning is high on rhetoric and light on analysis.

And finally, *Adams* actually harms Cross-Appellants' argument. In that case, the Kansas House of Representatives adopted an impeachment, but both the House and Senate adjourned *sine die* before the Senate began

trying the impeachment. *See Adams*, 1863 WL 299 at *1-7. The central issue was whether the Senate had obtained permission from the House to adjourn and sit as a Court of Impeachment, and the Supreme Court of Kansas determined that it had, but, along the way, emphasized that the Senate could, with the House's consent, "adjourn to any period during their term of office . . . **not beyond the regular meeting of the legislature.**" *Adams*, 1863 WL 299 at *7. In other words, the House's consent to adjourn to try the impeachment could only persist until the end of its members' terms:

> [S]uch adjournments can only be made by consent of the House. The law may be well taken as the clearly manifested consent of the House that passed it, that the then Senate might adjourn and hold sessions after the legislature, but not as the consent of any subsequent House that such sessions may be held.

Id. at *7. Here, Cross-Appellees essentially ask this Honorable Court to hold that the 206th General Assembly was free to bind the 207th.

Finally, as it pertains to Cross-Appellees' three cited Congressional "carryover impeachments,"[14] Jefferson's Manual[15], and the House of Lords,

[14] One who recalls the political climate in the 1990s might be circumspect about relying on the impeachment proceedings against President William J. Clinton as an example of ordinary federal legislative practice.

[15] Again, the Pennsylvania Senate does not use Jefferson's Manual.

suffice it to say that their practice and guidance is less than explicable or importable into Pennsylvania constitutional jurisprudence. Indeed, as one commentator has put it:

> Consider impeachment practice. There have been several instances in which the House presented the Senate with articles of impeachment at the end of one Congress and the Senate's trial concluded during the next. One might therefore be inclined to say that the Senate is (in that sense) a continuing body [perpetually][16] for impeachment-trial purposes. But when one seeks an explanation for the Senate's practices, the answer one finds does not have to do with the Senate's overlapping terms or abstract notions of continuity. Rather, the justification (such as it is) for carryover impeachments appears to rest on a particularized historical pedigree: namely, the British rule was that dissolution of Parliament did not affect impeachment proceedings in the House of Lords. Jefferson, in his famed parliamentary manual, gave no justification for doing the same thing in this country other than to cite the familiar British practice. [FN 158]
>
> > [FN 158] . . . Jefferson stated:
> >
> > When it was said above that all matters depending before Parliament were discontinued by the determination of the session, it was not meant for judiciary cases depending before the House of

[16] Notably, Senator Ward argues that Congress' practice is relevant because both the U.S. Congress and the Pennsylvania Senate are "continuing bodies." Respectfully, Senator Ward misses the mark. The U.S. Senate, whether it is called a "continuing body" or not, is at least in the nature of a continuing body for purposes of impeachment: it always has a quorum. The Pennsylvania Senate, by contrast, is a continuing body until, every two years, half of its members' terms expire.

> Lords, such as impeachments, appeals, and writs of error. These stand continued, of course, to the next session. Impeachments stand, in like manner, before the Senate of the United States.
>
> Jefferson does not explore the rationale for the British practice or whether that rationale applies to our system.

Aaron-Andrew P. Bruhl, "Burying the 'Continuing Body' Theory of the Senate," (2010), *available at* https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2805&context=facpubs (last visited Aug. 24, 2023) (some footnotes and citations omitted). This Honorable Court need not defer to unexplained practice in interpreting Pennsylvania's constitutional commands.

All of which is to say this. The question before this Honorable Court is one of first impression and should primarily be rooted on the text, structure, and meaning of the Constitution of 1968. Although Cross-Appellees have taken us all on a trip through space and time, the view was not particularly clear, and not particularly good.

e. Cross-Appellees policy arguments are, at best, misplaced.

Finally, Cross-Appellees offer a series of public policy arguments that are ill-conceived. First, Representatives advance a view that, if Article II's adjournment principle is applied to impeachments, public officials would

become obstreperous and litigious in an effort to avoid trial as the end of session looms night. *See* Representatives' Brief at 32 n.14. Respectfully, the argument gets points for boldness, considering that the 206th General Assembly's House of Representatives, after an election that would change party-control of that chamber, rushed to impeach him before session ended. But it loses those points for lack of merit. Indeed, it may be far more likely that, in situations where one party loses control of the House but anticipates retaining or taking control of the Senate, that party will have an incentive to advance articles of impeachment across General Assemblies.

In any event, although Senate leadership has thoughtfully foregone proceeding with District Attorney Krasner's litigation while this litigation seeking declaratory relief is ongoing, and, in Senator Costa's view, should be commended for doing so, there is nothing that requires that forbearance. Thus, were a public official to become obstreperous in the way Representatives' describe, it would be wholly in the Senate's discretion to determine whether to proceed or not. Indeed, this puts the General Assembly in a far more enviable position than it occupied in other kinds of business, such as Congressional reapportionment, where litigation can require herculean efforts by both the legislative and judicial branches to arrive at a legally sound plan in time for an election. In all events, some delay

is inevitable if we are to conduct governmental business with due regard for the Constitution.

Second, and perhaps most fundamentally, and contrary to Cross-Appellees' arguments, questions before the court really do implicate contemplation of the importance of respect for the will of the voters as expressed in elections. Although it is certainly true that being elected is not a "defense to impeachment," the fact that a lame-duck House prepared and presented articles of impeachment that its successors might not, at the eleventh hour, for the chamber their party still controlled to try in the new General Assembly, does not suggest a healthy respect for the voters' decision. And whether or not "misbehavior in office" expresses its common-law definition or something broader,[17] the fact that one might apply it to countermand Philadelphia voters' twice-expressed preferences as to the administration of justice in their community at all on the basis of differences of policy evinces a pretension to know their values and policy preferences better than they do. Whether either course is constitutional or not is a question for this Honorable Court, but such a disjunct between the voters'

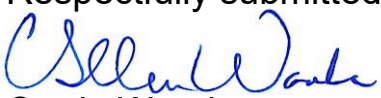
[17] Although Senator Costa did not litigate this issue below, he supports the view that "any misbehavior in office" in Section 6 has real meaning: it means what this Honorable Court has interpreted "misbehavior in office" to mean in Section 7. There are multiple reasons for this, including that the same terms in the Constitution should be interpreted to have the same meaning, which is consistent with the historical understandings of the term.

exercise of the franchise and elected officials' conduct evinces something less than the full promise of our republic, and counsels toward a finding that the Constitution requires more.

CONCLUSION

At bottom, the Constitution requires that the 206th General Assembly's business was done when it adjourned, regardless of the kind of business, and regardless of what a smattering of officials in relative antiquity believed. Accordingly, Senator Costa respectfully renews his request that this Honorable Court apply its meaning and reverse the lower court's refusal to grant relief on this basis, or grant such other relief as is just and proper.

Respectfully submitted,



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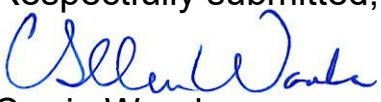
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word-count limits of Pa.R.A.P. 2135 in that its relevant portions contain approximately 7,621 words, which is fewer than 14,000 words, and 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.

Respectfully submitted,



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