THE SENATE OF THE STATE OF TEXAS
COURT OF IMPEACHMENT

SEP 13 2023

CLERK OF THE COURT

IN THE MATTER OF
WARREN KENNETH PAXTON, JR.

ATTORNEY GENERAL WARREN KENNETH PAXTON JR.'S
RESPONSE TO HOUSE MOTION TO
RECONSIDER AND AMEND SENATE RULES 27 AND 30(a)

The House Board of Managers' untimely motion should be either denied outright or deferred until after a vote on Attorney General Paxton's innocence. Regarding deferral, should the Senate vote to acquit the Attorney General later this week or early next, that acquittal will moot this late-breaking question raised by the House and will make any consideration of this motion unnecessary. Further, as the House itself points out, every precedent weighs against the House's position.[1] Modifying 100 years of precedent on the fly and at the last minute would not respect the gravity of that precedent—or this process. And in any event, the House is wrong on the merits in their misreading of the Constitution.

Senate Impeachment Rule 22 in the impeachment trial of O.P. Carrillo expressly carves out the question of disqualification from the question of acquittal or conviction. While it is true that the Price, Ferguson, and McGaughey impeachment trial rules included no relevant rule on the question presented by the House, that does not mean they did not consider the question: while Price and McGaughey were ultimately acquitted, Ferguson was convicted, at which point this Court voted separately, *after* conviction, to disqualify him from holding further office. *See* State of Tex. Senate, Rec. of Proc. of the High Ct. of Impeachment on the Trial of Hon. James E. Ferguson, Governor, S. 35, 2nd & 3rd Sess. at 865 (1917); Cortez A. M. Ewing, *The Impeachment of James E. Ferguson*, 48 Political Science Quarterly 2, 206 (June 1933).

The Supreme Court has likewise addressed the discretionary nature of the disqualification clause in *Ferguson v. Maddox*, 114 Tex. 85 (Tex. 1924). In that case, the Court expressly regarded the Court of Impeachment's verdicts regarding an impeached official to be twofold: first, whether to convict, and second, if the Court has convicted an official, whether to then disqualify him from future office. *Id.* at 99. As the Court put it, "under the Constitution the Senate may not only remove

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[1] *See* House Motion at 2, n.2.

the offending official; it may disqualify him from holding further office, and with relation to this latter matter his resignation is wholly immaterial." *Id.* at 99. Here, the Texas Supreme Court itself twice says that the Senate "may," meaning the Senate has two optional actions to take: first, whether to convict, and second, whether to disqualify. This interpretation is consonant with the Constitution's plain language and is totally at odds with the House's *prima facie* erroneous interpretation of the Texas Constitution.

Further, the House's interpretation of article XV, section 4 is mistaken for several reasons. *First*, the one case on which the House relies (at 3 n.3) to suggest that the use of "shall" in section 4 indicates a mandatory duty is a case that applies only to statutes, not the Constitution. *See City of Houston v. Houston Mun. Employees Pension Sys.*, 549 S.W.3d 566, 582 (Tex. 2018) ("[u]se of the word 'shall' **in a statute** evidences the mandatory nature of the duty imposed.") (internal quotations omitted) (emphasis added). It is therefore entirely irrelevant to interpreting the Constitution.

Second, section 4 itself also counsels against the House's interpretation in its plain text. Section 4 states that,

> Judgment in cases of impeachment shall extend only to removal from office, and disqualification from holding any office of honor, trust or profit under this state. A party convicted on impeachment shall also be subject to indictment trial and punishment according to law.

As an initial matter, the second sentence of section 4 disposes of the House's argument by itself. That second sentence likewise uses what the House calls a "mandatory" "shall," and yet no one would suggest that impeachment for non-criminal "offenses" would subject a removed officer to "indictment, trial, and punishment." Nor would anyone imagine that article XV, section 4 of its own force obligates a grand jury, prosecutor, and judge to, respectively, indict, try, and punish a given putative offender—three actions long understood to fall within the discretion of those three

entities. Under the House's interpretation, however, if an official is removed for an impeachable offense—whether or not the offense amounted to a crime—*must* be indicted, tried, and punished. That is preposterous.

Third, the first sentence of section 4 says that a judgment in a case of impeachment "shall extend only to" removal and disqualification. "[S]hall extend only to" is a limiting clause, meaning it limits the scope of punishments available—namely to, at most, removal and disqualification. This clause is significant because it distinguishes the Texan system of impeachment from the English system that came before: historically in England, the potential punishments following a conviction in an impeachment trial could range from censure to execution. That limiting clause does not mean that the punishments—removal, disqualification, or both—are mandatory; indeed, the Court could elect to convict and impose one, the other, neither, or both. Nothing in section 4 indicates that either punishment is triggered simply on account of conviction.

Fourth, the first sentence of section 4 includes a comma between the removal provision and the disqualification provision. If removal and disqualification were merely a list of consequences, then there would be no comma. A comma is not required in a list of two. But because there is a comma and the conjunction "and" the removal provision and the disqualification provision are independent clauses. The consequence of this is that both clauses must be read independently and as two separate options.

Fifth, regarding the House's aspirational "interpretation" of the Texas Constitution, it gives short shrift to the need to read the Constitution through the eyes of the public institution meant to implement the words of the Constitution. That institution is the Senate, and the Senate has consistently understood for over a century that the clause in question grants discretion to the Senate. *See, e.g.*, Carrillo Impeachment Rule 22. Indeed, the Senate in this case made that same

considered judgment when it adopted Rule 30(a). The Supreme Court has stood by this interpretation for nearly a century itself. The House's late-considered motion is no place to abandon this longstanding precedent.

CONCLUSION

The Attorney General respectfully requests that the Court deny the House's motion to amend the rules or defer it until after the Senate votes on the Articles of Impeachment.

Respectfully submitted.

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CERTIFICATE OF SERVICE

This motion was served via email on the House Board of Managers' counsel, to wit: Rusty Hardin, rhardin@rustyhardin.com, and Dick DeGuerin, ddeguerin@aol.com on September 13, 2023.

/s/ Joseph N. Mazzara
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