



## MEMORANDUM

**TO:** The Pennsylvania House of Representatives

**FROM:** Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

**DATE:** June 21, 2021

**RE: OPPOSITION TO HB 822 P.N. 1818 (White)**

**Bill summary:** [HB 822](#) (PN 1818) is a proposed amendment to the Pennsylvania Constitution that would permit recall elections for an elected officer in a city or county of the first class (i.e., Philadelphia) without requiring that an elected official can only be removed for cause.

**On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 822.**

### Constitutionality of Philadelphia's recall provision

The Pennsylvania Constitution governs the removal of public officers under [Article VI, Section 7](#), which provides that, "All civil officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime<sup>1</sup>. . . . All civil officers elected by the people, except the Governor, the Lieutenant Governor, members of the General Assembly and judges of the courts of record, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate."<sup>2</sup>

In the 1976 case [Citizens Committee to Recall Rizzo v. Board of Elections](#),<sup>3</sup> the Pennsylvania Supreme Court ruled that the [recall provision](#) in Philadelphia's home rule charter<sup>4</sup> was unconstitutional because it violated the cause provision under Article VI, Section 7.<sup>5</sup> In other words, recall elections are only constitutional if the public official is being removed for cause, which can include violating the oath of office, unlawfully or improperly fulfilling the duties of the office, and/or being convicted of a crime.

But Philadelphia is not alone. Of the 88 other commonwealth counties, cities, boroughs, and townships that have home rule charters, at least 31 of them have recall provisions.<sup>6</sup> Of those 31, only 4 include provisions that require and define cause for removal.<sup>7</sup> **This means that 27 home rule charters in Pennsylvania (including Philadelphia) presumably have unconstitutional recall provisions.**

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<sup>1</sup> [Article II, Section 7](#) of the Pennsylvania Constitution provides that any person convicted of embezzlement of public moneys, bribery, perjury or other infamous crime is ineligible to hold any office of trust or profit in the Commonwealth. The courts have determined that the term "other infamous crime" includes all felony convictions.

<sup>2</sup> [Pa.Const. Art. VI, § 7](#).

<sup>3</sup> [Citizens Committee to Recall Rizzo v. Board of Elections](#), 470 Pa. 1, 367 A.2d 232 (1976).

<sup>4</sup> Philadelphia Home Rule Charter, [Article IX – Removal of Elective and Appointed Officers](#).

<sup>5</sup> "It is clear, from the foregoing, that the power of the legislature to shape and frame the tenure of legislatively created civil officeholders must be considered together with the requirement of Article VI, Section 7, that all elected civil officers be removed only for sufficient cause established by due process. The Constitution authorizes the adoption of alternative means of removal subject to the express rule that removal be for cause. A removal scheme which is premised on something less is unconstitutional and void. We hold that the recall provisions of the Philadelphia Home Rule Charter established such a scheme and, thus, are unconstitutional." [Citizens Committee to Recall Rizzo v. Board of Elections](#), 470 Pa. 1, 367 A.2d 232 (1976).

<sup>6</sup> See enclosed spreadsheet.

<sup>7</sup> These include: [Clairton](#) (Allegheny), [Monroeville](#) (Allegheny), [Penn Hills](#) (Allegheny), and [West Chester](#) (Chester). [Chalfont](#) (Bucks) is the only home rule charter that repealed its recall provision on the grounds that "the Pennsylvania Supreme Court in a unanimous opinion ruled that recall is unconstitutional, violating Article VI, Section 7 of the Pennsylvania Constitution." Borough of Chalfont Home Rule Charter, [§ C8-2 \(Repealed\)](#).

## HB 822 fails to “fix” the constitutional problem with Philadelphia’s recall provision.

HB 822 was [amended](#) in committee to narrow the scope of the proposed amendment to apply only to cities and counties of the first class — in other words, solely to Philadelphia. The sponsor of this amendment argued that HB 822 would “fix” a constitutional problem with Philadelphia’s home rule charter. One might assume, then, that HB 822 would amend the recall provision to require removal of a public official for cause. It did not.

Instead, HB 822 was amended to add a new section to the constitution that mirrors Philadelphia’s current recall procedure without the constitutional fix required by the Pennsylvania Supreme Court.

## HB 822 would make Philadelphia the ONLY city/county that can remove its elected officials without cause or due process.

By creating a new section in the constitution, HB 822 would reverse the PA Supreme Court decision holding the recall provision unconstitutional, superseding the current requirements for removal under Article VI, Section 7. In so doing, HB 822 would carve out Philadelphia elected officials as the only officials who can be whimsically recalled without cause or due process (and likely at a significant cost) in clear contradiction to the current intent of and protections provided by Article VI, Section 7.

Presumably, the other 26 home rule charters that include recall provisions that do not require cause for removal would still be deemed unconstitutional. But in Philadelphia, every election of a public official — whether or not the elected official engaged in unlawful, unethical, or illegal behavior — could be recalled by a fraction of the electorate<sup>8</sup> simply because they may not like or agree with their policy decisions.

## The Pennsylvania Constitution is not a statute — nor is it a home rule charter.

The constitution is NOT a statute and it is NOT a home rule charter. Legislating by constitutional amendment establishes a dangerous precedent of creating an end-run around the principle of checks and balances that lies at the core of our democratic process. And it risks turning our constitution into a scattershot dumping ground of provisions that are more properly housed under statute or, in this instance, in a home rule charter.

### Questions for legislators:

- Why is this amendment a priority? There has not been another attempted recall election in Philadelphia since 1976. So why the urgency?
- Why is the General Assembly presuming to interfere with Philadelphia’s home rule charter? Shouldn’t Philadelphians be responsible for addressing any “fixes” that need to be made to the charter?
- If the General Assembly is genuinely concerned about squaring recall provisions with the constitution, why not amend the constitution to allow all home rule charter entities to recall elected officials without cause? Why limit this only to Philadelphia?
- Since HB 822 copies some — but not all — of the [recall procedures](#) currently outlined in Philadelphia’s home rule charter, the General Assembly is effectively legislating changes to Philadelphia’s home rule charter via constitutional amendment. Why should these changes be decided by voters throughout the commonwealth? What stake do non-Philadelphia voters have in determining the specific process and procedures for Philadelphia’s recall elections?
- What happens if/when Philadelphia voters choose to change, update, or amend their recall provision? By adding (some) of the granular details of Philadelphia’s recall procedure to the constitution, the ONLY way Philadelphians could make changes to this section of their charter would be to **re-amend the constitution** — a process that could easily take at least 2-3 years to implement.

## For these reasons, we ask you to oppose House Bill 822.

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<sup>8</sup> HB 822 allows a recall to be proposed by a petition signed by a number of electors equal in number to at least 25% of the total votes cast for that position in the preceding election.

PA Home Rule Charters | Recall Provisions

Name	Classification	County	Recall provision? (Y/N)	If yes, link to recall provision	Cause provision (if a charter contains a cause provision, it is noted here)
Allegheny County			<a href="#">No</a>		
Allentown	City	Lehigh	<a href="#">No</a>		
Altoona	City	Blair	<a href="#">No</a>		
Bellevue	Borough	Allegheny	<a href="#">No</a>		
Bethel Park	Borough	Allegheny	<a href="#">No</a>		
Braddock	Borough	Allegheny	N/A		
Bradford Woods	Borough	Allegheny	Yes	<a href="#">§ C-28 Recall election</a>	
Bryn Athyn	Borough	Montgomery	N/A		
Cambridge Springs	Borough	Crawford	N/A		
Carbondale	City	Lackawanna	N/A		
Carlisle	Borough	Cumberland	<a href="#">No</a>		
Chalfont	Borough	Bucks	Yes	<a href="#">§ C8- 2 – REPEALED</a>	<i>Section C8-2, Recall, was repealed 7-9-2013 by Ord. No. 407 and 1-14-2014 by Ord. No. 411, "as the Pennsylvania Supreme Court in a unanimous opinion ruled that recall is unconstitutional, violating Article VI, Section 7 of the Pennsylvania Constitution."</i>
Cheltenham	Township	Montgomery	Yes	<a href="#">§ C1415-§ C1419 – Recall</a>	
Chester	City	Delaware	N/A		
Chester	Township	Delaware	N/A		
Clairton	City	Allegheny	Yes	<a href="#">Article XXVI – Recall</a>	Section 2602 – Reasonable cause. (a) The recall of an incumbent of an elective office of the municipality shall be for reasonable cause which shall include but not be limited to an act or acts which constitute forfeiture of office under this Charter, malfeasance in office, misfeasance in office or a violation of the oath of office committed by any elective public officer of the municipality during the term of office which he or she is presently serving. (b) For the purpose of this Article: (1) "Malfeasance in office" means an unlawful act committed willfully by any elective public officer; (2) "Misfeasance in office" means the fulfillment of a statutorily imposed duty in an unlawful or improper manner by an elective public officer; (3) "Violation of the oath of office" means the neglect or failure by an elective public officer to perform faithfully a duty imposed by law.
Coatesville	City	Chester	Yes	<a href="#">§ 2-804 – Recall of elected officials</a>	
Concord	Township	Delaware	<a href="#">No</a>		
Delaware County			<a href="#">No</a>		
Easton	City	Northampton	<a href="#">No</a>		
Edinboro	Borough	Erie	<a href="#">No</a>		
Elk	Township	Chester	N/A		
Erie County			Yes	<a href="#">Article X – Recall</a>	
Farrell	City	Mercer	Yes	<a href="#">Article XIV – Recall</a>	
Ferguson	Township	Centre	Yes	<a href="#">Section 9.04 – Recall</a>	
Franklin	City	Venago	N/A		
Grant	Township	Indiana	<a href="#">No</a>		

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Name	Classification	County	Recall provision? (Y/N)	If yes, link to recall provision	Cause provision (if a charter contains a cause provision, it is noted here)
Green Tree	Borough	Allegheny	Yes	<a href="#">Article XVII – Recall</a>	
Greensburg	City	Westmoreland	No		
Greenville	Borough	Mercer	No		
Hampton	Township	Allegheny	No		
Hanover	Township	Lehigh	No		
Haverford	Township	Delaware	Yes	<a href="#">§ C-903 Procedure for recall of elected officials</a>	
Hermitage	City	Mercer	No		
Highland	Township	Elk	N/A		
Horsham	Township	Montgomery	Yes	<a href="#">Section 503 – Recall</a>	
Johnstown	City	Cambria	No		
Kingston	Borough	Luzerne	Yes	<a href="#">Article VII – Initiative, Referendum and Recall</a>	
Kingston	Township	Luzerne	Yes	<a href="#">Article X – Recall</a>	
Lackawanna County			Yes	<a href="#">Article XII – Initiative, Referendum and Recall</a>	
Latrobe	Borough	Westmoreland	No		
Lebanon	City	Lebanon	N/A		
Lehigh County			No		
Luzerne County			No		
Mahanoy City	Borough	Schuylkill	No		
Malvern	Borough	Chester	No		
McCandless	Township	Allegheny	No		
McKeesport	City	Allegheny	N/A		
Middletown	Township	Delaware	No		
Monroeville	Borough	Allegheny	Yes	<a href="#">Article XXIII – Recall</a>	<p>§ C-147 Reasonable cause.</p> <p>A. The recall of an incumbent of an elective office of the Municipality shall be for reasonable cause which shall include, but not be limited to, an act or acts which constitute forfeiture of office under this Charter, malfeasance in office, misfeasance in office, or a violation of the oath of office, committed by any elective public officer of the Municipality during the term of office which he or she is presently serving.</p> <p>B. For the purpose of this article:</p> <p>(1) "Malfeasance in Office" means an unlawful act committed willfully by any elective public officer;</p> <p>(2) "Misfeasance in Office" means the fulfillment of a statutorily imposed duty in an unlawful or improper manner by an elective public officer;</p> <p>(3) "Violation of the Oath of Office" means the neglect or failure by an elective public officer to perform faithfully a duty imposed by law.</p>
Mt. Lebanon	Township	Allegheny	No		
Murrysville	Borough	Westmoreland	No		
Nanticoke	City	Luzerne	Yes	<a href="#">Article XII – Initiative, Referendum and Recall</a>	

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Name	Classification	County	Recall provision? (Y/N)	If yes, link to recall provision	Cause provision (if a charter contains a cause provision, it is noted here)
Norristown	Borough	Montgomery	<a href="#">No</a>		
Northampton County			Yes	<a href="#">Section 1101 – Initiative, Referendum and Recall</a>	
O'Hara	Township	Allegheny	Yes	<a href="#">Article XVI – Recall</a>	
Penn Hills	Township	Allegheny	Yes	<a href="#">Article XXII – Recall</a>	Section 2. Reasonable cause. a. The recall of an incumbent of an elective office of the Municipality shall be for reasonable cause which shall include, but not be limited to, an act or acts which constitute forfeiture of office under this Charter, malfeasance in office, misfeasance in office, or a violation of the oath of office, committed by any elective public officer of the Municipality during the term of office which he or she is presently serving. b. For the purpose of this article: (1) "Malfeasance in Office" means an unlawful act committed willfully by any elective public officer; (2) "Misfeasance in Office" means the fulfillment of a statutorily imposed duty in an unlawful or improper manner by an elective public officer; (3) "Violation of the Oath of Office" means the neglect or failure by an elective public officer to perform faithfully a duty imposed by law.
Peters	Township	Washington	<a href="#">No</a>		
Philadelphia County			Yes	<a href="#">Article IX – Removal of Elective and Appointed Officers</a>	
Pine	Township	Allegheny	<a href="#">No</a>		
Pittsburgh	City	Allegheny	<a href="#">No</a>		
Pittston	City	Luzerne	<a href="#">No</a>		
Plymouth	Township	Luzerne	N/A		
Plymouth	Township	Montgomery	Yes	<a href="#">Article IX – Recall</a>	
Portage	Borough	Cambria	Yes	<a href="#">Article XVII – Recall</a>	
Radnor	Township	Delaware	Yes	<a href="#">§ 803 – Recall of elected officials</a>	
Reading	City	Berks	Yes	<a href="#">§ 1110 – Recall of elected officials</a>	
Richland	Township	Allegheny	Yes	<a href="#">Part 14 – Recall</a>	
Salisbury	Township	Lehigh	N/A		
Scranton	City	Lackawanna	<a href="#">No</a>		
Sharon	City	Mercer	<a href="#">No</a>		
St. Marys	City	Elk	Yes	<a href="#">§ 2101 – Initiative and Recall</a>	
State College	Borough	Centre	<a href="#">No</a>		
Tredyffrin	Township	Chester	<a href="#">No</a>		
Tyrone	Borough	Blair	Yes	<a href="#">Article XVII – Recall</a>	
Upper Darby	Township	Delaware	Yes	<a href="#">Article X – Recall</a>	
Upper Providence	Township	Delaware	Yes	<a href="#">Section 10.09 – Recall</a>	
Upper St. Clair	Township	Allegheny	Yes	<a href="#">Article XII – Recall</a>	
Warren	City	Warren	<a href="#">No</a>		

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West Chester	Borough	Chester	Yes	<a href="#">Article X – Recall</a>	Section 1002. Cause for Recall. The Mayor or a Member of Council may be removed from office at a recall election, for cause, for the following reasons: A. Not having the qualifications for office prescribed by this Charter or by General Law; B. Violating any express prohibition of this Charter; C. Conviction for any offense or violation described in § 211(A)(3); or D. Failing or neglecting to perform the duties of office.
West Deer	Township	Allegheny	<a href="#">No</a>		
Wheatland	Borough	Mercer	N/A		
Whitehall	Township	Lehigh	Yes	<a href="#">Article XIII – Recall</a>	
Whitehall	Borough	Allegheny	<a href="#">No</a>		
Whitemarsh	Township	Montgomery	<a href="#">No</a>		
Wilkes-Barre	Township	Luzerne	N/A		
Wilkes-Barre	City	Luzerne	<a href="#">No</a>		
Youngsville	Borough	Warren	<a href="#">No</a>		