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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals

ZENA COLLINS STEPHENS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for Review from the First Court of Appeals, Cause No. 01-19-00209-CR & No. 01-19-00243-CR, Affirming in Part and Reversing in Part, District Court of Chambers County, 344th Judicial District
Cause No. 18-DCR-0152, Hon. Randy McDonald, Presiding.

BRIEF OF *AMICI CURIAE* BRIAN M. MIDDLETON, DISTRICT ATTORNEY OF FORT BEND COUNTY; JOE D. GONZALES, CRIMINAL DISTRICT ATTORNEY OF BEXAR COUNTY; JOHN COLEMAN CREUZOT, CRIMINAL DISTRICT ATTORNEY OF DALLAS COUNTY; KIMBRA KATHRYN OGG, DISTRICT ATTORNEY OF HARRIS COUNTY; MARK A. GONZÁLEZ, DISTRICT ATTORNEY OF NUECES COUNTY; MARGARET M. MOORE, DISTRICT ATTORNEY OF TRAVIS COUNTY; AND DAVID A. ESCAMILLA, COUNTY ATTORNEY OF TRAVIS COUNTY IN SUPPORT OF THE PETITION FOR REVIEW

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Brian M. Middleton, District Attorney of Fort Bend County (268th Judicial District of Texas),[2] joined by *Amici* Joe D. Gonzales, Criminal District Attorney of Bexar County; Kimbra Kathryn "Kim" Ogg, District Attorney of Harris County; John Coleman Creuzot, Criminal District Attorney of Dallas County; Mark A. González, District Attorney of Nueces County (105th Judicial District); Margaret M. Moore, District Attorney of Travis County (53d Judicial District); and David A. Escamilla, County Attorney of Travis County[3] (collectively, "*Amici Curiae*")[4] file this brief in support of Petitioner Zena Collins Stephens

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[1] Pursuant to Texas Rule of Appellate Procedure 11(c), undersigned counsel of record certifies that he authored this brief in whole (consulting with *Amici*), that he has endeavored to add novel arguments rather than merely recite those already advanced, that no party or any party's counsel authored any part of this brief, and that no other person or entity made a monetary contribution to the preparation of any portion of this brief aside from Fort Bend County and the governmental entities associated with undersigned *Amici*.

[2] Under Texas law, the Fort Bend County District Attorney's Office has the official name of the Office of the District Attorney for the 268th Judicial District of Texas and represents the State in all criminal matters in the district courts of Fort Bend County. *See* TEX. GOV'T CODE § 43.181(b). As noted, other *Amici* have the formal title of the district attorney for a judicial district, which similarly corresponds to all district courts within the county(s) of the named judicial district.

Texas law permits cross-designation of assistant district and county attorneys in Fort Bend County. TEX. GOV'T CODE §§ 43.181(g) & 45.279(g).

[3] Unlike other counties represented in this brief, the Travis County Attorney has primary authority over misdemeanor matters. *See* TEX. CODE CRIM. PROC. art. 2.02.

[4] Undersigned counsel of record certifies that he has obtained the permission of *Amici* to affix their electronic signature to this brief.

("Stephens"). *Amici* are the elected district attorneys—and county attorney with related misdemeanor authority—chosen by the voters of their county to enforce the criminal laws of this State. *Amici* represent approximately 41.5% of the population of this State.[5]

Amici assert that the Texas Constitution of 1876—as has every constitution of this State and the Republic of Texas—empowers only the duly elected or appointed district attorney, criminal district attorney, or county attorney of a county or judicial district to ***direct*** prosecutions under the criminal laws of this State in the district and inferior courts. The asserted independent prosecutorial authority of Respondent Attorney General of Texas ("Attorney General" or "Respondent") is an affront to nearly two centuries of Texas history. *Amici* support Stephens's petition for review because this matter requires the court to resolve an important question of statewide significance. The court should grant the petition for review and invalidate, as unconstitutional, the jurisdictional statutes upon which the Attorney General relies in his prosecution of Stephens.

Alternatively, the court of appeals manifestly erred in construing the Legislature's intent as including tampering with a governmental document as being

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[5] *See* TEX. DEMOGRAPHIC CTR., Tex. Population Projections & Estimates, Tbl. 2, *available at*, https://demographics.texas.gov/Data/TPEPP/Projections/Report.aspx?id=3d34403746b8453b817969d640339dfa#pnl_Output1 (last visited Dec. 17, 2020).

part of the "election laws" of this state. The statutory structure provides no support for the decision of the court of appeals. To this extent, this court should at least restore the trial court's ruling.

STATEMENT OF THE CASE

Texas law does not limit the amount any one individual may donate to any one candidate's or officeholder's campaign except for judicial offices. *See* TEX. ELEC. CODE § 253.155(b) (setting contribution limits for "a judicial candidate or officeholders").[6] Texas law just prohibits a candidate or officeholder from accepting "political contributions *in cash* that in the aggregate exceed $100." TEX. ELEC. CODE § 253.033(a) (emphasis added).

The voters of Jefferson County elected Stephens as their sheriff in 2016. *State v. Stephens*, 608 S.W.3d 245, 249 (Tex. App.—Houston [1st Dist.] Jul. 9, 2020, pet. pending). Texas Rangers thereafter investigated alleged campaign-finance allegations against her. *Id*. The investigation concluded that Stephens allegedly received cash campaign contributions in excess of $100. *Id*. The Jefferson County

[6] Texas cities, however, may place substantial monetary limitations on an individual's contribution to a candidate or officeholder in elections for that city. *See Zimmerman v. City of Austin, Tex.*, 881 F.3d 378, 387 (5th Cir.), *cert. denied*, 139 S. Ct. 639 (2018) (upholding $350 per election individual-contribution limit). Although some eight times more permissive, federal statutory law limiting an individual's contribution to federal candidates does not violate the First Amendment of the federal Constitution. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 210–218 (2014).

district attorney declined to prosecute, referring the Rangers to the Attorney General. *Id*. The matter was never presented to the grand jury of Jefferson County. *See* TEX. CODE CRIM. PROC. art. 20.03 (allowing "the Attorney General, district attorney, criminal district attorney, or county attorney" to appear before a grand jury). The Rangers presented the results of their investigation to the Attorney General, who chose to prosecute in Chambers County—a county adjoining Jefferson County. *Stephens*, 608 S.W.3d at 249.[7] An assistant attorney general presented the case to the grand jury.[8]

STATEMENT OF PROCEDURAL HISTORY

In April 2018, the Chambers County grand jury indicted Stephens on three counts. *Id*. Count One alleges that Stephens tampered with a governmental record

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[7] Section 273.024 purports to allow prosecution in an adjoining county for violations of the "election laws of this state." Count One charges an offense not within the "election laws of this state." As a Jefferson County grand jury did not indict Stephens, the Indictment is a nullity as to the felony count.

[8] CR.1. The record does not indicate whether the Attorney General received affirmative consent to prosecute. In the court of appeals, the Attorney General relied on the Election Code's statutory grant of authority and the Texas Constitution's grant of "other duties as may be required by law." *See* No. 01-19-00209-CR Attorney General's (Appellant) Reply Br. at 11–19 (Aug. 5, 2019); No. 01-19-00243 Attorney General's (Appellee) Br. at 5–17 (Sept. 9, 2019); Combined Attorney General's Resp. to Mot. for Reh'g En Banc at 4–11 (Sept. 10, 2010). The Attorney General has not asserted receiving consent to from one of the locally elected district attorneys as a basis for his prosecution. No. 01-19-00209-CR Attorney General's (Appellant) Br. at 3 (Apr. 5, 2019) (stating that the Jefferson County District Attorney advised the Rangers to contact the Attorney General who presented evidence to the grand jury in Chambers County); No. 01-19-00243 Attorney General's Br. at 3 (same) Combined Attorney General's Resp. to Mot. for Reh'g En Banc at 2 (same).

in violation of § 37.10(a) of the Penal Code "by ***reporting*** a $5,000.00 individual cash contribution in the political contributions of $50 or less section of said Report." *Id*. (emphasis added). Counts Two and Three allege that Stephens accepted cash contributions in excess of $100 from two different individuals in violation of § 253.033(a) of the Election Code. *Id*.

Stephens filed a motion to quash the Indictment. CR.77-84, 99-105, 136-143. Stephens, by a petition for a pretrial writ of habeas corpus, also challenged the constitutionality of § 273.021 of the Election Code—the statute providing the Attorney General authority to prosecute a criminal offense "prescribed by the election laws of this state." *See Stephens*, 608 S.W.3d at 249–50.

The trial court granted Stephens's motion to quash in part with respect to Count One, reasoning that the Attorney General lacked authority to prosecute an offense outside the Texas Elections Code. *Id*. at 250. The trial court denied Stephens's motion to quash the remaining counts. CR.157-58, 179-80. The trial court also denied Stephens's pretrial habeas corpus petition without comment. 2.RR.156. Both the Attorney General and Stephens appealed.

On July 9, 2020, the First Court of Appeals, in a divided opinion, affirmed the trial court's denial of Stephens's pretrial habeas corpus petition. *Stephens*, 608 S.W.3d at 253–57. The court of appeals reversed the district court's decision to quash Count One. *Id*. at 250–53.

On August 14, 2020, Stephens filed a motion for rehearing en banc with respect to both of the majority's holdings. The court of appeals en banc, over a dissent, denied Stephens's motion on October 6, 2020. Stephens filed a petition for review with this court on December 10, 2020. *See* TEX. R. APP. P. 68.2.

GROUNDS FOR REVIEW

1. May the Legislature enact a statute providing the Attorney General with independent criminal prosecutorial authority under the Constitution of the State of Texas?

2. Secondarily, did the court of appeals err, as a matter of statutory interpretation, by concluding that the Legislature granted the Attorney General independent criminal prosecutorial authority outside of the Election Code?

RELEVANT STATUTES

The Legislature of this state empowered the Attorney General to "prosecute a criminal offense prescribed by the election laws of this state." TEX. ELEC. CODE § 273.021(a). The Legislature enacted a special venue provision for an offense under this subchapter—Subchapter B of Chapter 273 of the Election Code, §§ 273.021, 273.022, 273.023 & 273.024—to include the county of the alleged offense, an adjoining county, and, in the case of statewide elections, Travis County. TEX. ELEC. CODE § 273.024. The Legislature permitted the Attorney General to commandeer and direct the county and district attorneys in both counties. TEX.

ELEC. CODE §§ 273.002(1) & 273.022. Last, the Legislature granted the Attorney General authority to direct the Department of Public Safety to serve subpoenas. TEX. ELEC. CODE § 273.023.

Section 37.10 of the Texas Penal Code prohibits tampering with a governmental record. The Legislature granted the Attorney General concurrent jurisdiction only "[w]ith the consent of the appropriate local county or district attorney * * * to prosecute an offense under this section that involves the state Medicaid program." TEX. PENAL CODE § 37.10(i).

SUMMARY OF THE ARGUMENT

The Attorney General's authority to prosecute ***any*** crime in a district or inferior court without the consent of the appropriate local county or district attorney is unconstitutional. The Texas Constitution of 1876 unequivocally prohibits the Legislature from commending independent criminal prosecutorial power to the Attorney General in the district and inferior courts. The framers of the 1876 Constitution established fragmented and decentralized prosecutorial authority. Not even at the apex of the Attorney General's constitutional authority—represented by the prior 1869 Constitution—did the Attorney General of this State ***ever*** have an explicit constitutional basis to independently initiate criminal prosecutions. Creating the Court of Criminal Appeals thereby splitting the State' judicial power between this court and the Supreme Court and limiting the State's appellate rights

also demonstrates the framer's intent. The 1876 Constitution maintains the Attorney General's authority in only the Supreme Court and provides the county and district attorneys with the authority to represent the State in the district and inferior courts. *See* TEX. CONST. art., 4 § 22 & TEX. CONST. Art. 5, § 21. The contrary provisions in the Election Code—like § 273.021—violate the Texas Constitution.

Section 273.021 of the Election Code is without parallel to any of the other criminal laws of this state. The Attorney General's broad claims of independent prosecutorial authority in the district and inferior courts for election-related matters requires unending contradictions when read with the Penal Code, the Code of Criminal Procedure, and the Government Code. Last, the history of this State and evolution of common law both mandate a decentralized, rather than unitary model in the exercise of prosecutorial discretion. The exercise of ultimate prosecutorial authority from a localized district has been an enduring and indissoluble principle since the Revolution.

ARGUMENT

Amici strongly disapprove of the Attorney General's trial-court prosecution of *any* offense without the express approval of the judicial district's district or county attorney (except the *pro tem* authorization in the Texas Code of Criminal Procedure). The Texas Constitution of 1876 does not permit the Legislature to so empower the Attorney General, which ends the inquiry.

I. SECTION 273.021(a) OF THE ELECTION CODE VIOLATES THE TEXAS CONSTITUTION

The Legislature transcended the Texas Constitution of 1876 by granting the Attorney General independent prosecutorial authority over alleged criminal violations of the Election Code. *See*, *e.g.*, TEX. ELEC. CODE § 273.021(a). The 1876 Constitution separately confines the spheres of powers assigned to the Attorney General and the district attorneys.[9] Despite the difficulty of drawing an elegant line for all situations, the structure of the 1876 Constitution mandates that the state's prosecutorial authority be vested in the district attorney for two reasons. First, the 1876 Constitution expressly provided for the Legislature to expand the Attorney General's authority in civil matters. Second, the creation of this court's processor (the Court of Appeals) by the 1876 Constitution and prohibition of appeals by the State in criminal cases further separated the Attorney General from the act of instituting criminal prosecutions without the local county and district attorneys. Because § 273.021(a) of the Election Code confers exclusive criminal prosecutorial authority upon the Attorney General, the Legislature overstepped its constitutional authority by enacting it.[10]

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[9] "District Attorney," hereinafter, encompasses the local prosecuting authority of each county or judicial district. Such may include a county attorney, district attorney, or a criminal district attorney. The differences between these offices in the different counties and judicial districts is tangential to the issue presented.

[10] Sections 273.002(1), 273.021, 273.022, and 273.023(c) of the Election Code are unconstitutional as written, which constitutes the majority of Subchapter B of

A. The 1876 Constitution Unambiguously Separates the Attorney General from Any Independent Authority to Initiate Prosecutions.

1. *The 1876 Constitution Unambiguously Diminished the Attorney General's Authority*.

That the 1876 Constitution diminished the Attorney General's constitutional authority is self-evident by review of the prior constitutions. *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997) (Abbott, J.) (allowing consideration of "the historical context in which it was written [and] the collective intent * * * of the framers and the people who adopted it"). While missing from the Constitution of the Republic of Texas, REPUB. TEX. CONST. of 1836 arts. III & IV,[11] the Attorney General was initially in the judicial branch in the same section as the district attorneys. TEX. CONST. of 1845 art. 4, § 12.[12] The Statehood Constitution

Chapter 273 of the Election Code. References in Subchapter A to the Attorney General directing the county or district attorney must also be severed or construed in a constitutional fashion.

Amici will vigorously enforce the Election Code in their districts. In the case of multi-jurisdictional criminal conduct, *Amici* will cooperate with each other and other district attorneys to ensure appropriate enforcement of the Election Code in conformance with article 13.04 of the Texas Code of Criminal Procedure, and, in appropriate cases, assistance from the Attorney General.

[11] The proper citation for these articles of the Constitution of the Republic of Texas is as follows: REPUB. TEX. CONST. of 1836, arts. III & IV, *reprinted in* H.P.N. GAMMEL, The Laws of Texas 1822–1897, at 1069, 1073–74 (Austin, Gammel Book Co. 1898). Undersigned counsel of record uses a truncated citation in the interest of clarity.

[12] The office of district attorney has continuously appeared since the Constitution of the Republic. REPUB. TEX. CONST. of 1836, art. IV, § 5, *reprinted in* H.P.N. GAMMEL, The Laws of Texas 1822–1897, at 1069, 1074 (Austin, Gammel

empowered both with duties as "prescribed by law." *Id*. The First Legislature invested each district attorney with the duty "to conduct all prosecutions for crimes and offenses cognizable in such [district] court."[13] The First Legislature authorized the position of Attorney General "to prosecute and defend all actions in the supreme court of the State, in which the State may be interested."[14] The Attorney General was also invested with the authority to "counsel and advise the several district attorneys in the State * * * whenever requested by them so to do * * * *."[15]

Until 1869, the constitutional duties of each office remained as "prescribed by law." The means of selecting these officials varied greatly. The Statehood Constitution empowered the Governor to appoint the Attorney General with advice and consent of two-thirds of the Senate. TEX. CONST. of 1845 art. 4, § 12. The district attorneys were "elected by joint vote of both houses of the legislature." *Id*. Voters elected the Attorney General and district attorneys between 1850 and the Succession Constitution, which restored the Statehood Constitution's means of

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Book Co. 1898) ("There shall be a district attorney appointed for each district, whose duties, salaries, perquisites, and terms of service shall be fixed by law.")

[13] Act approved May 13, 1846, 1st Leg., R.S., § 2, 1846 Tex. Gen. Laws 295, 296, *reprinted in* H.P.N. GAMMEL, 2 The Laws of Texas 1822–1897, at 1601–02 (Austin, Gammel Book Co. 1898).

[14] Act approved May 11, 1846, 1st Leg., R.S., § 1, 1846 Tex. Gen. Laws 206, 206, *reprinted in* H.P.N. GAMMEL, 2 The Laws of Texas 1822–1897, at 1512 (Austin, Gammel Book Co. 1898).

[15] *Id*. at § 3, 1846 Tex. Gen. Laws 206, 206, *reprinted in* H.P.N. GAMMEL, 2 The Laws of Texas 1822–1897, at 1512 (Austin, Gammel Book Co. 1898).

selection. TEX. CONST. of 1861 art. 4, § 12. The Reconstruction Constitution returned the choice to the electorate for each. TEX. CONST. of 1866 art. 4,§ 13 & art. 4, § 14.

The 1869 Constitution contained significant structural changes to the Office of the Attorney General. TEX. CONST. of 1869 art. 4, § 23.[16] First, it became part of the Executive Department. *Id*. The ***appointive*** office of Attorney General provided him with the authority to "represent the interests of the State in all suits or pleas in the Supreme Court [and] ***instruct and direct*** the official action of the ***District Attorneys*** so as to secure all fines and forfeitures, all escheated estates, and all public moneys to be collected by suit." TEX. CONST. of 1869 art. 4, § 23. "Instruct and direct" twenty-three years after "counsel and advise,"[17] constitutes a change. Created under "military occupation" the 1869 constitutional convention "framed a document which conformed to the requirements of the Radical Republicans." A.J. Thomas, Jr. & Ann van Wynen Thomas, *The Texas Constitution 1876*, 35 TEX. L. REV. 907, 912 (1957).[18] It centralized authority "by extending the governor's

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[16] The 1869 Constitution continued with an election requirement for the district attorneys. TEX. CONST. of 1869 art. 5, § 12.

[17] Act approved May 11, 1846, 1st Leg., R.S., § 1, 1846 Tex. Gen. Laws 206, 206, *reprinted in* H.P.N. GAMMEL, 2 The Laws of Texas 1822–1897, at 1512 (Austin, Gammel Book Co. 1898).

[18] The government formed under 1869 Constitution is not remembered kindly by history. *See, e.g.*, *id*. ("The Radical Republican Regime in Texas was one of oppression, corruption, graft and blackmail."); RAMSDELL, RECONSTRUCTION IN TEXAS at 317 ("The administration of [1870–74 Governor E.J.] Davis was

appointive power and lengthening the terms of nearly all state officials." CHARLES WILLIAM RAMSDELL, RECONSTRUCTION IN TEXAS 227 (1910).

Just ***seven years*** later, the 1869 Constitution's explicit grant of authority to the Attorney General—still limited to certain ***civil*** matters—to instruct the district attorneys disappeared. *Compare* TEX. CONST. of 1876 art. 4, § 22 *with* TEX. CONST. of 1869 art. 4, § 23. So too the Governor's authority to appoint—the position henceforth became ***elective***. TEX. CONST. of 1876 art. 4, § 2. And the four-year term became two, *Compare* TEX. CONST. of 1876 art. 4, § 22 *with* TEX. CONST. of 1869 art. 4, § 23, tightening the electorate's control on the Attorney General and other statewide executive officials.

"[A] convention dominated by agrarian reformers of the Grange sought all possible means to forestall oppressive, corrupt, and expensive government." Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1339 (1990). Under the 1869 Constitution, even when the Legislature had formed the various judicial districts, "no election was allowed for district attorneys or clerks [as] the [Governor] was authorized to appoint them instead." RAMSDELL, RECONSTRUCTION IN TEXAS at 298.[19]

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responsible for more bitterness with which the people of Texas have remembered the reconstruction era than all that happened from the close of the war to 1870.").

[19] Electing the district attorneys was a constitutional requirement for the existing districts. TEX. CONST. of 1869 art. 5, § 12.

The 1876 Constitution, for the first time, recognized the ***elected*** office of County Attorney.[20] *Compare* TEX. CONST. of 1876 art. 5, § 21 *with* REPUB. TEX. CONST. of 1836 art. IV,[21] TEX. CONST. of 1845 art. 4, TEX. CONST. of 1861 art. 5, and TEX. CONST. of 1866 art. 4, and TEX. CONST. of 1869 art. 5. Under the 1876 Constitution, "[t]he County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature." TEX. CONST. of 1876 art. 5, § 21. The creation of county attorneys to act for the State in the "District and inferior courts," and the legislative division between the county and district attorneys for such counties containing both loses its significance if the Legislature can provide such for the Attorney General. Although the Texas Supreme Court has allowed the Legislature to invest the Attorney General exclusively with certain civil responsibilities in the district courts, *see infra* I.B., the Attorney General's role remained to "counsel and advise the several district and

[20] The Legislature received the authority to require the election of district attorneys. TEX. CONST. of 1876 art. 5, § 21. The Legislature retains this discretion to this day. TEX. CONST. art. 5, § 21

[21] REPUB. TEX. CONST. of 1836, art. IV, *reprinted in* H.P.N. GAMMEL, The Laws of Texas 1822–1897, at 1069, 1073–74 (Austin, Gammel Book Co. 1898).

county attorneys * * * whenever requested by them." TEX. REV. CIV. CODE tit. 47, ch. 5, art. 2798 (1879).[22]

Using these interpretative tools, this express provision conferring on the county and district attorneys the authority to represent the State in "the District and inferior courts," TEX. CONST. art. 5, § 21, mandates a vertical separation of powers between the Attorney General and the district attorneys in matters of criminal prosecution. *Saldano v. State*, 70 S.W.3d 873, 877 (Tex. Crim. App. 2002). "This diffusion of the authority to prosecute is in keeping with the deliberately 'fractured' nature of Texas government, in which the 'framers of our constitution, influenced by the political philosophy of the Jacksonian era and the despotic control of the reconstruction governor, deliberately chose to decentralize executive authority.'" *Id.* (quoting *State v. Brabson*, 976 S.W.2d 182, 186 (Tex. Crim. App. 1998) (Womack,

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[22] *See also* TEX. REV. CIV. CODE tit. 52, ch. 5, art. 2887 (1895) (The Attorney General "shall counsel and advise the several district and county attorneys in the prosecution and defense of all actions in the district or inferior courts wherein the state is interested, whenever requested by them."); TEX. REV. CIV. CODE tit. 65, ch. 5, art. 4414 (1911); TEX. REV. CIV. CODE tit. 70, ch. 4, art. 4399 (1925) (same);VERNON'S TEXAS ST. 1936, art. 4399; VERNON'S TEXAS ST. 1948, art. 4399 (same); WEST'S TEXAS CIVIL STATUTES, Art. 4399 (1974) (same).

In fact, the Legislature prohibited the Attorney General "from giving legal advice or written opinions to any other than the public officials named above." Act of May 30, 1917, 35th Leg., R.S., ch. 165, § 1, 1917 Tex. Gen. Laws 376, 376 (adding county auditor to list of authorized officials which included the county and district attorneys); *see also* WEST'S TEXAS CIVIL STATUTES, Art. 4399 (1974) (same).

J., concurring), *adopted by the court, Reynolds v. State*, 4 S.W.3d 13, 15 (Tex. Ct. App. 1999)). The court of appeals erred in concluding otherwise.

2. *Bifurcation of the Judicial Power of the State and Limitation of the State's Appellate Rights in Criminal Matters*.

In addition to insufficiency of duties "prescribed by law" as a limiting principal, the 1876 Constitution fractured the State's judicial power. Creating the Court of Appeals (after 1891 the Court of Criminal Appeals) thereby splitting the State' judicial power between this court and the Supreme Court and limiting the State's appellate rights also demonstrates the framer's intent. As noted above, the 1876 Constitution maintains the Attorney General's authority in only the Supreme Court and provides the county and district attorneys with the authority to represent the State in the district and inferior courts.

The 1876 Texas Constitution bifurcated the state's judicial power by vesting such into one Supreme Court and one Court of Appeals. TEX. CONST. of 1876 art. 5, § 1 (after 1891 the Court of Criminal Appeals). As written, the 1876 Constitution granted "[t]he Supreme Court * * * appellate jurisdiction only, which shall be coextensive with the limits of the state; but shall only extend to ***civil cases*** of which the district courts have original or appellate jurisdiction." TEX. CONST. of 1876 art. 5, § 3 (emphasis added). By contrast, the "[t]he Court of Appeals [has] final appellate jurisdiction co-extensive with the limits of the State in ***all criminal cases***

of whatever grade * * * *." TEX. CONST. OF 1876 art. 5, § 6 (emphasis added).[23]

Additionally, the 1876 Constitution provided that "[t]he State [had] no right of appeal in criminal cases." TEX. CONST. OF 1876 art. 5, § 26.[24] Accordingly, appellate proceedings were to defend the local prosecutor's exercise of discretion. And the enacted statutes reflect this. The year before the 1876 Constitution, the Legislature created the position of one "Assistant Attorney General" requiring a

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[23] The 1876 Constitution promulgated a judicial structure with a hierarchy far different than that of present day. The Supreme Court heard appeals from the district courts. TEX. CONST. of 1876 art. 5, § 3. The Court of Appeals heard criminal cases and "all civil cases, unless hereafter otherwise provided by law, of which the County Courts have original or appellate jurisdiction." TEX. CONST. of 1876 art. 5, § 6.

The Court of Appeals name changed to the Court of Criminal Appeals by an 1891 constitutional amendment. *See* TEX. S.J.R. 16, 22nd Leg., R.S., 1891 Tex. Gen. Laws 197, 198, *reprinted in* H.P.N. GAMMEL, 10 The Laws of Texas 1822–1897, at 199–200 (Austin, Gammel Book Co. 1898); TEX. CONST. art. 5, § 5 (amended 1891). Said amendment established the intermediate civil courts of appeal. *Id*. at 198–99, 10 GAMMEL at 200–01; Tex. Const. art. 5, § 6 (added 1891). The Court of Appeals lost appellate jurisdiction over those civil cases emanating from the County Courts. It became an exclusively criminal court known as the Court of Criminal Appeals. The relevant part of this historical minutia is that this court is the state court of last resort for all criminal cases in Texas and has been since 1876 (despite the name change).

[24] Prior to 1981, "the State had almost no role in bringing an action to this court." *Ex parte Taylor*, 36 S.W.3d 883, 886 (Tex. Crim. App. 2001) (per curiam). In 1981, the intermediate courts of appeal received appellate jurisdiction over non-capital criminal cases, which precipitated a constitutional amendment to reverse the 1876 framers' judgment. *See* TEX. S.J.R. 34, 70th Leg., R.S., 1987 Tex. Gen. Laws 4114, 4114; TEX. CONST. art. 5, § 26 (amended 1987) ("The State is entitled to appeal in criminal cases, as authorized by general law."); *see also, infra*, II.B.2.

gubernatorial appointment and with advice and consent of the Senate.[25] Even with the name of the office, this position was often treated as a judicial branch official whose salary the Legislature classified as part of the appropriation to this court. *See*, *e.g.*, Act of Aug. 29, 1911, 32nd Leg., 1st C.S., ch. 3, 1911 Tex. Gen. Laws 2, 17–18 (attorney general); 34 (salary of assistant attorney general underneath the Court of Criminal Appeals). Such was a precursor to the position of the State Prosecuting Attorney, discussed more fully *supra* II.B.2.[26]

The 1876 Constitution empowered the Attorney General to "represent the State in all suits and pleas in the ***Supreme Court of the State*** in which the State may be a party." TEX. CONST. of 1876 art. 4, § 22 (emphasis added).[27] The 1876

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[25] Act approved Mar. 15, 1875, 14th Leg., 2nd R.S., ch. 122, § 1, 1875 Tex. Gen. Laws 179, 179–80, reprinted in H.P.N. GAMMEL, 8 The Laws of Texas 1822–1897, at 551–52 (Austin, Gammel Book Co. 1898).

[26] In *Ex parte Taylor*, this court noted, "[f]rom 1876 to 1923, the attorney general represented the State in the Court of Criminal Appeals (and its predecessor, the Court of Appeals)." 36 S.W.3d at 886. *Ex parte Taylor* concerned appellate representation before this court after the 1981 provision of criminal jurisdiction to the intermediate court of appeals, not whether a statewide officer had independent and exclusive authority to prosecute in the district or inferior courts. *Id*. at 884–87 (State's petition for review must be filed by the State Prosecuting Attorney rather than a district attorney). As noted above, the position seemed to be independent of the Attorney General and confined to representing the State in this court and its predecessor in defending criminal convictions on appeal.

[27] As established in 1876: "The attorney general shall hold his office for two years and until his successor is duly qualified. He shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and, from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power

Constitution's creation of the Court of Criminal Appeals without a corresponding grant of authority to the Attorney General also demonstrates the framer's intent to divide and separate authority. "When interpreting our state Constitution, we rely heavily on its literal text and are to give effect to its plain language." *Dietz*, 940 S.W.2d at 89. The omission of the Court of Criminal Appeals from the Attorney General's constitutional authority qualifies, particularly when read with the constitutional provision providing the county and district attorneys with the express authority to represent the State in the district and inferior courts.

To reach the conclusion of the Attorney General and the court below that the framers of the 1876 Constitution intended for the Attorney General to have any independent criminal prosecutorial authority in the "District and inferior courts" is to silence the framers.[28] Deleting the Attorney General's authority to direct district

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or demanding or collecting any species of taxes, tolls, freight or wharfage, not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the governor and other executive officers, when requested by them, and perform such other duties as may be required by law. He shall reside at the seat of government during his continuance in office. He shall receive for his services an annual salary of two thousand dollars, and no more, besides such fees as may be prescribed by law; provided, that the fees which he may receive shall not amount to more than two thousand dollars annually." TEX. CONST. of 1876 art. 4, § 22.

[28] "The constitution, outlook, and philosophies of 1876 brought Texas into the modern world with very much the viewpoints of 1836, because in Texas these did not substantially change." T.R. FEHRENBACH, LONE STAR A HISTORY OF TEXAS AND THE TEXANS 437 (2d ed. 2000).

attorneys and cabining him to the Supreme Court without any mention of the Court of Appeals renders the Attorney General's constitutional interpretation incorrect. Constitutional interpretation requires consideration of "the historical context in which it was written [and] the relation of the provision to the law as a whole, the understanding of other branches of government." *Davenport v. Garcia*, 834 S.W.2d 4, 30 (Tex. 1992) (Hecht J., concurring, joined by Cook and Cornyn, JJ.). But the Attorney General and the majority of the court of appeals fail to even acknowledge that 1876 Constitution "retains its underlying nature" to this day. Bruff, 68 TEX. L. REV. at 1339. The underlying nature of 1876 Constitution prohibits any independent grant of prosecutorial authority to the Attorney General in the district and inferior courts of this State.

B. The Attorney General's Constitutional Reserve Powers Do Not Support Independent Prosecutorial Authority Because these Powers are Unambiguously Civil.

The Attorney General believes that the Constitution's grant of authority to "perform such other duties as may be required by law," TEX. CONST. art. 4, § 22, gives the Legislature *carte blanche* authority to define his duties. The Attorney General is wrong. Texas courts have consistently recognized that the district and county attorneys' "primary function, is to prosecute the pleas of the state in criminal cases." *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987) (internal quotation marks omitted). Because "a district or county attorney's duty to prosecute

criminal cases is the utilization of his own discretion[,] the Legislature may not remove or abridge [their] exclusive prosecutorial function, unless authorized by an express constitutional provision." *Id*. 254–55. Allowing the Attorney General to "direct the county or district attorney," TEX. ELEC. CODE § 273.022, unconstitutionally confers the specific powers upon another. *See Hill Cnty. v. Sheppard*, 178 S.W.2d 261, 264 (Tex. 1944).

The Attorney General's express constitutional mandate is to represent the State in the Supreme Court of Texas, in any court regarding private corporations, and provide legal advice to the State's executive officers "when requested by them." TEX. CONST. art. 4, § 22.[29] This constitutional provision allows the Legislature some flexibility in granting the Attorney General some civil responsibilities; it does not support any argument that the Legislature may grant the Attorney General independent prosecutorial authority expressly assigned elsewhere. *See* Tex. Const. of 1876 art. 5, § 3 (Supreme Court's jurisdiction "shall only extend to civil cases"). Which civil powers the Attorney General may exercise independent of and contrary

[29] The present constitution keeps the core language of the 1876 version. *See* TEX. CONST. art. 4, § 22 (omitting the 1876 Constitution's term of office, the Austin residency requirement, and the salary cap). Because "constitutional provisions and amendments that relate to the same subject matter [are construed] together," *Doody v. Ameriquest Mort. Co.*, 49 S.W.3d 342, 344 (Tex. 2001), the lack of substantive change to the powers of the Attorney General in subsequent amendments puts any case interpreting this constitutional provision on equal footing.

to wishes of the locally elected county and district attorney becomes an academic exercise.

Six years after 1876 Constitution, the Supreme Court of Texas thoroughly examined this constitutional provision in a civil dispute between the State and the then-Travis county attorney regarding collection of tax money owed to the State's treasury. *State v. Moore*, 57 Tex. 307, 310–12 (1882), *overruled in part on other grounds*, *Brady v. Brooks*, 89 S.W. 1052 (Tex. 1905). "If we look to past legislation, under all the constitutions of this state, none of which defined the duties of the attorney general or of district or county attorneys so specifically as does the present, it will be seen that it was always contemplated that the district attorneys should represent the state in all cases in the district and inferior courts * * * *." *Id*. at 316 (noting prior laws the Attorney General's duty to litigate "against colonial contractors").

Subsequent Supreme Court decisions recognized the state's personhood to bring suit to protect property rights. *Day Land & Cattle Co. v. State*, 4 S.W. 865, 867 (Tex. 1887) ("The state doubtless has the right, by suit, to protect any ***property right*** vested in it ***as fully as has any person***; and this suit was brought in its name, and on its behalf, by persons claiming to act as its officers or agents) (emphasis added); *accord Brady*, 89 S.W. at 1055. Indeed, § 21 of article 5 imposes the "important restriction" that "the Legislature could not take away from the county

attorneys as much of their duties as practically to destroy their office." *Brady*, 89 S.W. at 1056.

But these Supreme Court decisions have no bearing on whether § 273.021(a) of the Election Code abridges or interferes with the specific independent prosecutorial powers conferred upon the county or district attorneys. *See Meshell*, 739 S.W.2d at 254. The Supreme Court has not considered who may represent the State in the district and inferior courts because that court lost its criminal jurisdiction in 1876. Tex. Const. of 1876 art. 5, § 3. Because "the language of the Texas Constitution is carefully selected," *cf. Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) (Abbott, J.), the hairsplitting between ***which*** civil responsibilities are properly handled by the county-level or State-level in a district court is not germane to the question of prosecutorial authority.

II. STATUTORY CONSTRUCTION REQUIRES THE ATTORNEY GENERAL TO OBTAIN PERMISSION FROM THE LOCAL PROSECUTORIAL AUTHORITY TO PROSECUTE

The Attorney General argued in the court of appeals that his independent criminal prosecutorial authority for election-related offenses is uncontroversial since his office has enjoyed this authority since 1951. *See* No. 01-19-00209-CR Attorney General's (Appellant's) Br. at 6. Reliance on that lineage begs the question of legitimacy. The Attorney General's statutory authority has always been to provide assistance to the county and district attorneys upon their request. TEX. GOV'T CODE

§ 402.028(a) & *supra* n. 22. Further, the Attorney General noted that the Governor at the time specifically requested that the Attorney General have this authority because local law enforcement officers had been "unable to cope with problems arising out of [Texas] elections." *Id*. at 8 (quoting H.J. of Tex., 52d Leg., R.S. 2023–24 (1951)).[30] These arguments are woefully insufficient given the plain text of ***every*** other grant of independent prosecutorial authority under the Texas Penal Code, the repeated distinction of terms in the Code of Criminal Procedure, and the distinct chapters of the Government Code setting out the duties of the Attorney General, district attorneys, criminal district attorneys, and county attorneys.

A. The Legislature Has Uniformly Required the Attorney General to Obtain the Permission of the Local Prosecuting Attorney to Prosecute a Criminal Offense.

1. *Prosecution of a Criminal Offense by the Attorney General Requires an Express Invitation*.

The Texas Penal Code requires the consent of the appropriate local county or district attorney before the Attorney General may prosecute. To extricate himself and other statewide executive officers from lawsuits filed by the Texas Democratic Party, Planned Parenthood, civil rights organizations, and judges, the Attorney

[30] The Governor of Texas in 1951 was Allan Shivers. He should have pushed for a constitutional amendment rather than a statute, but this would likely have not born fruit. The House concurred in the Senate amendments to H.B. 6 on May 30, 1951, with a vote of 79 ayes, 50 noes, and 1 voting present. H.J of Tex., 52d Leg., R.S. 2912 (1951). That vote is short of the requisite two-thirds vote required for a constitutional amendment. *See* TEX. CONST. art. 17, § 1.

General has already admitted this basic concept. "District Attorneys could prosecute violations of EO-GA-13, [TEX. GOV'T CODE] § 418.173, and while the Attorney General has statutory authority to 'assist' with such prosecutions, he can do so only '[a]t the request of a district attorney, criminal district attorney, or county attorney,' *id*. § 402.028(a).'" Pet. for a Writ of Mandamus, In re Abbott, 601 S.W.3d 802 (Tex. 2020) (No. 20–0291) 2020 WL 1977356, at *8 (Tex. Apr. 13, 2020). Only "local prosecutors" can enforce compliance with the Governor's emergency declaration because such enforcement "constitutes a criminal offense." *Tex. League of United Latin Am. Citizens v. Abbott*, No. 1:20-CV-1006-RP, 2020 WL 5995969, at *15, ___ F. Supp. 3d ___ (W.D. Tex. Oct. 9, 2020); Transcript of Proceedings at 61:16-22, Tex. League of United Latin Am. Citizens v. Abbott, No. 1:20-CV-1006-RP (W.D. Tex. Oct. 8, 2020), ECF No. 41; *see also Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020) ("Attorney General lacks a requisite connection" to question of Election Code enforcement).[31]

In promulgating the penal law of this State, the Legislature has almost exclusively used one of two formulas to provide the Attorney General authority to

[31] The Governor is not amenable to suit for his pandemic-related executive orders because he lacks a sufficient connection to their enforcement. *Tex. Democratic Party*, 978 F.3d at 180; *In re Abbott* (Abbott IV), 956 F.3d 696, 708–09 (5th Cir. 2020). Rather, violators of the Governor's orders are subject to "criminal penalties" enforced by local prosecutors. *In re Abbott* (Abbott II), 954 F.3d 772, 780 & n. 12 (5th Cir. 2020) (citing TEX. GOV'T CODE § 418.173).

prosecute with the permission of the locally elected official: (1) express consent and (2) express request.

An example of the express-consent model is the concurrent jurisdiction to prosecute offenses that involve state property. TEX. PENAL CODE § 1.09 ("With the ***consent of the appropriate local county or district attorney***, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute under this code any offense an element of which occurs on state property or any offense that involves the use, unlawful appropriation, or misapplication of state property, including state funds.") (emphasis added). Several grants of authority follow this model, including the offense of "tampering with direct recording electronic voting," which derives from the Election Code itself. *See* TEX. PENAL CODE § 33.05(f).[32] Medicaid fraud constitutes the bulk of these legislative grants. *See* TEX. PENAL CODE § 31.03(j) (theft involving state Medicaid program);[33] TEX. PENAL CODE § 32.32(e) (fraud related to mortgage loan);[34] TEX. PENAL CODE § 32.45(e)

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[32] "With the ***consent of the appropriate local county or district attorney***, the attorney general has concurrent jurisdiction with that consenting local prosecutor to investigate or prosecute an offense under this section." (emphasis added).

[33] "With the ***consent of the appropriate local county or district attorney***, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section that involves the state Medicaid program." (emphasis added).

[34] "With the ***consent of the appropriate local county or district attorney***, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section that involves a mortgage loan." (emphasis added).

(misapplication of fiduciary property related to Medicaid program);[35] TEX. PENAL CODE § 32.46(e) (deceitful execution of Medicaid-related document);[36] TEX. PENAL CODE § 32.53(e) (exploitation of child, disabled, or elderly person related to a Medicaid program);[37] TEX. PENAL CODE § 35A.02(f) (fraud related to state or federal healthcare program);[38] TEX. PENAL CODE § 37.10(i) (tampering with a government

[35] "With the ***consent of the appropriate local county or district attorney***, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section that involves the state Medicaid program." (emphasis added).

[36] "With the ***consent of the appropriate local county or district attorney***, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section that involves the state Medicaid program." (emphasis added).

[37] "With the ***consent of the appropriate local county or district attorney***, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section that involves the Medicaid program." (emphasis added).

[38] "With the ***consent of the appropriate local county or district attorney***, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section that involves a health care program." (emphasis added).

record related to Medicaid fraud);[39] TEX. PENAL CODE § 39.015 (abuse of office);[40] & TEX. PENAL CODE § 48.03(f) (purchase and sale of human fetal tissue).[41]

Bias-related crimes constitute an example of the second category. TEX. PENAL CODE § 12.47(b) ("The attorney general, ***if requested to do so by a prosecuting attorney***, may assist the prosecuting attorney in the investigation or prosecution of an offense committed because of bias or prejudice. The attorney general shall designate one individual in the division of the attorney general's office that assists in the prosecution of criminal cases to coordinate responses to requests made under this subsection.") (emphasis added). This model primarily concerns financial and remote-method crimes.[42] TEX. PENAL CODE § 33.04 (crimes using a computer);[43]

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[39] "With the ***consent of the appropriate local county or district attorney***, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section that involves the state Medicaid program." (emphasis added).

[40] "With the ***consent of the appropriate local county or district attorney***, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this chapter." (emphasis added).

[41] "With the ***consent of the appropriate local county or district attorney***, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section." (emphasis added).

[42] "The attorney general, ***if requested to do so by a prosecuting attorney***, may assist the prosecuting attorney in the investigation or prosecution of an offense under this chapter or of any other offense involving the use of a computer." (emphasis added).

[43] "The attorney general, ***if requested to do so by a prosecuting attorney***, may assist the prosecuting attorney in the investigation or prosecution of an offense under this chapter or of any other offense involving the use of a computer." (emphasis added).

TEX. PENAL CODE § 33A.06 (crimes using telecommunications);[44] & TEX. PENAL CODE § 34.03 (money laundering).[45] Prosecution of insurance fraud follows this model, except using "attorney for the state" as the requestor instead of "prosecuting attorney." TEX. PENAL CODE § 35.04(a) & (b) (insurance fraud).[46] The separation of Attorney General from "attorney representing the state" appears to be drafting error without any larger significance. *See* Act of June 14, 1995, 74th Leg. R.S., ch. 622 § 1, 1995 Tex. Gen. Laws 3483, 3484. *Amici* assert that this model is constitutionally appropriate for these largely white-collar crimes. The local prosecutorial authority often benefits from the Attorney General's expertise, but continues to retain discretion related to the matter's prosecution.

2. *The Election Code's Grant is a Clear Outlier and Has Been So Treated by the Courts of this State*.

The legislative grant upon which the Attorney General relies is buried on the 56th page of a 96-page session law in the middle of the 130th section. *See* Act of

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[44] "The attorney general, ***if requested to do so by a prosecuting attorney***, may assist the prosecuting attorney in the investigation or prosecution of an offense under this chapter or of any other offense involving the use of telecommunications equipment, services, or devices. (emphasis added).

[45] "The attorney general, ***if requested to do so by a prosecuting attorney***, may assist in the prosecution of an offense under this chapter." (emphasis added).

[46] "The ***attorney general may offer to an attorney representing the state*** in the prosecution of an offense under Section 35.02 the investigative, technical, and litigation assistance of the attorney general's office." TEX. PENAL CODE § 35.04(a) (emphasis added). "The attorney general may prosecute or assist in the prosecution of an offense under Section 35.02 on ***the request of the attorney representing the state*** described by Subsection (a)." TEX. PENAL CODE § 35.04(b) (emphasis added).

May 30, 1951, 52d Leg., R.S., ch. 492, § 130(2), 1951 Tex. Gen. Laws 1097, 1152. Just six years after this supposed sea change, the San Antonio Court of Civil Appeals upheld an injunction sought by the Webb County district attorney restraining the Attorney General from prosecuting a matter that Webb County was already prosecuting. *Shepperd v. Alaniz*, 303 S.W.2d 846 (Tex. Civ. App.—San Antonio 1957, no pet.).

The *Shepperd* court correctly concluded that granting the Attorney General exclusive or independent prosecutorial authority "would run afoul of Sec. 21 of Article 5 of the Constitution and would be void [because] it has always been the principal duty of the district and county attorneys to investigate and prosecute the violation of all criminal laws, including the election laws." *Id*. at 850.[47] Of course, the Attorney General and his assistants may participate when invited by the locally elected district attorney. *See Medrano v. State*, 421 S.W.3d 869, 877–81 (Tex.

[47] The Legislature has enacted a provision in the Securities Act whereby "[i]f the district or county attorney neglects or refuses to prosecute the alleged criminal violation," the Attorney General may proceed with the prosecution. TEX. GOV'T CODE § 4007.001(d). Because this statute does not become effective until January 1, 2022, no challenge is ripe or likely to be ripe during the pendency of this case. *Cf. Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms.") Rather, "[t]he accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection." *Fenner v. Boykin*, 271 U.S. 240, 244 (1926) (criminalizing certain commodities futures trading).

App.—Dallas 2014, pet. ref'd) (Rockwall County district attorney appearing first).[48]

3. *The Trial Court Correctly Determined that Tampering with a Public Record is Not an Election-Related Crime.*

Even if the 1876 Constitution permitted the Legislature to invest the Attorney General with independent criminal prosecutorial power, the Legislature did not grant the Attorney General such authority to prosecute tampering with a governmental record. The court of appeals majority misapplied this court's decisions in *Ex parte Vela* and *State v. Schunior*. *Stephens*, 608 S.W.3d at 251–52 (citing *Ex parte Vela*, 460 S.W.3d 610, 612 (Tex. Crim. App. 2015) & *State v. Schunior*, 506 S.W.3d 29, 37 (Tex. Crim. App. 2016)). The court of appeals majority concluded that "election laws of this state" is unambiguous and employed the canon of construction that courts should neither add nor subtract from it. *Stephens*, 608 S.W.3d at 251. The majority then contradicted itself by employing the canon of construction applied when the "plain-language interpretation is ambiguous." *Id*. at 252.

Amici agree that *Shunior* governs. Section 37.10 of the Texas Penal Code prohibits tampering with a governmental record. The Attorney General indicted Stephens for a violation of subsection (a). The Legislature, however, granted the

[48] Assistant attorney general Jonathan White signed a notarized deputation before appearing in the 439th District Court under the direction of Rockwall County District Attorney Kenda L. Culpepper. District Attorney Culpepper executed a deputation for each case arising out of the election fraud charged, including the Carlos Medrano matter. Due to errors in the clerk's office at the time, only the deputation for Ronaldo Medrano survived.

Attorney General concurrent jurisdiction only for subsection (i) ***after*** granting the Attorney General independent authority to prosecute election offenses. Act of Jun. 2, 2003, 78th Leg., R.S., ch. 198, § 2.139, 2003 Tex. Gen. Laws 611, 705 (codified at TEX. PEN. CODE § 37.10(i) ("With the consent of the appropriate local county or district attorney * * * to prosecute an offense under this section that involves the state Medicaid program.")). "As a rule of statutory interpretation, the express mention or enumeration of one person, thing, consequence, or class is tantamount to an exclusion of all others." *Schunior*, 506 S.W.3d at 38 (internal quotation remarks omitted). Because a campaign-finance report unambiguously does not involve the state Medicaid program, the trial court correctly quashed the Indictment with respect to Count One. The Attorney General's broad reading of election law, accepted below, would make any penal offense susceptible to having an application to an election law. The court of appeals did not articulate a limiting principle.

Last, constructing § 273.021 too broadly renders superfluous statutes creating specific crimes the Legislature has created outside the Election Code. In 2005, for example, the Legislature created the new election-related offense prohibiting tampering with a "Direct recording electronic voting machine." Act of May 23, 2005, 79th Leg., R.S., ch. 470, § 1, 2005 Tex. Gen. Laws 1329, 1329 (codified TEX. PEN. CODE § 33.05). Unlike § 37.10(a), § 33.05(a) expressly incorporates provisions from the Election Code. If § 273.021(a) has the broad meaning ascribed to it by the

court of appeals, that begs the question of why the Legislature created what is unquestionably an act criminalized by both the Election Code and the Penal Code. The court of appeals erred because § 1.03(b) controls the importation of offenses outside the Penal Code into it. *State v. Colyandro*, 233 S.W.3d 870, 884 (Tex. Crim. App. 2007) (that section "directs the export of the provisions contained only in Titles 1, 2, and 3 of the Penal Code to criminal offenses defined outside the Penal Code and contemporaneously bars the import of extra-Penal Code offenses to offenses defined in Titles 4 through 11 of the Penal Code."). Section 37.10 is in Title 8 of the Penal Code, as an offense against public administration. Therefore, it is not subject to general importation.[49]

B. The Texas Code of Criminal Procedure Provides the Only Appropriate Method of Displacing Competent Local Prosecutorial Authority in the District and Inferior Courts.

The Attorney General admits, in the 185th year of the independence of this State, that his authority to prosecute here raises "an issue of first impression." No. 01-19-00209-CR Attorney General's (Appellant's) Br. at v. But the Attorney General's own metrics of statutory interpretation undermine his assertion. *Id*. at 7 (citing *Schunior*, 506 S.W.3d at 37 (statutory interpretation requires analyzing "not

[49] As noted, *supra* II.A.2, the Legislature later provided the Attorney General with consent-based concurrent authority to prosecute the offense. Act of May 26, 2009, 81st Leg., R.S., ch. 503, § 1, 2005 Tex. Gen. Laws 1121, 1121 (codified TEX. PEN. CODE § 33.05(f)).

only at the single, discrete provision at issue but at other provisions within the whole statutory scheme")). Moreover, appellate representation of the State, for which the Attorney General has played a minimal role, bears little on the unique exercise of prosecutorial discretion that the county and district attorneys perform in prosecuting and trying a criminal matter in the district and inferior courts.

1. *The Attorney General's Trial Court Representation is Limited to Expressly Requested Assistance*.

The Attorney General may only assist in a prosecution at "the request of a district attorney, criminal district attorney, or county attorney." Pet. for a Writ of Mandamus, In re Abbott (Abbott II), 954 F.3d 772 (5th Cir. 2020) (No. 20–50264), at 26 n. 33 (5th Cir. Mar. 30, 2020) (citing TEX. GOV'T CODE § 402.028(a)). This overriding structural provision combined with the specific statutory grants exhaustively detailed above mean that even if § 273.021(a) were constitutional, the Attorney General would not even win as a matter of statutory interpretation. Chapter 402 of the Government Code defines the statutory duties of the "Attorney General." Subchapter B defines his duties of which § 402.028 allows assistance to prosecuting attorneys when requested.[50]

Statutes governing "Prosecuting Attorneys" are found at Subtitle C of Title 2. Title 2 of the Government Code defines the duties and powers of the "Judicial

[50] Section 402.024(a) of the Government Code permits the Attorney General to defend "a state district attorney in an action in a federal court" when requested.

Branch." Chapters 43, 44, and 45, are, respectively, the statutes governing district attorneys, criminal district attorneys, and county attorneys. Where the Code repeatedly distinguishes "attorney general" from "prosecuting attorney," *see supra* II.A.1, one is not like the other. *Cf. In re House Republican Caucus PAC*, No. 20–0663, 2020 WL 5351318 at *4, ___ S.W.3d ___ (Tex. Sept. 5, 2020) (per curiam) ("The Legislature consistently distinguished between the two different labels, and the courts are bound to respect that choice."). The comprehensive 1985 Act revising and replacing Title 2 of the Government Code would have been a good place to articulate any intent to displace the county and district attorney from "representing the state" in "criminal case[s]." Act of May 17, 1985, 69th Leg., R.S. ch. 480, 1985 Tex. Gen. Laws 1720, 1720. As demonstrated below, the Legislature accomplished such for the State Prosecuting Attorneys at the appellate level. *Id*. at § 42.001(a), 1985 Tex. Gen. Laws at 1921 (codified TEX. GOV'T CODE §42.001).

Section 402.028(c) of the Government Code reinforces this conclusion with an explicit cross-reference to the provision of Texas Code of Criminal Procedure allowing the appointment of a *pro tem* attorney for the state. The district attorney may voluntarily request (or the Attorney General or defendant may file a motion with) any judge of Texas to appoint an attorney *pro tem* whenever "an attorney for the state * * * is otherwise unable to perform the duties of the attorney's office, or in any instance where there is no attorney for the state." TEX. CODE CRIM. PROC. art.

2.07(a). Such *pro tem* attorneys specifically may include the appointment of "an assistant attorney general to perform the duties of the office during the absence or disqualification of the attorney for the state." *Id*. The use of "attorney for the state" in lieu of "prosecuting attorney" is intentional. Although the Legislature has not explicitly defined these terms, the repetitious use of these terms throughout the above-mentioned Codes provides only one rational interpretation: the Attorney General is in the attorney-for-the-state bucket, but not in the prosecuting-attorney bucket. That is the only conclusion that disambiguates hundreds of pages of Code.

2. *Appellate Representation is of Tangential Relevance to Question of the Prosecutorial Discretion of the Elected Local Prosecutor*.

As discussed, *supra* I.A.2, the 1876 Constitution explicitly prohibited the State's appellate rights in criminal cases. TEX. CONST. OF 1876 art. 5, § 26. "In 1981, when the intermediate courts of appeals gained jurisdiction of criminal appeals other than capital, the State acquired a more active role in bringing cases to this Court." *Ex parte Taylor*, 36 S.W.3d at 886. "For the first time in an appeal, conflicts and omissions in the State's pleadings could have significant effects on the disposition of an appeal." *Id*. Accordingly, the need for constitutional amendment now apparent, the voters ratified the 1987 amendment "to give the State the right to appeal [granting] the State * * * the full status of an appellant." *Compare* TEX. H.J.R. No. 97, 66th Leg., R.S, 1980 Tex. Gen. Laws 3228, 3228–29 (Failed 47.8%); *with* TEX. CONST. art. 5, § 26 (amended 1987) (Adopted 67.9%). Still, appeals and

petitions for discretionary review by the "attorney for the state"—whether the district attorney or the State Prosecuting Attorney—"have been in much smaller numbers than those by defendants." *Ex parte Taylor*, 36 S.W.3d at 887.[51]

The "State Prosecuting Attorney" is not a part of the Office of the Attorney General. Held by the Honorable Stacey M. Soule, that office may represent the State in all proceedings before this court. TEX. GOV'T CODE § 42.001(a). And it was this court that appointed her to that position, *see id*., and has since 1931. *See* Act of May 18, 1931, 42nd Leg., R.S. 1931, ch. 139, § 1, 1931 Tex. Gen. Laws 234, 234.[52] Accordingly, those matters relied upon by the Attorney General where a district attorney and/or assistant district attorney(s) appeared before this court with the State Prosecuting Attorney are not applicable. *See, e.g.*, *Jones v. State*, 803 S.W.2d 712 (Tex. Crim. App. 1991); *Meshell*, 739 S.W. 2d at 246. Moreover, the State Prosecuting Attorney maintains express authority to intervene in "a criminal case

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[51] Between 1876 and 1981, the State made scant applications to this court. *See id*. at 886 (noting the presence of small number extraordinary applications for writs of mandamus or prohibition).

[52] Prior to that, the Governor appointed this position with advice and consent of the Senate. *See* Act of Mar. 30, 1923, 38th Leg., R.S., ch. 156, § 4, 1923 Tex. Gen. Laws 335, 335 (providing an assistant to the "attorney for the State before the Court of Criminal Appeals of Texas," who also was subject to gubernatorial appointment with advice and consent of the Senate). The 1875 "Assistant Attorney General" position also required a gubernatorial appointment with advice and consent of the Senate. Act approved Mar. 15 1875, 14th Leg., 2d R.S., ch. 112, § 1, 1875 Tex. Gen. Laws 179, 179–80, *reprinted in* H.P.N. GAMMEL, 8 The Laws of Texas 1822–1897, at 551–52 (Austin, Gammel Book Co. 1898).

before a state court of appeals if [she] considers it necessary for the interest of the state." TEX. GOV'T CODE § 42.001(a).

Last, that this court specifically approved of the Attorney General representing the State of Texas before the Supreme Court of the United States bears little on the question of whether he has authority so to do at a county-level or district-level court. *See Saldano*, 70 S.W.3d at 881–84. And there, this court granted post-hoc approval because the district attorney's "silence in the face of a long practice whereby the attorney general has undertaken to respond to such petitions when the county or district attorney does not, should be construed as an implied request for such assistance in this case." *Id*. at 883–84. How the Attorney General's representation in the Supreme Court of the United States for a post-conviction matter involving federal constitutional issues of equal protection and due process bear on the unrelated separation-of-powers provision of the ***Texas*** Constitution is mystifying.

III. FOR NEARLY TWO HUNDRED YEARS, THE FUNDAMENTAL LAWS OF TEXAS HAVE PLACED PROSECUTION INTO THE HANDS OF LOCALLY SELECTED OFFICIALS

As noted, the predominance of locally selected officials, particularly in matters of law enforcement and the judiciary, is thoroughly demonstrated in all but the penultimate constitution, *supra* I.A.1. It is this 1869 Constitution in which the Attorney General first appears. It is this 1869 Constitution that the framers of the

present constitution thoroughly disemboweled seven years later. The statutes and case law detailed naturally flow from *Amici*'s constitutional analysis, which in turn emanates from the history of this State.

The Story of Texas is a continuous struggle of its citizenry jealously guarding their liberties from usurpation by more remote authorities. During the reign of Spanish King Ferdinand VII, *el rey felón*, Mexico, of which Texas was then a part, threw off the government of the distant Madrid. Fifteen years later, Texas did the same to Mexico City.[53] Since Independence, Texas's localities have continued to guard jealously their authority from those more remote.

The Attorney General's contrary arguments below are against the weight of the history of the Republic and of this State. Again, the First Legislature invested each district attorney with the duty "to conduct all prosecutions for crimes and offenses cognizable in such [district] court"[54] and the Attorney General the duty to "counsel and advise * * * whenever requested by them so to do * * * *."[55] As detailed, *supra* II.A, all legislative grants of criminal prosecutorial authority to the

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[53] Mexican General Antonio López de Santa Ana signed the surrender Treaties of Velasco (May 14, 1836) before Spain even recognized Mexico's independence in the Treaty of Santa María–Calatrava (December 28, 1836).

[54] Act approved May 13, 1846, 1st Leg., R.S., § 2, 1846 Tex. Gen. Laws 295, 296, *reprinted in* H.P.N. GAMMEL, 2 The Laws of Texas 1822–1897, at 1601–02 (Austin, Gammel Book Co. 1898).

[55] Act approved May 11, 1846, 1st Leg., R.S., § 3, 1846 Tex. Gen. Laws 206, 206, *reprinted in* H.P.N. GAMMEL, 2 The Laws of Texas 1822–1897, at 1512 (Austin, Gammel Book Co. 1898).

Attorney General presently in effect have been concurrent except for § 273.021(a).

Further, the evolution of common law also mandates *Amici*'s conclusion that the district attorney exercises the power of the State as an independent decentralized figure vertically separated from and independent of the Attorney General. The Republic of Texas adopted common law over the civil law of the Mexican and Spanish antecedents.[56]

After a thorough analysis of common-law background principles, the Supreme Court of the United States held that the analogous office of county sheriff has always maintained a high degree of independence. *McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 784–96 (1997). Since at least the Norman Conquest in 1066, English sheriffs (or "shire-reeves") were the King's officer in the English counties ("shires"). *Id*. at 793. "Although chosen locally by the shire's inhabitants, the sheriff did all the king's business in the county and was the keeper of the king's peace." *Id*. (internal citations and quotation marks omitted). The present office of the sheriff represents "an unbroken lineage from the Anglo-Saxon shire-reeve." *Id*. (citation omitted).

The Supreme Court, therefore, held that the Monroe County, Alabama, sheriff executed the powers of the State of Alabama when acting in his law enforcement

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[56] *See* Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 REPUB. TEX. LAWS 3–4, *reprinted in* 2 H.P.N. GAMMEL, The Laws of Texas 1822–1897, at 177–80 (Austin, Gammel Book Co. 1898).

capacity while also being a locally accountable official. *Id*. at 784–96. "As the basic forms of English government were transplanted in our country, it also became the common understanding here that the sheriff, though limited in jurisdiction to his county and generally elected by county voters, was in reality an officer of the State, and ultimately represented the State in fulfilling his duty to keep the peace." *Id*. at 794 (footnote omitted). Just as is true for the district attorney, the sheriff's functions and duties "pertain chiefly to the affairs of state in the county." *Id.* (citation omitted).

The Texas Constitution establishes county sheriffs under the state's power of the judiciary, TEX. CONST. art. 5, § 23, right after enumerating the powers of county and district attorneys, TEX. CONST. art. 5, § 21. Article 2.13 of the Texas Code of Criminal Procedure provides that a sheriff has "the duty * * * to preserve peace within the officer's jurisdiction." *See also Minor v. State*, 219 S.W.2d 467, 468 (Tex. Crim. App. 1949) (The sheriff has a "duty to preserve the peace and arrest all offenders, and when authorized by the Code [of Criminal Procedure], he shall interfere, without warrant, to prevent and suppress crime.") The district attorney's "primary duty [is] to see that justice is done." TEX. CODE CRIM. PROC. 2.01. Elected locally, both may only be removed by the local electorate or by local judicial action.

Cf. McMillian, 520 U.S. at 788.[57]

Like the relevant constitutional and statutory provisions, the common law in light of the history of this State all point to prohibiting the Attorney General independent criminal prosecutorial authority. *Cf. Meshell*, 739 S.W.2d at 254 (quoting *Baker v. Wade*, 743 F.2d 236, 242 & n. 28 (5th Cir. 1984), *opinion withdrawn on reh'g*, 769 F.2d 289, *cert. denied*, 478 U.S. 1022 (1986) ("The laws of Texas vest in district and county attorneys the exclusive responsibility and control of criminal prosecutions and certain other types of proceedings.")). Decentralized and locally accountable prosecutors is a cornerstone of the liberty of Texans as much as are the rights to trial by jury and public access to judicial proceedings. The court of appeals erred in not evaluating these background principles.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Stephens's petition for review should be granted and the statutory grant of independent prosecutorial authority to the Attorney General should be invalidated as unconstitutional.

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[57] County sheriffs are removable by the judges of that county's district courts with the verdict of a jury. TEX. CONST. art. 5, § 24. District attorneys also are removable only by a locally accountable jurist. TEX. LOC. GOV'T CODE §§ 87.012; 87.015 (limiting to district court of a particular county in the case of a multi-county district).

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CERTIFICATE OF SERVICE

Pursuant to Texas Rule of Appellate Procedure 9.5(b) (d) & (e), I hereby certify that on December 24, 2020, I electronically filed the foregoing document Clerk of Court, using the efile.TXcourts.gov electronic filing system. In accordance with Rule 9.5(b)(1), I served all counsel by their email address listed below. My email address of justin.pfeiffer@fortbendcountytx.gov.

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This brief complies with the type-volume limitations of Rule 9.4 because it contains 9,850 words, excluded the parts of the brief exempted by Rule 9.4(i)(1).

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