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IN THE TEXAS COURT OF CRIMINAL APPEALS

Zena Collins Stephens,

Petitioner,

v.

The State of Texas,

Respondent.

On Petition for Discretionary Review from the First Court of Appeals, Houston

BRIEF OF AMICUS CURIAE JASON BOATRIGHT

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I. IDENTITY OF AMICUS CURIAE AND STATEMENT ON FEES

I am submitting this brief in my individual capacity only, not on behalf of a party, my law firm, or any other entity. I did not receive a fee for it.

The brief does not support or oppose the motion for rehearing and does not take a side. It provides background information on separation of powers and draws a series of new conclusions from points that have been previously raised in this case.

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IV. SUMMARY OF THE ARGUMENT

Section 273.021 of the Election Code authorizes the attorney general to prosecute election law violations. The attorney general is in the executive department of state government. The Texas Constitution prohibits anyone in one department from exercising a power that is properly attached to another department.

The power to prosecute election law violations is an executive power. Because section 273.021 authorizes an executive officer to use a power that is properly attached to the executive department, it is constitutional.

V. ARGUMENT

A. *Section 273.021 of the Texas Election Code is constitutional*

1. Section 273.021 authorizes the attorney general to prosecute election law violations. Prosecution is an executive power

The Constitution divides government power into three departments. TEX. CONST. art. II, § 1. It prohibits a person in one department from exercising a power properly attached to another unless expressly permitted in the Constitution. *Id*. The attorney general is in the executive department. *Id*. art. IV, § 22.

Section 273.021 of the Election Code expressly authorizes the attorney general to prosecute criminal violations of Texas election laws. TEX. ELEC. CODE § 273.021(a). Thus, section 273.021 would be constitutional if prosecuting election law violations is an executive power. TEX. CONST. art. II, § 1.

To determine whether the power to represent the state in criminal prosecutions is properly attached to the executive department, it is necessary to determine what kind of power—legislative, executive, or judicial—that power is.

The Constitution vests the judicial power in Texas courts. *Id*. art. V, § 1. Courts do not prosecute election law violations, so it stands to reason that the power to prosecute election law violations is not a judicial power. Indeed, judicial power is not the sort of power that prosecutors use. *See* BLACK'S LAW DICTIONARY 924 (9th ed. 2011) (defining "judicial power" as the "authority vested in courts and judges to hear and decide cases and to make binding judgments on them").

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In contrast, the power to represent the state in criminal prosecutions is the special province of the executive branch. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). This conclusion is consistent with classical separation of powers theory, which posits that it would be unfair to the accused if the judicial branch could bring a prosecution and then decide the case too. David A. Martland, *Justice without Favor: Due Process and Separation of Executive and Judicial Powers in State Government*, 94 YALE L. J. 1675, 1677 (1985). Thus, representing the state in criminal prosecutions is an executive power.

   2. Section 273.021 is constitutional because it authorizes an executive officer to use executive power

Because the power to prosecute election law violations is an executive power and the attorney general is an executive officer, section 273.021 does not violate the separation of powers clause. This conclusion allows every relevant part of the Constitution to work together as it should. Article IV, section 22 enumerates certain instances in which the attorney general must use executive power, but it does not purport to enumerate all the instances in which the attorney general *may* use that power. Accordingly, the legislature—which is vested with all legislative power by article III, section 1—can authorize the attorney general to use executive power to represent the state in criminal prosecutions of election law violations under section 273.021. Thus, section 273.021 is constitutional.

  B. *The Court may wish to revisit parts of its opinion*

1. The Court reasons that county and district attorneys have judicial power because they are in the judicial branch, but the Court suggests its reasoning may be wrong

The Court says article V, section 21 grants county and district attorneys the authority to represent the state in criminal prosecutions of election law violations. Opinion at 12. The Court calls these prosecutions "judicial branch duties" because county and district attorneys are in the judicial branch. Opinion at 7-8, 12, 16. However, the Court also says the Constitution sometimes grants powers to one branch that are properly attached to another branch. Opinion at 8.

Indeed, the Constitution frequently grants members of one department some powers that are properly attached to others. For example, the Constitution grants the governor the legislative power of veto and it makes the lieutenant governor the president of the senate. TEX. CONST. art. IV, §§ 14, 16. It also makes county judges the presiding officers of county commissioners courts. *Id*. art. V, § 18(b). Similarly, the Constitution expressly requires the legislature to regulate the duties of county and district attorneys—duties which can include the executive power of representing the state in trial courts. *Id*. art. V, § 21. The Court even acknowledges that the Constitution grants the attorney general "'duties that are both executive and judicial in function.'" Opinion at 20.

Because the Court is correct when it observes that the Constitution grants officers in one branch some powers that are properly attached to other branches, the

Court is incorrect when it says that county and district attorneys' power is judicial because they are in the judicial branch. As the Court suggests, government power is not legislative, executive, or judicial because of *where* it is, but rather *what* it is.

2. The Court says article V, section 21 grants county and district attorneys the "specific duty" to prosecute election crime, but the Court also says section 21 does not enumerate their duties

The Court concludes that the attorney general lacks the power to represent the state in criminal prosecutions of election law violations because the "Constitution already grants this authority to county and district attorneys" and it "is already the specific duty" of county and district attorneys. Opinion at 12. But the Court also says that "the duties of county and district attorneys are not enumerated" in article V, section 21. Opinion at 8. Those statements are not consistent with one another.

Nor are they consistent with the text of the Constitution. Contrary to the Court's assertion that the Constitution grants county and district attorneys the "specific duty" to represent the state in criminal prosecutions of election law violations, section 21 does not mention that duty, specifically or otherwise. TEX. CONST. art. V, § 21. Instead, the Constitution expressly requires the legislature to regulate the duties of county and district attorneys, and those duties can include the criminal prosecution of election law violations. TEX. ELEC. CODE § 273.022.

3. The Court says county and district attorneys—not the legislature—can authorize the attorney general to prosecute election law violations, but it is likely the other way round

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The Court says the power to prosecute election law violations is properly attached to the judicial branch and that section 273.021 is unconstitutional because it grants that power to the attorney general, who is part of the executive branch. Opinion at 12. But the Court also says the attorney general can prosecute election law violations if county and district attorneys ask him to. Opinion at 18-20.

Nothing in the text, jurisprudence, or scholarship of the separation of powers clause supports the notion that someone can convert an unconstitutional act into a constitutional act by asking someone to perform the unconstitutional act.

To be clear, it is constitutional for the attorney general to prosecute election law violations. TEX. CONST. art. IV, § 1; *id.* art. V, § 1; *Heckler*, 470 U.S. at 832; Martland, 94 YALE L. J. at 1677. And it is constitutional for the legislature to enact laws that authorize the attorney general to prosecute election law violations. TEX. CONST. art. II, § 1; *id.* art. III, § 1; *id.* art. IV, §§ 1, 22; *id.* art. V, § 21. But if section 273.021 were unconstitutional—if, that is, the Court were correct that prosecuting election crimes is a judicial power that the attorney general is constitutionally forbidden from exercising—it could not become constitutional upon the request of a judicial official. *Id.* art. II, § 1.

Because the Court says county and district attorneys, but not legislators, can authorize the attorney general to prosecute election law violations, the Court's opinion appears to create rather than solve a separation of powers problem.

VI.   PRAYER

Before deciding whether to grant the motion for rehearing, the Court should inquire into the nature of executive power. It should also remember the expansive power of the legislature to say what the law will be and the comparatively limited power of the Court to decide a case. Above all, the Court should make certain that its opinion is faithful to the text of the Constitution.

Respectfully submitted,

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VII.   CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was served the following counsel by an electronic filing service provider in compliance with the rules of appellate procedure on January 12, 2022.

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VIII. CERTIFICATE OF COMPLIANCE

I certify that this brief is 1,419 words long in relevant part and is written in 14 point Times New Roman font.

/s/ Jason Boatright

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