In the Texas Court of Criminal Appeals

ZENA COLLINS STEPHENS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

EX PARTE ZENA COLLINS STEPHENS,
Petitioner.

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

BRIEF FOR THE STATE OF TEXAS

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ORAL ARGUMENT GRANTED

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Statement of the Case

Nature of the Case:	Following grand-jury proceedings initiated by the Office of the Attorney General, Defendant Zena Collins Stephens was charged with a felony (Tex. Penal Code § 37.10) and two misdemeanors (Tex. Elec. Code § 253.033) related to alleged campaign-finance violations. CR.12-13. Stephens filed a motion to quash and a pretrial habeas petition. CR.77-84, 85-94.
Trial Court:	344th Judicial District Court, Chambers County The Honorable Randy McDonald
Disposition in the Trial Court:	The trial court quashed Count I of the indictment but otherwise denied the motion to quash. CR. 179-80. The court also denied the pretrial habeas petition. CR.179-80.
Parties in the Court of Appeals:	Regarding the State's appeal of the motion to quash ruling, the State was appellant, and Stephens was the appellee. Regarding Stephens' appeal of the pretrial habeas ruling, Stephens was the appellant, and the State was the appellee.
Disposition in the Court of Appeals:	In a 2-1 decision, the court of appeals reversed the trial court's order quashing Count I and affirmed the order denying pretrial habeas. *State v. Stephens*, 608 S.W.3d 245 (Tex. App.—Houston [1st Dist.] 2020, pet. granted) (Kelly, J., joined by Radack, C.J.). Justice Goodman dissented. The court of appeals denied rehearing en banc with Justice Goodman dissenting.

Issues Presented

1. Whether the Texas Legislature's grant of authority to the Attorney General in Texas Election Code section 273.021(a) to prosecute violations of election laws violates the separation of powers established by article II of the Texas Constitution.
2. Whether Count I, which asserts that Stephens presented or used a false campaign-finance report, alleges the violation of an election law that may be prosecuted by the Attorney General under Texas Election Code section 273.021(a).

To the Honorable Court of Criminal Appeals:

Pursuant to the authority granted him by the Texas Legislature, the Texas Attorney General convened a grand jury and brought criminal charges against Petitioner Zena Collins Stephens for alleged campaign-finance violations. Seeking dismissal of the charges against her, Stephens argues that the Attorney General lacks the constitutional authority to prosecute her and that he lacks the statutory authority to prosecute Count I. The court of appeals properly rejected both arguments.

As to her claim that prosecution by the Attorney General violates the Texas Constitution's separation of powers, Stephens cannot deny that the Attorney General routinely and constitutionally exercises judicial power, as the Attorney General frequently appears in a variety of courts on behalf of the State. The Texas Constitution grants him judicial authority, and his ability to represent the State has been recognized by this Court, the Texas Supreme Court, and the Texas Legislature. Stephens' attempt to characterize the Attorney General as an executive-branch official with few, limited judicial functions does not match the reality of the office as it has existed and developed over the past century. There is no separation-of-powers violation in giving the Attorney General an additional judicial function when he already exercises many judicial duties. And this grant of authority does not unduly interfere with the ability of district and county attorneys to fulfill their constitutional roles. The Court should affirm the court of appeals' judgment on the constitutional question.

The Court should also affirm the court of appeals' judgment permitting the Attorney General to bring Count I, which alleges that Stephens' submission of a false

campaign-finance report violated the Texas Penal Code. Texas Election Code section 273.021 permits the Attorney General to prosecute violations of election laws. Because the relevant Penal Code provisions refer explicitly to ballots and election records, they are election laws that may be prosecuted by the Attorney General. Stephens' arguments to the contrary unnecessarily limit the plain language chosen by the Legislature. The court of appeals properly reversed the trial court's order quashing Count I.

Statement of Facts

I. Investigation and Grand Jury Indictment

A. The criminal charges in this case arise from Stephens' campaign for Sheriff of Jefferson County, a position to which she was elected in 2016. CR.78. While investigating someone else, the FBI uncovered information regarding potential campaign-finance violations concerning Stephens and another individual. 2.RR.69-71. The FBI turned the information over to the Texas Rangers, who investigated Stephens and three others. 2.RR.71-72. The Rangers presented the results of their investigation to the District Attorney of Jefferson County, but that office advised the Rangers to contact the Texas Attorney General instead. 2.RR.75-77.

Under Texas law, the Attorney General has the authority to prosecute violations of state election laws. Tex. Elec. Code ch. 273, subch. B. Specifically, section 273.021 of the Texas Election Code states:

> (a) The attorney general may prosecute a criminal offense prescribed by the election laws of this state.

> (b) The attorney general may appear before a grand jury in connection with an offense the attorney general is authorized to prosecute under Subsection (a).

Tex. Elec. Code § 273.021. The Legislature has also authorized the Attorney General to bring these prosecutions in "the county in which the offense was committed or an adjoining county." *Id.* § 273.024.

B. The Attorney General's Office took the case and presented evidence to a grand jury in Chambers County, which adjoins Jefferson County. 2.RR.77; CR.12-13. The grand jury indicted Stephens on three counts. CR.12-13. Two of the counts (Counts II and III) allege that Stephens accepted $1,000 in cash and $5,000 in cash from a single contributor in violation of Texas Election Code section 253.033(a), which prohibits a candidate from "knowingly accept[ing] from a contributor . . . political contributions in cash that in the aggregate exceed $100" in one reporting period. CR.12. Violation of this law is a Class A misdemeanor. Tex. Elec. Code § 253.033(b).

Count I alleges a violation of Texas Penal Code section 37.10, which makes it an offense to "make[], present[], or use[] any record . . . with knowledge of its falsity and with intent that it be taken as a genuine governmental record." CR.12. The term "governmental record" includes "an official ballot or other election record." Tex. Penal Code § 37.01(2)(E). The indictment specifically alleges that Stephens

> with intent to defraud or harm another, namely: the Jefferson County Clerk or Jefferson County or the citizens of Jefferson County . . . did present or use a record or document, namely: a Candidate/Officeholder Campaign Finance Report, by reporting a $5,000.00 individual cash contribution in the political contributions of $50.00 or less section of said Report, with

knowledge of its falsity and with intent that it be taken as a genuine governmental record.

CR.12.

As relevant here, a candidate like Stephens must file a campaign-finance report at least twice a year. Tex. Elec. Code §§ 254.063 (January and July), .064 (additional reports that may be required). The report must include, among other amounts, "the total amount or a specific listing of the political contributions of $50 or less accepted." *Id.* § 254.031(a)(5); *see also id.* §§ 254.031, .061 (prescribing contents of campaign-finance report). Thus, the State intends to prove that Stephens unlawfully accepted a $5,000 cash contribution, which exceeds the $100 limit for cash contributions, *see id.* § 253.033(a), and attempted to cover it up by falsely including it in her campaign-finance report as part of the total amount of contributions of $50 or less, thereby presenting and using a false election record in violation of Texas Penal Code section 37.10. When intent to defraud is proven, a violation of Texas Penal Code section 37.10 is a state jail felony. Tex. Penal Code § 37.10(c)(1).

II. Trial-Court Proceedings

Stephens filed a motion to quash the indictment, which she then amended twice. CR.77-84, 99-105, 136-43. One of her arguments was that the Attorney General's statutory authority to prosecute violations of "election laws," Tex. Elec. Code § 273.021(a), was limited to violations of the "Election Code." CR.77-78, 99-100. Because Count I alleged a violation of the Texas Penal Code, Stephens argued that the Attorney General lacked the statutory authority to prosecute her for that offense. CR.77-78, 99-100.

Stephens also sought a pretrial writ of habeas corpus, claiming, as relevant here, that the Attorney General lacked the constitutional authority to charge her with Count I. CR.85-94, 144-54. Her theory was that the Legislature's grant of prosecutorial authority in Texas Election Code section 273.021(a) to the Attorney General (a member of the executive branch) violated the separation of powers because the authority to prosecute lies exclusively with district and county attorneys (members of the judicial branch). CR.87-88, 146-47. She explicitly limited her constitutional challenge to Count I of the indictment. CR.85, 87, 88, 144, 146, 147.

Following a hearing, the trial court granted Stephens' motion to quash Count I, denied her motion to quash Counts II and III, and denied her pretrial habeas petition. CR.179-80. The State appealed the order quashing Count I, CR.181-82; Tex. Code Crim. Proc. art. 44.01(a)(1), and Stephens appealed the denial of her pretrial habeas petition, CR.186. Although separately docketed and briefed, the court of appeals consolidated the cases for purposes of submission and determination.

III. Appellate Proceedings

In a 2-1 decision authored by Justice Kelly and joined by Chief Justice Radack, the court of appeals reversed the trial court's order quashing Count I but affirmed the denial of Stephens' pretrial habeas petition. *State v. Stephens*, 608 S.W.3d 245, 256 (Tex. App.—Houston [1st Dist.] 2020, pet. granted). The panel majority concluded that the Attorney General's statutory authority to prosecute "election laws," Tex. Elec. Code § 273.021(a), includes the authority to prosecute Texas Penal Code section 37.10 with respect to Stephens' campaign-finance report. *Stephens*, 608 S.W.3d at 251-53. The panel majority further ruled that the Texas Constitution's

grant of authority to the Attorney General to perform "such other duties as may be required by law," Tex. Const. art. IV, § 22, permitted the Attorney General to bring the current prosecution without violating article II's separation-of-powers requirement. *Stephens*, 608 S.W.3d at 253-56. Justice Goodman, writing in dissent, would have held that the prosecutorial authority granted to the Attorney General in Texas Election Code section 273.021(a) violated the separation of powers. *Id.* at 257-61 (Goodman, J., dissenting).

The court of appeals denied Stephens' petition for rehearing en banc, with Justice Goodman again dissenting. *Id.* at 261-62 (Goodman, J., dissenting from denial of rehearing en banc).

Summary of the Argument

I. The Texas Legislature's decision to grant the Attorney General limited prosecutorial authority in Texas Election Code section 273.021(a) does not violate the separation of powers. Although treated as a judicial power, the authority to represent the State in court is shared between the Attorney General in the executive branch and the district and county attorneys in the judicial branch. The text of the Texas Constitution, precedent from this Court and the Texas Supreme Court, and over a century of legislative acts demonstrate that the Attorney General routinely represents the State in court—and has done so in criminal matters. It cannot, therefore, be a separation-of-powers violation for the Attorney General to exercise judicial power by prosecuting election-law violations.

Additionally, the Texas Constitution permits the Legislature to assign the Attorney General "other duties." Those duties are not limited to executive-branch

functions, as the Attorney General's constitutional duties include judicial-branch functions. The court of appeals properly construed the Attorney General's constitutional duties to allow for the prosecution of election-law violations. Moreover, there is no indication that the Attorney General's limited prosecutorial authority has interfered with the ability of district and county attorneys to carry out their constitutional duties. They remain free to prosecute election-law violations, too. The court of appeals correctly rejected Stephens' constitutional claim.

II. Count I alleges the violation of an election law, as described in Texas Election Code section 273.021(a). Texas Penal Code section 37.10, when used in conjunction with section 37.01(2)(E), is an election law, as section 37.01(2)(E) explicitly refers to ballots and election records. The trial court erred in construing the Attorney General's authority to encompass only violations of the Election Code.

Stephens' other statutory arguments also fail. Section 273.021(a) does not conflict with Texas Penal Code section 37.10(i). Each grants the Attorney General different and non-conflicting authority. And a campaign-finance record is an election record under the Penal Code. The court of appeals correctly reversed the trial court's order quashing Count I.

This Court should affirm the court of appeals' judgment in its entirety.

Standard of Review

A trial court's decision on a motion to quash an indictment is a question of law that is reviewed de novo. *State v. Rousseau*, 396 S.W.3d 550, 555 n.6 (Tex. Crim. App. 2013). A trial court's ruling on a habeas petition is reviewed only for an abuse of discretion. *Ex parte Montano*, 451 S.W.3d 874, 877 (Tex. App.—Houston [1st Dist.]

2014, pet. ref'd). Review of legal questions, however, is de novo. *Sandifer v. State*, 233 S.W.3d 1, 2 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

ARGUMENT

I. The Attorney General Has Constitutional Authority To Prosecute Election-Law Violations.

In 1951, the Texas Legislature gave the Attorney General the authority to prosecute certain election-law violations. Act of May 30, 1951, 52d Leg., R.S., ch. 492, § 130(2), 1951 Tex. Gen. Laws 1097, 1152. That provision has been recodified and amended, but the Attorney General's authority continues today: "[t]he attorney general may prosecute a criminal offense prescribed by the election laws of this state." Tex. Elec. Code § 273.021(a).

Stephens asserts that this law violates the Texas Constitution's separation-of-powers requirement because, as she sees it, the authority to prosecute lies exclusively with district and county attorneys in the judicial branch. Stephens Br. 6-10; Tex. Const. art. V, § 21. As a result, Stephens argues that the Legislature cannot grant the authority to prosecute crime to the Attorney General, who is part of the executive branch, Stephens Br. 6-10; Tex. Const. art. IV, § 22. The court of appeals properly rejected Stephens' argument, and this Court should affirm.

A. Section 273.021(a) does not violate the separation of powers.

The separation-of-powers provision in the Texas Constitution prohibits a member of one branch of government from "exercis[ing] any power properly attached to either of the others, except in the instances . . . expressly permitted" within the Constitution. Tex. Const. art. II, § 1. To demonstrate a separation-of-powers violation,

Stephens must show that either (1) one branch of government has assumed or been delegated a power more properly attached to another branch, or (2) one branch of government is unduly interfering with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers. *Jones v. State*, 803 S.W.2d 712, 715 (Tex. Crim. App. 1991). She has not done so.

The Texas Constitution directs that district and county attorneys shall "represent the State in all cases in the District and inferior courts in their respective counties[.]" Tex. Const. art. V, § 21. "By establishing" these positions "under Article V, the authors of the Texas Constitution placed those officers within the Judicial department." *Meshell v. State*, 739 S.W.2d 246, 253 (Tex. Crim. App. 1987). The Attorney General, a member of the executive branch, 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 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.

Tex. Const. art. IV, § 22. The last clause—"perform such other duties as may be required by law"—expressly authorizes the Legislature to give the Attorney General by statute additional duties other than those listed in the Constitution.

Stephens asserts that prosecution in the district courts is a judicial function exclusively reserved to district and county attorneys. Stephens Br. 6-10. Her premise

is flawed. First, as the Attorney General's constitutional role as the State's principal legal representative demonstrates, prosecution is not—and never has been—exclusively the province of the judicial branch or of district and county attorneys. Thus, section 273.021(a) does not delegate to the executive branch a power more properly attached to the judicial branch. Second, the "other duties" clause in the Attorney General's constitutional duties permits the Legislature to assign judicial functions, including some prosecutorial authority, to the Attorney General. And third, section 273.021(a) does not allow the Attorney General to unduly interfere with district and county attorneys such that they cannot exercise their constitutionally assigned powers.

1. Representing the State in court—even in criminal matters—is not exclusive to the judicial branch.

"Although the language of the separation of powers provision is rigid, there is natural overlap in the duties proscribed to each branch." *Vandyke v. State*, 538 S.W.3d 561, 571 (Tex. Crim. App. 2017). Indeed, the "provision reflects a belief on the part of those who drafted and adopted our state constitution that one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government." *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990). "Not every instance of overlap, therefore, will amount to a violation of separation of powers." *Vandyke*, 538 S.W.3d at 571. Rather, the question here is whether the overlap invades "a core judicial power." *Ex parte Lo*, 424 S.W.3d 10, 29 (Tex. Crim. App. 2013); *see Armadillo*, 802 S.W.2d at 241. As the Constitution itself shows, and as precedent and practice confirm, the authority to represent the State is not

exclusively the province of the judicial branch. *Contra* Stephens Br. 6-10. Rather, prosecutorial functions are generally split between the judicial and executive branches. This cross-branch authority extends even to the criminal context, as this Court has already recognized. Because the authority to represent the State in criminal matters or in the district court is not exclusively a judicial-branch function, Stephens' argument falls apart.

a. The Texas Constitution vests the "judicial power of this State" in the courts, not in local prosecutors. Tex. Const. art. V, § 1. According to this Court, the heart of the judicial power is the power to: (1) hear facts, (2) decide the issues of fact made by the pleadings, (3) decide the questions of law involved, (4) enter a judgment on the facts found in accordance with the law as determined by the court, and (5) execute the judgment or sentence. *Kelley v. State*, 676 S.W.2d 104, 107 (Tex. Crim. App. 1984); *Holmes v. Morales*, 924 S.W.2d 920, 923 (Tex. 1996) (similar); *Armadillo*, 802 S.W.2d at 239-40 (similar); *see also Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) ("[T]he legislature makes, the executive executes, and the judiciary construes the law."). Under that definition, neither the Attorney General nor the district and county attorneys exercise a core judicial power when representing the State in a lawsuit.

Rather, as this Court has confirmed, the State's legal representatives perform functions that resist rigid categorization based on the constitutional article in which their offices are discussed. Consider *Meshell v. State.* There, the Court noted that, even though "the authors of the Texas Constitution placed [district and county attorneys] within the Judicial department," 739 S.W.2d at 253, those officers exercise

some powers that are "executive in nature." *Id.* at 253 n.9. Because that "case involve[d] a conflict between the Legislative and Judicial departments," the Court did not elaborate further. *Id.*

The Attorney General's constitutional duties are of a similarly mixed nature. "The duties imposed upon [the Attorney General] are both executive and judicial, that is, they are judicial in the sense, that he is to represent the state in some cases brought in the courts." *Brady v. Brooks*, 89 S.W. 1052, 1056 (Tex. 1905). For that reason, it has long been held that the Attorney General may "prosecute or defend [] suit[s] in the district and inferior courts" without violating the separation of powers. *Id.* at 1055.

This Court has relied on *Brady*'s separation-of-powers holding. *See Meshell*, 739 S.W.2d at 254; *id.* at 271 (Miller, J., dissenting) (discussing the majority's use of *Brady*). And, more recently, the Texas Supreme Court has affirmed *Brady*'s vitality, stating that the constitutional grant of authority to the district and county attorneys "does not preclude the Legislature, pursuant to the authority delegated to it under Article IV, Section 22, from empowering the Attorney General to likewise represent the State in district court." *El Paso Elec. Co. v. Tex. Dep't of Ins.*, 937 S.W.2d 432, 438 (Tex. 1996) (citing *Brady*, 89 S.W. at 1055); *see also Smith v. State*, 328 S.W.2d 294, 295 (Tex. 1959) (per curiam) ("[I]t is clear that when the Legislature creates a new or additional cause of action in favor of the State it may also constitutionally authorize the Attorney General to prosecute such cause of action in both the trial and appellate courts of the State.").

If representing the State in court is a judicial function, then over half of the Attorney General's constitutional duties are judicial: representing the State in the Texas Supreme Court, "tak[ing] such action in the courts" as necessary to prevent private corporations from exercising powers or collecting taxes not authorized by law, and "seek[ing] . . . judicial forfeiture" of certain charters. Tex. Const. art. IV, § 22. Thus, the Texas Constitution assigns judicial duties to both the Attorney General and the district and county attorneys, just as those local prosecutors perform both judicial and executive functions. *See Meshell*, 739 S.W.2d at 253 n.9.

What's more, the Attorney General's mixed duties are not limited to civil litigation—the power to bring criminal prosecutions may also "properly attach" to the Attorney General. Consider *Saldano v. State*, for example. 70 S.W.3d 873 (Tex. Crim. App. 2002). There, this Court recognized that the Constitution "gives the county attorneys and district attorneys authority to represent the State in criminal cases." *Id.* at 880. But the Court also noted that the Constitution "authorizes the legislature to give the attorney general duties which, presumably, could include criminal prosecution." *Id.* Thus, this Court has acknowledged that "criminal prosecution" is a permissible duty that may be given to the Attorney General.

Other courts have recognized as much. The Fifth Court of Appeals also considered, and rejected, the same separation-of-powers argument regarding section 273.021(a) made here. *Medrano v. State*, 421 S.W.3d 869, 877-80 (Tex. App.—Dallas 2014, pet. ref'd). In *Medrano*, the court noted that the defendant's argument was "premised on the notion that county and district attorneys fall squarely into the judicial branch and the [Attorney General] into the executive branch." *Id.* at 879. But

the Fifth Court then recognized that Texas courts "have acknowledged otherwise." *Id.* The court walked through the decisions in *Meshell*, *Saldano*, and *Brady*, noting all the language discussed above, and concluded that no separation-of-powers problem existed. *Id.* at 879-80.[1]

b. Historical practice confirms the natural overlap between the branches implicit in the constitutional text and repeatedly acknowledged by the courts. As demonstrated in *Brady*, the Texas Legislature began to give trial-court duties to the Attorney General early on. 89 S.W. at 1053. And it is unquestioned today that the Attorney General may represent the State in trial court in all manner of civil lawsuits. *See, e.g.*, Tex. Civ. Prac. & Rem. Code § 101.103(a); Tex. Gov't Code § 492.010; Tex. Prop. Code § 71.303(b); *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826 (Tex. 2016); *State v. Lueck*, 290 S.W.3d 876 (Tex. 2009); *State v. Holland*, 221 S.W.3d 639 (Tex. 2007). Under Stephens' interpretation of articles IV and V, these representations would not be constitutionally permissible.

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[1] The District Attorneys' amicus brief attempts to cast doubt on *Medrano* by suggesting that the Assistant Attorney General who prosecuted the case was, in fact, deputized but that the clerk's office lost the documentation. Dist. Att'y Am. Br. 31 n.48. That suggestion is false. As recognized by the court of appeals and the parties, the Attorney General's authority came from section 273.021(a). *Medrano*, 421 S.W.3d at 877. Moreover, the prosecution occurred in Rockwall County, although the crimes occurred in Dallas County. *Id.* at 873. The District Attorneys' brief fails to explain how the Rockwall County District Attorney could have deputized an Assistant Attorney General to prosecute crimes outside of her jurisdiction. The Attorney General, however, has the authority to bring criminal prosecutions in an adjoining county. Tex. Elec. Code § 273.024.

The Legislature has also given the Attorney General duties regarding criminal cases. As this Court noted, the Attorney General's Office represented the State in criminal appellate matters from 1876 to 1923. *Ex parte Taylor*, 36 S.W.3d 883, 886 (Tex. Crim. App. 2001) (per curiam); *see also* 1879 Code of Criminal Procedure, tit. I, ch. 2, art. 28, at 4 (State Printing Office, Austin 1887). The Legislature also provided that the Governor could appoint an Assistant Attorney General who would "represent the State in all cases in the district and inferior courts of any county when required so to do by the governor or attorney general." 1879 Revised Civil Statutes, tit. XLVIII, ch. 5, arts. 2809-11, at 406 (State Printing Office, Austin 1887). For purposes of salary, however, the Assistant Attorney General was listed as a judicial officer, *see id.* tit. LXXVIII, ch. 2, art. 4474, at 642, again reflecting the often-blurred line between the judicial and executive branches.

Similarly, the State Prosecuting Attorney, who took over appellate representation in criminal matters from the Attorney General, was originally appointed by the Governor—a member of the executive branch. *Taylor*, 36 S.W.3d at 886. It was not until 1931 that the Legislature vested the authority to appoint the State Prosecuting Attorney in this Court. *Id.*

Further, the Attorney General has had the authority to prosecute violations of election law since 1951, when the predecessor to section 273.021(a) was enacted. Act of May 30, 1951, 52d Leg., R.S., ch. 492, § 130(2), 1951 Tex. Gen. Laws 1097, 1152; *see also Heath v. State*, No. 14-14-00532-CR, 2016 WL 2743192, at *3 (Tex. App.—Houston [14th Dist.] May 10, 2016, pet. ref'd) (mem. op., not designated for publication) (recognizing Attorney General's statutory authority to prosecute election-

law violations). Several other grants of authority to the Attorney General to prosecute criminal offenses also exist. *See, e.g.*, Tex. Gov't Code § 4007.001(d); Tex. Health & Safety Code §§ 436.039, 571.021; *see also* Tex. Code Crim. Proc. art. 20A.001(1).

c. Stephens' arguments cannot sustain the weight of a century of precedent and historical practice. She discusses *Saldano* at length, *see* Stephens Br. 9-10, focusing on the Court's statement that "[t]he attorney general, on the other hand, has no criminal prosecutorial authority," *id.* at 10 (quoting *Saldano*, 70 S.W.3d at 880). But this comment relates to the Attorney General's *statutory* authority "to prosecute criminal cases," *Saldano*, 70 S.W.3d at 880, not his *constitutional* authority—the Court in *Saldano* was being asked to infer the Attorney General's criminal authority in the face of legislative silence. Here, however, the Legislature was not silent. It explicitly granted prosecutorial authority to the Attorney General, Tex. Elec. Code § 273.021(a), something this Court indicated was permissible, *Saldano*, 70 S.W.3d at 880.

Stephens also tries halfheartedly to distinguish away *Brady*, a case that squarely forecloses the hard line between the branches that Stephens seeks to draw in this case. Stephens Br. 18 n.4. Her first argument, that the suit in *Brady* "falls within the express authority of the attorney general to sue corporations," *id.*, does not accurately reflect the text of the Constitution, which authorizes the Attorney General to sue corporations only for exercising powers or demanding taxes not permitted by law. Tex. Const. art. IV, § 22. *Brady* concerned a suit by the Attorney General to

collect unpaid taxes.[2] 89 S.W. at 1053. Moreover, as an example of the Attorney General properly representing the State in trial court, *Brady* cited *State v. O'Connor*, 73 S.W. 1041 (Tex. 1903), which did not involve a corporation. *Brady*, 89 S.W. at 1055. But Stephens' attempt to broaden the Attorney General's constitutional authority to include the claim in *Brady* reflects the reality that her strict interpretation of the Attorney General's authority cannot be squared with over a century of history and precedent in which the Attorney General has routinely represented the State in trial courts despite the "all cases" language in article V.

Stephens' second argument (at 18 n.4), that *Brady* was rejected by this Court in *Saldano*, is not supported by *Saldano* itself. *Saldano* did not mention *Brady*, did not make a separation-of powers ruling, and did not state that the Legislature was powerless to assign prosecutorial functions to the Attorney General. Instead, as previously explained, the Court indicated that the Legislature could grant the Attorney General the authority to prosecute. *Saldano*, 70 S.W.3d at 880. Had this Court rejected a holding of its sister Court, it presumably would have said so, particularly given this Court's own affirmative reliance on *Brady* in *Meshell*. *See* Part I.A.1.a, *supra*.

* * *

Constitutional text, precedent, and history all demonstrate that the Attorney General routinely exercises judicial power when representing the State. As a result,

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[2] Of course, for the reasons discussed in this brief and in *Brady*, the Legislature could give the Attorney General the authority to sue corporations in instances other than those expressly stated in article IV.

it cannot be a separation-of-powers violation to give the Attorney General an additional judicial function—prosecution of election-law violations. By contrast, Stephens' theory of "a strict separation between the branches of government . . . ignores the precedent of not only this Court, but also that of the Texas Supreme Court." *State v. Rhine*, 297 S.W.3d 301, 305 (Tex. Crim. App. 2009). It disregards the "natural overlap in the duties proscribed to each branch." *Vandyke*, 538 S.W.3d at 571. And it seeks to impose a "rigid compartmentalization" between the branches that this Court has rejected, that "undermines the efficiency of government," and that "undervalues the availability of checks and balances." *Armadillo*, 802 S.W.2d at 239.

2. Section 273.021(a) does not grant the executive branch power more properly attached to the judicial branch.

Because representing the State, and even representing the State in a criminal matter, is not exclusively a function of the judicial branch, section 273.021(a) does not grant the executive branch power that is more properly attached to the judicial branch. *See Jones*, 803 S.W.2d at 715. Thus, no separation-of-powers violation exists.

But even recognizing that criminal prosecutions are typically the province of district and county attorneys, there is no violation. One branch may exercise a power that would normally belong to another branch when "authorized by an express provision of the Constitution." *Meshell*, 739 S.W.2d at 252; *see also* Tex. Const. art. II, § 1. And the "other duties" clause in article IV's description of the Attorney General's authority permits the assignment of some prosecutorial authority, Tex. Const. art. IV, § 22, despite Stephens' arguments to the contrary.

Stephens first asserts that the "other duties" language is irrelevant because article V gives prosecutorial authority to the district and county attorneys regardless. Stephens Br. 11-12. But the "all cases" language in article V has never been interpreted as narrowly as Stephens suggests. Discussing the "other duties" clause, the Texas Supreme Court found it reasonable to believe that the framers of the Constitution and the voters who ratified it would have understood that the Legislature could grant to the Attorney General the authority to represent the State in lawsuits where his "services should be deemed requisite." *Brady*, 89 S.W. at 1056. And in *Meshell*, this Court noted with approval the Supreme Court's holding that "the Legislature could create new causes of action in favor of the state and lodge the exclusive duty to prosecute such suits in the office of the Attorney General." 739 S.W.2d at 254. "This apparent encroachment," the Court explained, "was permissible because an express provision of the Texas Constitution provides that the Attorney General shall 'perform such other duties as may be required by law.'" *Id.* (quoting Tex. Const. art. IV § 22).

Stephens next asserts that the court of appeals erred in using *ejusdem generis* principles to conclude that the "other duties" language could include criminal prosecutions of election laws. Stephens Br. 12-13. But the premise underlying Stephens' argument is flawed. She believes the "other duties" clause must be limited to executive duties. But that cannot be right because at least half of the Attorney General's constitutional duties are judicial in nature. *See* Tex. Const. art. IV, § 22 (appearing in the Texas Supreme Court, bringing certain suits against corporations and

charters). There is no textual reason to limit the "other duties" clause to executive functions when the Constitution lists judicial ones alongside them.

But even had the court of appeals ignored *ejusdem generis* altogether, it would have reached the same result. After all, that canon applies with its greatest force where various terms share a close common link, and there is no obvious common thread running throughout all of the Attorney General's constitutional duties. *See Hurt v. Oak Downs, Inc.*, 85 S.W.2d 294, 298 (Tex. App.—Dallas 1935, no writ) (finding that *ejusdem generis* did not apply "where the specific words of a statute signify subjects or things differing greatly one from another"). If this Court determines there is no such common link, Stephens' argument fails: the "other duties" clause instead becomes a grant of authority to the Legislature to assign the Attorney General whatever duties it sees fit, including prosecution of election-law offenses. *See Brady*, 89 S.W. at 1056 (recognizing the Legislature can authorize the Attorney General to represent the State in lawsuits where his "services should be deemed requisite").

Yet if *ejusdem generis* applies, the court of appeals still reached the correct conclusion. The Attorney General's constitutional duties include representing the State in the Texas Supreme Court, inquiring into charter rights of private corporations, taking action to prevent corporations from acting unlawfully, and advising the Governor and other executive officers. Tex. Const. art. IV, § 22. The court of appeals synthesized those various duties and concluded that (1) they generally involve state-created entities, and (2) elections and elected offices are creatures of state action. *Stephens*, 608 S.W.3d at 255-56. Authorizing the Attorney General to prosecute

election-law offenses, therefore, fits within the scope of the "other duties" clause as it concerns state-created offices and positions. *Id.* Stephens does not offer her own unifying theory of the Attorney General's power for *ejusdem generis* purposes but concludes only that it cannot include prosecuting her. That argument lacks an organizing principle aside from Stephens' self-interest.

Stephens next argues that permitting the Legislature to grant limited prosecutorial duties via the "other duties" clause would open a Pandora's box in which the Legislature could give the Attorney General the authority to reconcile bills in the House and Senate, propose revenue bills, or adjudicate prosecutions of election-law violations. Stephens Br. 13-14. That argument fails for at least three reasons. First, the Texas Constitution's separation-of-powers requirement also prevents undue interference with another branch. *Jones*, 803 S.W.2d at 715. Thus, assignment to the Attorney General of core duties of another branch would be unconstitutional on that ground. Second, this case concerns a power that is already shared by members of the executive and judicial branches. None of Stephens' examples contain the explicit cross-branch obligations present here, which makes them obvious separation-of-powers violations.

Last, whatever parade of horribles Stephens might dream up, there can be little doubt the Legislature appropriately "deemed requisite" the Attorney General's "services" here. *Brady*, 89 S.W. at 1056. Because "elections are essentially the exercise of political power," they "belong to the political branch of the government." *City of Austin v. Thompson*, 219 S.W.2d 57, 59-60 (Tex. 1949); *see Leslie v. Griffin*, 25 S.W.2d 820, 821 (Tex. Comm'n App. 1930) ("It is no longer an open question in

this state that an election is essentially the exercise of political power."). As a result, "[i]t is well settled that separation of powers" principles require "the judiciary's deference to the legislative branch" to be at its highest in matters relating to elections. *Blum v. Lanier*, 997 S.W.2d 259, 263 (Tex. 1999); *see Thompson*, 219 S.W.2d at 60. It was therefore well within the Legislature's power to entrust the Attorney General—another position wielding political power—with the duty to prosecute election-related offenses.

Indeed, if Stephens' rigid view of the Constitution is correct, and district and county attorneys are exclusively members of the judicial branch, exercising exclusively judicial power, it is *their* involvement in election-related litigation (and not the Attorney General's) that raises separation-of-powers concerns. Given that the judicial branch is "neither designed to exercise [political] power, nor equipped to control it," *City of Dallas v. Dallas Consol. Elec. St. Ry.*, 148 S.W. 292, 295 (Tex. 1912), "the general rule is that [elections] are beyond the control of the judicial power," *Thompson*, 219 S.W.2d at 59. And "[t]he political power of the state may not be . . . transferred" to the judiciary. *City of Dallas*, 148 S.W. at 295.

Because the judicial power to represent the State is split between the Attorney General and the district and county attorneys, and because the "other duties" language in article IV, section 22, is not limited to executive duties, section 273.021(a)'s limited grant of prosecutorial authority does not violate the separation of powers.

3. Section 273.021(a) does not permit the executive branch to unduly interfere with the judicial branch.

Stephens also fails to demonstrate that the executive branch is unduly interfering with the judicial branch by way of section 273.021(a) such that the judicial branch cannot effectively exercise its constitutionally assigned powers. *See Jones*, 803 S.W.2d at 715. Even if criminal prosecution is largely the realm of district and county attorneys, Stephens has shown no undue interference that has been caused by allowing the Attorney General to also prosecute election-law violations. Indeed, no impact on the offices has been shown at all. As recognized by the Fifth Court in *Medrano*, district and county attorneys retain the independent authority to prosecute election-law violations. 421 S.W.3d at 879-80. Their authority to prosecute has not been removed.

The circumstances here demonstrate how this grant of concurrent authority can work in practice—and that the Attorney General's prosecution has not unduly interfered with the duties of the district attorney. The Jefferson County District Attorney was given the opportunity to prosecute Stephens but advised the Texas Rangers to take the case to the Attorney General instead. 2.RR.75-77. The Attorney General has handled the prosecution since then, and the record contains no indication that the Attorney General's prosecution has interfered with any duties of the Jefferson County District Attorney. That makes this case even clearer cut than *Saldano*. There, the Court treated a district attorney's silence while the Attorney General responded to a petition for certiorari in the United States Supreme Court "as an

implied request for . . . assistance." 70 S.W.3d at 883. Here, no such inference is necessary.

Because there was no undue interference in this case, Stephens' facial challenge is untenable. *See Rosseau*, 396 S.W.3d at 557 (holding that "to prevail on a facial challenge, a party must establish that the statute always operates unconstitutionally in all possible circumstances"). Absent any actual conflict here, Stephens hypothesizes circumstances in which the Attorney General and district or county attorney both attempt to prosecute the same individual for the same conduct. Stephens Br. 19. But in the one instance the State has found in which something like that occurred, the court of appeals had little difficulty holding that the district attorney's first-filed suit should be permitted to proceed, concluding that the Attorney General's authority did not permit him to claim exclusive jurisdiction through a later-filed suit. *Shepperd v. Alaniz*, 303 S.W.2d 846, 850 (Tex. App.—San Antonio 1957, no writ). Should any future conflicts arise, they could be similarly resolved. Stephens' hypothetical concerns do not justify facially invalidating a lawfully enacted statute. *See Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 463 (Tex. 1997) (stating that a court "may not hold the statute facially invalid simply because it may be unconstitutionally applied under hypothetical facts which have not yet arisen").

Moreover, the Attorney General has not sought to abuse this authority. As demonstrated in the District Attorneys' amicus brief, the Attorney General consistently informs courts that he lacks the authority to prosecute other criminal violations. Dist. Att'y Am. Br. 24-25. And it is ultimately up to the Legislature whether

to assign the Attorney General any "other duties." The Legislature is best able to judge when the Attorney General's assistance is necessary.[3]

For example, when the Legislature was considering whether to grant the Attorney General this authority, the Governor made a special plea to the Legislature, noting that local officials had been "unable to cope with problems arising out of [Texas] elections." H.J. of Tex., 52d Leg., R.S. 2023-24 (1951). The Fifth Court in *Medrano* also recognized that there may be "politically sensitive" cases in which it is advisable for the Attorney General to step in because local prosecutors might be discouraged from acting. 421 S.W.3d at 880. Thus, rather than interfering with district and county attorneys, the Legislature likely envisioned circumstances in which, for whatever reason, the local prosecutors did not or were unable to enforce election laws.

The Legislature's decision to grant limited prosecutorial authority to the Attorney General was constitutionally permissible. And the Attorney General's exercise of that authority has not unduly interfered with the constitutional duties of the district and county attorneys. This Court should affirm the court of appeals' judgment that section 273.021(a) does not violate the separation of powers.

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[3] Stephens also references Texas Election Code section 273.022, which authorizes the Attorney General to direct that a district or county attorney prosecute an offense. Stephens Br. 19-20. The Attorney General has not attempted to do so in this case, nor does Stephens cite any evidence that the Attorney General has ever attempted to exercise that authority. That provision is irrelevant to the constitutional question presented in this case.

B. Stephens affirmatively limited her constitutional argument to Count I.

An additional reason to affirm the denial of pretrial habeas as to Counts II and III is that Stephens did not raise her separation-of-powers challenge with respect to those Counts in the trial court, explicitly limiting her argument to Count I. *Stephens*, 608 S.W.3d at 254. By failing to object to the Attorney General's authority to bring Counts II and III on separation-of-powers grounds, Stephens has forfeited her opportunity to make that argument on appeal. *See* Tex. R. App. P. 33.1(a); *Pena v. State*, 285 S.W.3d 459, 463-64 (Tex. Crim. App. 2009). The Court should therefore affirm the court of appeals' judgment on this point. *Stephens*, 608 S.W.3d at 254.

Stephens asserts that the court of appeals erred in concluding that she waived her argument as to Counts II and III, claiming the court used a "hyper-technical parsing of a header typo." Stephens Br. 21. But this was not an isolated typographical error. Stephens explicitly and repeatedly limited her constitutional argument to Count I. CR.85 ("The Texas Attorney General does not have the Constitutional or statutory authority to prosecute Count I of the indictment[.]"); CR.87 ("The Texas Attorney General's prosecution of count one exceeds [his] constitutional and statutory authority[.]" (all caps removed)); CR.88 ("[T]here is no authority for the Texas Attorney General to prosecute Count I[.]"); *see also* CR.144, 146, 147 (amended habeas petition making same statements); 2.RR.91 (stating that the habeas petition challenges "the State's ability to even prosecute the conduct alleged in Count I"). Indeed, her initial summary identifies the Attorney General's alleged lack of authority to prosecute "Count I[] of the indictment namely, the Tampering with a

Governmental Record Allegation." CR.85. This was not a typographical error, but a deliberate litigation choice.

At most, Stephens included a single, unsupported sentence claiming that if the trial court granted the habeas petition as to Count I, then it should dismiss the entire indictment because the Counts are "inseverable[.]" CR.87, 146. But at no point did she argue that the Attorney General lacked the constitutional authority to prosecute Counts II and III. Instead, Stephens conceded that "the Election Code does permit the Attorney General to investigate Election Code offenses as outlined in Counts II and III." CR.89, 149.

Multiple courts of appeals have concluded that the authority of a prosecutor to proceed is an error that can be waived by the failure to object. *See, e.g.*, *Heath*, 2016 WL 2743192, at *3; *Hartsfield v. State*, 200 S.W.3d 813, 816 (Tex. App.—Texarkana 2006, pet. ref'd); *Stephens v. State*, 978 S.W.2d 728, 730 (Tex. App.—Austin 1998, pet. ref'd). Because the trial court's order may be affirmed on any correct legal theory, *Martinez v. State*, 74 S.W.3d 19, 21 (Tex. Crim. App. 2002), the court of appeals appropriately affirmed it as to Counts II and III for the simple reason that Stephens did not ask for relief on those Counts in the trial court, *Stephens*, 608 S.W.3d at 254.

This omission by Stephens also impacts the availability of pretrial habeas as a remedy. "Pretrial habeas, followed by an interlocutory appeal, is an extraordinary remedy." *Ex parte Ingram*, 533 S.W.3d 887, 891 (Tex. Crim. App. 2017) (footnote omitted). Habeas relief generally is available to correct only jurisdictional defects or denials of constitutional or fundamental rights. *Ex parte Pena*, 71 S.W.3d 336, 336-37 (Tex. Crim. App. 2002) (per curiam); *Ex parte Shields*, 550 S.W.2d 670, 675 (Tex.

Crim. App. 1976). A claim is cognizable in pretrial habeas only "if, resolved in the defendant's favor, it would deprive the trial court of the power to proceed and *result in the appellant's immediate release*." *Ex parte Smith*, 185 S.W.3d 887, 892 (Tex. Crim. App. 2006) (emphasis added). Because Stephens' habeas petition cannot succeed as to Counts II and III by necessity, it cannot lead to her "immediate release," rendering pretrial habeas improper. This provides an independent basis for affirming the court of appeals' judgment.

II. The Attorney General Has Statutory Authority To Prosecute Count I.

Should the Court conclude that the Attorney General has the constitutional authority to prosecute this case, the Court should also affirm the court of appeals' judgment reversing the trial court's order quashing Count I. *Stephens*, 608 S.W.3d at 251-53. The trial court reached its erroneous conclusion because it interpreted section 273.021(a) to permit the Attorney General to prosecute violations only of the Election Code—not the Penal Code. 2.RR.158-59. But section 273.021(a) gives the Attorney General the statutory authority to prosecute violations of election laws no matter where the law is located. Stephens' additional arguments do not demonstrate a lack of statutory authority. The Court should affirm the court of appeals' judgment.

A. Section 273.021(a) permits the Attorney General to prosecute Stephens for the Penal Code violation described in Count I.

As described earlier, section 273.021(a) states: "[t]he attorney general may prosecute a criminal offense prescribed by the election laws of this state." Tex. Elec. Code § 273.021(a). A plain text reading of "election laws" would include any law that is explicitly related to elections. But Stephens urges this Court to conclude that

this language refers only to the Election Code. Stephens Br. 27-28. The Court should reject that unnecessarily narrow interpretation.

1. "Election laws" can be found outside of the Election Code.

The Legislature means what it says, and "Election Code" and "election laws" have different meanings—the latter encompassing more than the former. When attempting to discern legislative intent, courts "necessarily focus [their] attention on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). "[I]f the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, [courts] ordinarily give effect to that plain meaning." *Id.* (footnote omitted) (citing *Smith v. State*, 789 S.W.2d 590, 592 (Tex. Crim. App. 1990)).

The "plain meaning" of the "literal text" used by the Legislature is simply laws relating to elections. "Election laws" naturally includes *all* legislative enactments pertaining to elections, not just those appearing in the Election Code. The Court should not alter the plain meaning of section 273.021(a) by engrafting a limitation that is not there. *See Coit v. State*, 808 S.W.2d 473, 475 (Tex. Crim. App. 1991) ("Where the statute is clear and unambiguous the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute.") (quoting *Ex parte Davis*, 412 S.W.2d 46, 52 (Tex. Crim. App. 1967)).

Moreover, the State's interpretation of "election laws" is confirmed by other provisions in the Election Code. When interpreting a statute, courts look "not only at the single, discrete provision at issue but at other provisions within the whole statutory scheme." *State v. Schunior*, 506 S.W.3d 29, 37 (Tex. Crim. App. 2016). Relevant here, Texas Election Code sections 31.003 and 31.004 refer to "this code and . . . *the election laws outside this code*." Tex. Elec. Code §§ 31.003, .004(a) (emphasis added); *see also id.* § 1.005(10) (defining "law" as "a constitution, statute, city charter, or city ordinance"). The Texas Legislature has, thus, explicitly recognized that there are "election laws" that reside outside of the Election Code.[4]

Stephens asserts that sections 31.003 and 31.004 actually demonstrate that the Legislature would have said "election laws outside this code" in section 273.021(a) if it intended to include those laws. Stephens Br. 27-28. But the rest of the Election Code demonstrates otherwise. The very first section of the Election Code states that "[t]his code may be cited as the Election Code." Tex. Elec. Code § 1.001. A Westlaw search reveals that there are approximately 150 references to "this code" within the Election Code. *E.g.*, *id.* §§ 1.019, 11.002(a), 273.081. In other words, the Legislature knows how to refer solely and specifically to the Election Code when it wants to: by referring to "this code," not by referring to "election laws" generally. The fact that

[4] While not an exhaustive list, other election laws include Texas Education Code sections 7.108 and 39.039, which prohibit certain political contributions to the campaigns of individuals seeking election to the State Board of Education, and numerous sections of the Texas Penal Code, *see e.g.*, Tex. Penal Code §§ 31.03(e)(4)(E) (theft of a ballot), 36.02(a)(1) (bribing a voter), 47.02(a)(2) (gambling on elections).

the Legislature did not limit the Attorney General's authority to violations of "this code," but instead granted him authority to prosecute violations of "election laws," *id.* § 273.021(a), demonstrates that it intended the Attorney General's prosecutorial authority to extend to election laws that are found outside of the Election Code.

Further, while courts usually do not consider an executive interpretation of a law unless the language is ambiguous, *see Boykin*, 818 S.W.2d at 785-86, that evidence nonetheless confirms that the State's interpretation is correct. The Director of the Elections Division for the Secretary of State explained that section 273.021(a)'s reference to "election laws" includes election laws outside the Election Code. 2.RR.11; *see also* Tex. Elec. Code § 31.003 (authorizing the Secretary of State to interpret election laws inside and outside the Election Code).

As confirmed by the words of the statute, other uses of "election laws" by the Texas Legislature, and the interpretation of the Secretary of State, election laws that may be prosecuted by the Attorney General are not limited to laws found in the Election Code. The Court should reject Stephens' attempt to engraft a non-textual limitation onto the words the Legislature chose.

2. "Election laws" includes the Penal Code provisions used here.

Because section 273.021(a) does not limit the Attorney General's prosecutorial authority to the Election Code, the next question is whether Count I alleges the violation of an election law. And although section 273.021 is not limited to Election Code violations, the Election Code is a good indicator of what types of activities the Legislature considers to be part of the election process. The Election Code covers, among other things, voter qualifications, the conduct of elections, voting, ballots,

candidates, political parties, and campaign-finance issues. Thus, laws governing any of these topics, wherever codified in Texas law, may be "election laws."

Specific to this case, the Election Code requires the filing of campaign-finance reports. Tex. Elec. Code §§ 254.063, .064. And the Election Code includes campaign-finance reports in its definition of "election record." *Id.* § 1.012(d) (including "anything . . . received by government under this code"). Thus, an allegation that Stephens filed a false campaign-finance report concerns elections generally.

Turning now to the Penal Code provision at issue here, the Court should examine its text to determine whether it addresses such matters as elections, voting, candidates, and campaigns. When used with respect to an "election record," Texas Penal Code section 37.10 satisfies that test.

Section 37.10(a)(2) states that a person commits an offense if he "makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record." Standing alone, this section does not have an explicit connection to elections. But in 2003, the Texas Legislature amended the definition of "governmental record" in section 37.01 to include "an official ballot or other election record." Act of May 31, 2003, 78th Leg., R.S., ch. 393, § 21, 2003 Tex. Gen. Laws 1633, 1639-40 (codified at Tex. Penal Code § 37.01(2)(E)). Now, when Texas Penal Code section 37.10 is invoked with respect to an "election record," it is an "election law" because it explicitly applies to election-related conduct. And, again, the Secretary of State has interpreted section 37.10, when used with respect to an election record, to be an "election law" under section 273.021(a). 2.RR.13-16.

This case is, therefore, unlike *Lightbourn v. County of El Paso*, 118 F.3d 421, 430 (5th Cir. 1997), in which the Fifth Circuit considered whether the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-34, was an "election law" as used in Texas Election Code sections 31.003 and 31.004. Stephens Br. 28-32 (relying on *Lightbourn*). The Fifth Circuit concluded it was not. *Lightbourn*, 118 F.3d at 430.

The court reasoned that "the common meaning of 'election laws' is laws that specifically govern elections, rather than generally applicable laws that may affect elections." *Id.* at 429. Because "the ADA does not include even a single provision specifically governing elections," the court determined it was only a generally applicable law, not an election law. *Id.* at 430. The same cannot be said of the Penal Code sections in Count I, as they refer specifically to ballots and election records. Because the Legislature added section 37.01(2)(E) regarding election records to the Penal Code's definition of "governmental record," section 37.10 is now an election law when used with respect to an election record. Contrary to Stephens' argument (at 29-32), it does not matter that section 37.10 also covers non-election conduct. Section 37.10 specifically and explicitly governs conduct relating to elections—in this case, the filing of a campaign-finance report by a candidate for public office—and that makes it an election law regardless of what else it might do.

Stephens asserts that the ADA's reference to "voting" in its section on congressional findings makes it similar to the Penal Code section here. Stephens Br. 29-30. But the two statutes are easily distinguishable. Congress listed "voting" as one of many areas in which it found that persons with disabilities face discrimination. 42 U.S.C. § 12101(3). But congressional findings are not enforceable law, and no

provision of the ADA specifically governs elections. *Lightbourn*, 118 F.3d at 430. Here, however, the Penal Code explicitly refers to ballots and election records—not in a section on "findings," but in the definition of the crime itself.

When used together, Penal Code sections 37.01(2)(E) and 37.10 are an election law. Count I, therefore, alleges the violation of an election law that the Attorney General has the authority to prosecute.

B. Stephens' other arguments are meritless.

Stephens finally offers a grab bag of miscellaneous arguments regarding Count I, but none have merit. Texas Election Code section 273.021(a) does not conflict with Texas Penal Code section 37.10(i), and Stephens' campaign-finance report is an "election record" under the Penal Code.

1. Texas Election Code section 273.021(a) does not conflict with Texas Penal Code section 37.10(i).

Stephens' first argument is that Texas Election Code section 273.021(a) conflicts with and is trumped by Texas Penal Code section 37.10(i). Stephens Br. 25-27. There is no conflict. Section 37.10(i) is entirely irrelevant to the Attorney General's authority under Texas Election Code section 273.021(a).

Section 37.10(i) gives the Attorney General "concurrent jurisdiction with th[e] consenting local prosecutor to prosecute an offense under [section 37.10] that involves the state Medicaid program." So, if the Attorney General wants to prosecute a Medicaid-related offense under section 37.10, he can do so with consent of the local prosecutor. That says nothing about whether the Legislature also chose to give the

Attorney General additional authority in another statute (section 273.021(a)) to prosecute different violations of section 37.10.

There is no reason to assume, as Stephens does (Stephens Br. 25-26), that in enacting subsection (i), the Legislature was contemplating the Attorney General's authority to prosecute any other violation of section 37.10: Subsection (i) does not refer to any other prosecutions that might possibly be brought under section 37.10 and who might be authorized to bring them. Subsection (i) is a *grant* of authority to the Attorney General, not a *limitation*. There is, therefore, no cause to engage in statutory interpretation in order to determine which statute prevails, as the two do not conflict in the first place. The Legislature chose to give the Attorney General both (1) the authority to prosecute Medicaid-related violations of section 37.10 with consent of the local prosecutor, and (2) the independent authority to prosecute violations of section 37.10 when they concern election records. The statutes are easily harmonized. The Court should reject Stephens' argument on this point.

2. Stephens' campaign-finance report is an "election record."

Even if the Attorney General has both the constitutional and statutory authority to prosecute Count I, Stephens asserts that Count I must still be quashed because her campaign-finance report is not an "election record" under section 37.01(2)(E). Although Stephens did not raise this argument in the trial court, she now claims that a campaign-finance report is not like a "ballot," so section 37.01(2)(E)'s reference to an "official ballot or other election record" does not include campaign-finance reports. Stephens Br. 33-36.

a. The primary basis of Stephens' argument is *ejusdem generis*: she asserts that the term "election record" in section 37.01(2)(E) is cabined by "official ballot." Stephens Br. 33-34. Thus, Stephens interprets the statutory text "official ballot or other election record" to mean only election records that are like official ballots, which Stephens defines as any record that is part of the "actual *voting* process." Stephens Br. 35.

But *ejusdem generis* is inapplicable here because section 37.01(2)(E) does not contain a list of related items. When there is no "list of specific items" in the first place, there can be no inference that the Legislature was "focused on [a] common attribute when it used [a] catchall phrase." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008). As the United States Supreme Court has explained, when a phrase is "disjunctive, with one specific and one general category," rather than "a list of specific items separated by commas and followed by a general or collective term," *ejusdem generis* has little, if any, role to play. *Id.*; *see also United States v. Buluc*, 930 F.3d 383, 389-90 (5th Cir. 2019) (applying *Ali* and holding *ejusdem generis* inapplicable to phrase "connives or conspires, or takes any other action").

Consequently, the phrase "other election record" in Texas Penal Code section 37.01(2)(E) is not limited by the preceding reference to "official ballot." There is no list of common items, and the phrase is cast in the disjunctive. *Cf. Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000) (applying *ejusdem generis* to constitutional provision listing "bribery, forgery, perjury, or other high crimes"). The Court should, therefore, not draw any inference that the Legislature intended the more

general phrase "election record" to be restricted by the specific reference to a "ballot."

b. Without *ejusdem generis*, the relevant interpretive tools indicate that the Legislature intended a broad definition of "election record" in the Penal Code. First, the Election Code's definition of "election record" is instructive as to what documents the Legislature considers to be "election records." And the Election Code uses a very broad definition: "(1) anything distributed or received by government under this code; (2) anything required by law to be kept by others for information of government under this code; or (3) a certificate, application, notice, report, or other document or paper issued or received by government under this code." Tex. Elec. Code § 1.012(d). This definition would unquestionably include campaign-finance reports, which are received by the government under the Election Code. *Id.* §§ 254.063, .064.

Second, while not controlled by the Election Code definition, the Penal Code includes similar and uniformly broad definitions in section 37.01. "[G]overnmental record," as defined in section 37.01(2), includes an extraordinarily wide range of records: "anything" belonging to, received by, or kept by the government. Yet Stephens would have the Court apply a narrow definition to "election record," essentially limiting it to voting records. Stephens Br. 35. In light of the breadth of the definition of "governmental record," the listing of a single example of an election record (an official ballot) should not serve to otherwise limit the definition of election record.

Given these additional broad definitions, Stephens' suggestion (at 35-36) that legislative history requires a narrower definition is weak. While the Legislature may

have been concerned with voting fraud when enacting section 37.01(2)(E), that does not mean that the Court should ignore the plain text that the Legislature chose, which is broad.

Finally, the Secretary of State's representative testified that "election record," as used in the Texas Penal Code, includes campaign-finance reports like the one Stephens submitted. 2.RR.13-14; *see also* Tex. Elec. Code § 31.003 (giving the Secretary the authority to interpret election laws outside the Election Code). The Legislature and Secretary of State have thus indicated that "election record" encompasses a wide range of documents, including the campaign-finance report submitted by Stephens that is the basis of Count I. Texas Election Code section 273.021(a) permits the Attorney General to bring the charges in Count I, and the court of appeals properly reversed the trial court's order quashing that count. This Court should affirm.

Prayer

The Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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