Nos. PD-1032-20 & PD-1033-20

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

The State of Texas,

Appellant,

v.

Zena Collins Stephens,

Appellee.

Ex Parte Zena Collins Stephens,

Appellant.

From the Court of Appeals for the First District of Texas
No. 01-19-00209-CR and No. 01-19-00243-CR
Appeal from the 344th District Court, Chambers County, Texas
Trial Court No. 18DCR0152
Hon. Randy McDonald, Presiding

ZENA COLLINS STEPHENS' BRIEF ON THE MERITS

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Court of Appeals, First District of Texas

Trial Court Judge:
Hon. Randy McDonald, 344th Judicial District Court of Chambers County, Texas

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STATEMENT OF THE CASE

This case involves the prosecution of Zena Collins Stephens, the elected Sheriff of Jefferson County. In violation of the Texas Constitution, and after the Jefferson County District Attorney refused the case, the attorney general changed the venue to Chambers County and indicted Stephens without the consent of the local district attorney in Chambers or Jefferson County. A Chambers County grand jury returned a three-count indictment against Stephens. Count one alleged a felony violation of Penal Code § 37.10 (Tampering with Government Record) and counts two and three alleged misdemeanor violations of Election Code provisions (accepting a cash donation exceeding $100). The indictment alleged that all the conduct took place in Jefferson County.

At the trial court, Stephens moved to quash the indictment and applied for a pretrial writ of habeas corpus. The trial court granted Stephens' motion to quash as to Count I and denied her application for a pretrial writ of habeas corpus. The State appealed the trial court's order to quash, and Stephens appealed the denial of her application for a pretrial writ of habeas corpus. On July 9, 2020, over a written dissent, a panel of the First District Court of Appeals reversed the trial court's quashing of Count I of the indictment and affirmed the denial of the pretrial writ of habeas corpus as to prosecutorial authority and venue. Stephens filed a Motion for Rehearing En Banc which was denied. This Court granted discretionary review.

ISSUES PRESENTED

1. Whether, if the attorney general has the authority to prosecute this case under § 273.021, the statute's grant of prosecutorial authority violates the separation of powers requirement of the Texas Constitution.
2. Whether the attorney general has the authority to prosecute "election law" cases outside of the Election Code, and if so, whether Penal Code § 37.10 is an "election law" within the meaning of Election Code § 273.021.
3. Whether campaign finance reports are "election records" within the meaning of Penal Code § 37.10.

STATEMENT OF FACTS

Zena Collins Stephens was elected Sheriff of Jefferson County in 2016. CR.78. Following her election, the Texas Rangers investigated alleged campaign finance violations. 2.RR75. The attorney general took over the investigation and prosecution, and "elected to move the venue from Jefferson County to a neighboring county, Chambers County." CR.158.

On April 26, 2018, a Chambers County grand jury indicted Stephens on three counts, including one felony count of Tampering with a Governmental Record (Penal Code § 37.10) and two misdemeanor counts of Accepting a Cash Contribution Exceeding $100 (Election Code § 253.033). CR.155. The indictment alleged that Stephens *reported* a $5,000 cash contribution in the "$50-or-less" section of her campaign finance report, and that she accepted two contributions that exceeded the

$100 limit for such contributions. CR.155. The indictment alleged that all the conduct took place "in Jefferson County, Texas." CR.155.

SUMMARY OF THE ARGUMENT

Ms. Stephens is entitled to a pretrial writ of habeas corpus because the statute purporting to authorize the attorney general to prosecute this case, ELEC. CODE § 273.021, violates the separation-of-powers mandate of the Texas Constitution. Even if the Constitution did not prohibit this entire prosecution, neither the Penal Code nor the Election Code authorize the attorney general's prosecution of Count I. The 2-1 decision of the court of appeals to the contrary should be reversed.

First, § 273.021 of the Election Code is facially unconstitutional because its grant of authority to the attorney general to prosecute election law violations contravenes the separation-of-powers limitation expressed in Article II of the Texas Constitution. The Constitution provides that an official of one branch of government may only exercise functions of another branch if "expressly permitted" by the Constitution itself. The Constitution provides that county and district attorneys are judicial officers who "shall" represent the state in "all cases" in the district courts. It provides that the attorney general is an executive officer with certain enumerated duties, and that the legislature may assign "other duties." Citing the *ejusdem generis* principle, a divided panel of the court of appeals reasoned that the "other duties" provision permits the legislature to assign to the attorney general any duty that relates to "State created entities"—*i.e.*, any governmental duty, without regard to the branch of government to which it attaches.

This was error. The *ejusdem generis* principle cannot override the Constitution's exclusive grant of power to district and county attorneys to prosecute "all cases" in trial courts. Nor can it be deployed to boundlessly expand a provision; its purpose is to avoid that result. The "other duties" phrase does not expressly permit those duties to be non-executive; the majority's contrary conclusion wholly exempts the attorney general and several other officials from the separation-of-powers limitation. The legislature's grant of prosecutorial power to the attorney general is facially unconstitutional, and thus there is no authority for the indictment in this case.

Second, the attorney general lacks the statutory authority to prosecute Count I, which alleges a violation of Penal Code § 37.10. Section 37.10 contains an express provision authorizing the attorney general to prosecute violations involving the state Medicaid program, if the district or county attorney consents. The rules of statutory construction require that this exception to be construed as exclusive, and so even if § 273.021 applied, it would conflict with § 37.10. Because § 37.10's Medicaid-only provision is the more specific and later-enacted provision, it controls and precludes the attorney general's prosecution of Count I. Moreover, as the trial court concluded in granting Ms. Stephens' motion to quash Count I, § 273.021 is limited to election laws within the Election Code. When the legislature chose to reference election laws outside the Election Code, it did so specifically. In any event, § 37.10—which affects government records generally—is not an "election law," as the Fifth Circuit held with respect to a similarly general law.

Third, even if § 37.10's single reference to an "official ballot or other election record" sufficed to make it an "election law" pursuant to § 273.021, a campaign finance report is not an "election record." The *ejusdem generis* principle requires the phrase "other election record" to be defined in a manner limited in scope to those items like an "official ballot"—*i.e.*, records that relate to the voting and canvassing process itself. A campaign finance report is not like an official ballot or canvassing record, and its inclusion is inconsistent with the legislature's goal to discourage voter fraud. To the extent a campaign finance report falls under the general definition of "government record" under § 37.10, as the majority suggested below, the attorney general has no authority to prosecute cases premised upon that general definition. His claim to authority is solely to the extent the "official ballot or other election record" clause is triggered. It is not triggered here, and so Count I of the indictment is outside his statutory authority.

The attorney general's prosecution of Ms. Stephens is a violation of the separation-of-powers mandate of the Constitution, and he lacks the statutory power to indict her under § 37.10 of the Penal Code. The court of appeals' decision affirming the denial of Ms. Stephens' application for a pretrial writ of habeas corpus should be reversed, as should its decision reversing the trial court's grant of her motion to quash Count I of the indictment.

ARGUMENT

I. Standard of Review

"Whether a statute is facially constitutional is a question of law that [this Court] review[s] *de novo*." *Ex parte Lo*, 424 S.W.3d 10, 14-15 (Tex. Crim. App. 2014). Likewise, "[s]tatutory construction is a question of law; therefore [this Court's] review is *de novo*." *Leming v. State*, 493 S.W.3d 552, 558 n.7 (Tex. Crim. App. 2016) (quoting *Mahaffey v. State*, 316 S.W.3d 633, 637 (Tex. Crim. App. 2010)).

II. Section 273.021's Grant of Prosecutorial Power to the Attorney General Violates the Constitution's Separation-of-Powers Mandate.

Section 273.021 violates the separation-of-powers requirement of the Texas Constitution because only the county and district attorneys may prosecute election crimes in Texas district courts. Article II, section 1 of the Texas Constitution provides that

> [t]he powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative to one; those which are Executive to another, and those with are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1. This provision ensures "that a power which has been granted to one department of government may be exercised only by that branch to the exclusion of others," *Ex parte Giles*, 502 S.W.2d 774, 780 (Tex. Crim. App. 1974), and thus "any attempt by one department of government to interfere with the powers of another is

null and void," *id.* Officers from one branch may only exercise powers of another branch in narrow circumstances that must be specified in the Constitution itself. "Exceptions to the constitutionally mandated separation of powers are *never to be implied* in the least; they must be 'expressly permitted' by the Constitution itself." *Fin. Comm'n of Texas v. Norwood*, 418 S.W.3d 566, 570 (Tex. 2014) (quoting TEX. CONST. art. II, § 1) (emphasis added).[1]

The separation-of-powers requirement can be violated in two ways. First, it is violated if one branch assumes or is delegated powers properly assigned to another branch. *See, e.g.*, *Ex parte White*, 506 S.W.3d 39, 40 (Tex. Crim. App. 2016); *see also Rushing v. State*, 85 S.W.3d 283, 285 (Tex. Crim. App. 2002) (delegation "to whatever degree" of power properly assigned to another department violates requirement). Second, it is violated when one department unduly interferes with another, thus preventing the latter from effectively exercising its powers. *See Ex parte White*, 506 S.W.3d at 50.

The Constitution provides that the attorney general is an officer of the Executive Department, TEX. CONST. art. IV, § 1, and provides that the attorney general "shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party," file suits against private corporations acting unlawfully, "give legal advice in writing to the Governor and other executive officers, when requested by them,

[1] This express separation of powers provision is unlike the implicit separation of powers in the federal Constitution, which "suggests that Texas would more aggressively enforce separation of powers between its government branches than would the federal government." *Ex parte Perry*, 483 S.W.3d 884, 894 (Tex. Crim. App. 2016) (plurality op.).

and perform such other duties as may be required by law," *id.* art. IV, § 22. By contrast, the Constitution provides that county attorneys and district attorneys are officers of the judicial department, *id.* art. V, § 21, and provides that "the County Attorney *shall* represent the State in *all cases* in the District and inferior courts in their respective counties." *id.* (emphasis added).

The Constitution's separation-of-powers dividing line between the attorney general's executive branch powers, and the county and district attorneys' judicial branch powers, is clear. "[O]ur courts have long recognized that, along with various civil duties, [county and district 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); *Baker v. Wade*, 743 F.2d 236, 242 n.28 (5th Cir. 1984) ("The laws of Texas vest in district and county attorneys the exclusive responsibility and control of criminal prosecutions and certain other proceedings."). The Texas courts have "consistently prevented the Legislature from removing or abridging the constitutional duties of county attorneys," *id.* This is so because "under the separation of powers doctrine, the Legislature may not remove or abridge a district or county attorney's exclusive prosecutorial function, unless authorized by an express constitutional provision." *Id.* at 254-55; *see also Hill County v. Sheppard*, 142 Tex. 358, 364 (Tex. 1944) ("'Where certain duties are imposed or specific powers are conferred upon a designated officer, the Legislature cannot withdraw them *nor confer them upon others* nor abridge them or interfere with the officer's right to exercise them unless the Constitution expressly so provides.'" (quoting 30 Tex. Jur. 445)

(emphasis added)).

In *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002), this Court considered at length the separation of powers between the attorney general and the county and district attorneys. The Court explained that "[e]very constitution of Texas, as a republic and as a state, has provided for district attorneys to represent Texas in criminal prosecutions. The office of district attorney has always been in the judicial department of government." *Id.* at 876. The Constitution thus spreads the prosecutorial power of the state across hundreds of county officials. "This diffusion of 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.* at 877 (quotation marks omitted). By contrast, this Court noted, "[t]he office of attorney general of Texas has never had the authority to institute a criminal prosecution." In the Reconstruction Constitution of 1869, "the office of the attorney general moved to the executive department," *id.* at 879, and it was kept there in the 1876 Constitution, "which still defines our government," *id.* That Constitution authorized the attorney general to represent the state in cases before the Supreme Court, *see* TEX. CONST. art. IV, § 22, but that "same Constitution took away the Supreme Court's jurisdiction of criminal cases, thereby eliminating the specific constitutional authority of the attorney general to represent the State in appeals of criminal cases." *Id.* at 880. In sum, this Court explained, "[u]nder our state law, only

county and district attorneys may represent the state in criminal prosecutions. The attorney general, on the other hand, has no criminal prosecutorial authority. Rather, he is generally limited to representing the State in civil litigation." *Id.* (quotation marks omitted).

Only where the Constitution "expressly permit[s]," TEX. CONST. art. II, § 1, may the legislature authorize the attorney general to exercise the exclusive power of county and district attorneys to "represent the State in *all cases* in the District and inferior courts." *Id.* art. V, § 21 (emphasis added). That is particularly so in criminal cases, given the "primary function" of the office. *Meshell*, 739 S.W.2d at 254. One such "express[] permi[ssion]" contained in the Constitution is the power of the attorney general to "take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power . . . not authorized by law." TEX. CONST. art. III, § 21. *See State of Texas v. I&G Northern Railway Co.*, 89 Tex. 562, 566 (Tex. 1896) (holding that suits against private corporations are "an exception to the general authority conferred upon the county attorney to represent the State in all cases in the district and inferior courts in their respective counties." (internal quotation marks omitted)).

The Texas Constitution contains no provision that "expressly permit[s]," TEX. CONST. art. II, § 1, the attorney general to prosecute election law violations in district courts—a power within the exclusive constitutional authority of the county and district attorneys—and thus § 273.021 is facially unconstitutional and void.

A majority of the Court of Appeals, over written dissent, held otherwise. The majority relied upon the portion of the Constitution providing that the attorney general shall "perform such other duties as may be required by law." TEX. CONST. art. IV, § 22, to hold that the legislature could assign the attorney general the judicial, rather than executive, task of prosecuting election law violations. The majority rested its holding on the *ejusdem generis* principle, concluding that the "other duties" clause should be interpreted to cover any duties related to "State created entities." Op. at 18. This is so, the majority reasoned, because the enumerated tasks pertained to such entities: "Corporations, like elections and elected offices, are wholly creatures of state action. It follows that the Attorney General has authority to prosecute election law violations." Op. at 18. Likewise, the majority held that empowering the attorney general to prosecute election law violations does not unduly interfere with the district and county attorneys' ability to effectively carry out their duties. As Judge Goodman concluded in dissent, the majority erred in a host of ways.

First, the majority erred by resorting to the *ejusdem generis* principle at all. *Ejusdem generis* "is best regarded as an aid to construction, . . . and not an end unto itself; it should never be invoked to trump otherwise manifest legislative intent." *Shipp v. State*, 331 S.W.3d 433, 437 (Tex. Crim. App. 2011). The manifest intent of the Constitution is plain: the task of representing the State in criminal cases is assigned to district and county attorneys, who are judicial officers. TEX. CONST. art. V, § 21 ("The County Attorneys *shall* represent the State in *all cases* in the District and inferior courts in their

respective counties . . . ." (emphasis added)). There was no need for the majority below to apply *enjusdem generis* in order to answer a question that the Constitution itself explicitly answers.[2] Nor can *ejusdem generis* be applied in a vacuum to contradict other provisions of the Constitution. "When construing constitutional provisions, we are required to interpret the Constitution as a whole, rather than piecemeal . . . . 'No part of the Constitution should be given a construction which is repugnant to express authority contained in another part, if it is possible to harmonize the provisions by any reasonable construction.'" *Cook v. State*, 902 S.W.2d 471, 478 (Tex. Crim. App. 1995) (quoting *Oakley v. State*, 830 S.W.2d 107, 110 (Tex. Crim. App. 1992)). The majority below used *ejusdem generis* to reach a result repugnant to both the separation-of-powers provision and the "express authority" the Constitution assigned to district and county attorneys. *Id.* In doing so, it disregarded the obvious interpretation that harmonized all provisions—that the "other duties" must only be those properly attached to the executive department. *See* TEX. CONST. art. II, § 1.

Second, the majority's expansive reasoning—characterizing the enumerated tasks of the attorney general at their highest level of generality—is precisely what the *ejusdem generis* principle is designed to avoid. "[T]he principle of ejusdem generis warns against the expansive interpretation of broad language that immediately follows narrow and

[2] The majority erred in concluding that county and district attorneys' "powers are not enumerated," Op. at 16; the Constitution explicitly assigns them the duty to represent the State in all cases in their jurisdictions. It enumerates the one duty at issue in this case.

specific terms, and counsels us to construe the broad in light of the narrow." *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010). It is difficult to conceive a more expansive interpretation than concluding that the legislature can assign the attorney general any task—whether executive, judicial, or legislative—that "relate[s] to State created entities." Op. at 17. *All* the offices created by the Constitution, and *all* the duties the Constitution assigns to those offices, relate to State created entities. The majority's conclusion is therefore that the attorney general can be assigned *any* task so long as it relates to *government*.

If the majority were correct, then the legislature could entirely *exempt* the attorney general from the Constitution's separation-of-powers limitation by virtue of the "other duties" provision. And that exemption from the separation-of-powers limitation—a bedrock constitutional principle—would not stop at the attorney general. The Constitution also permits the legislature to assign the secretary of state and the Texas Water Development Board "other duties," TEX. CONST. art. III § 49-c; art. IV § 21, to assign notaries public "such duties as . . . may be prescribed by law," *id.* art. IV § 26, and to assign duties to county clerks and sheriffs, *id.* art. V, §§ 20 & 23. Each of these officers are specifically assigned tasks that "relate to State created entities," Op. at 17, and so under the majority's view may be assigned additional such tasks regardless of the governmental department to which they properly attach, even if the Constitution expressly assigns those tasks to another officer in another branch of government.

There is no limiting principle to the majority's holding, and it renders the

separation-of-powers mandate dead letter. For example, under its interpretation, the legislature could assign the attorney general the "other duties" of representing the state in all criminal cases. The legislature could assign the attorney general the "other duties" of reconciling differences in bills passed by the house and the senate, rather than by conference committee of the legislature. The legislature could decide that the attorney general has concurrent authority with the house to originate revenue bills, and that tax proposals of the attorney general go to the senate for consideration and passage without involvement of the house. Or those powers could be extended as well to the secretary of state, sheriffs, and notaries public.

Likewise, the legislature's power to delegate the attorney general judicial powers would not be limited to prosecuting election law violations. Courts, like this Court, are "State created entities" too. Op. at 17. So under the majority's view, the legislature could assign the attorney general the "other duty" of hearing and adjudicating election law prosecutions—perhaps even the same election law cases the legislature assigns the attorney general to prosecute—like *this* case. Or, the legislature might find that to be a bridge too far, and decide instead to assign to the secretary of state the task of adjudicating election law prosecutions brought by the attorney general—perhaps even after assigning the secretary of state with the task of creating all election laws (rather than the legislature). Laws, after all, are creatures of the State, so the legislature could divest itself of the legislative power and instead assign that as an "other duty" of the secretary.

Moreover, the attorney general could also be tasked with adjudicating cases challenging the revenue bills the attorney general legislated together with the senate. Meanwhile, the Water Development Board could be tasked with the power to take discretionary appeals from the courts of appeals in cases involving water issues (or any other issue, really), rather than (or concurrent to) the Supreme Court's power to do so.

All of this, of course, is absurd and offends the Constitution's separation-of-powers mandate. But these examples follow directly from the argument adopted by the majority below and advanced by the State. If the attorney general has the power to prosecute this case because of the phrase "other duties" and the fact that the Constitution specifies duties that relate to *government*, then all the absurd scenarios above are likewise constitutional.

Third, even if the majority had correctly employed the *ejudsem generis* principle to conclude that "other duties" means *anything* related to State created entities (it did not), it still erred by concluding that those other duties could include those belonging to the judicial department. This is so because the phrase "other duties" does not "expressly permit" the legislatively-assigned duties to be those of another branch of government. TEX. CONST. art. II, § 1. Indeed, the clause says *nothing* about the governmental branch from which those "other duties" may derive. The clause's silence means that the general rule of Article II, Section 1 requires those "other duties" to be only executive branch duties. That is so because "[e]xceptions to the constitutionally mandated separation of powers are *never to be implied* in the least; they must be 'expressly permitted'

by the Constitution itself." *Norwood*, 418 S.W.3d at 570 (Tex. 2014) (emphasis added). Silence would be a peculiar way to expressly permit something—particularly something as serious as an exception to the fundamental tenet of separation of powers. The Framers of the Constitution should not be presumed to have hidden elephants in mouseholes. *Cf. Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 438 (Tex. 2016) ("The legislature does not alter major areas of law 'in vague terms' or no terms at all—'it does not, one might say, hide elephants in mouseholes.'" (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Scalia, J.)).

The "other duties" clause stands in stark contrast to other provisions of the Constitution that actually "expressly permit" an official from one branch of government to exercise the powers of another branch of government. For example, the Constitution provides that:

- The president pro tempore of the senate "shall perform the duties of the Lieutenant Governor in any case of absence or temporary disability" and that those duties shall be "in addition to the member's duties as Senator until the next general election." *Id.* art. III § 9.
- "The Lieutenant Governor shall by virtue of his office be President of the Senate, and shall have, when in Committee of the Whole, a right to debate and vote on all questions; and when the Senate is equally divided to give the casting vote." *Id.* art. IV § 15.
- When both the Governor and Lieutenant Governor are unable to serve or are impeached, "the President pro tempore of the Senate, for the time being, shall exercise the powers and authority appertaining to the office of Governor." *Id.* art. IV § 17.
- When the legislature fails to enact "valid and subsisting statewide reapportionment of judicial districts," a Judicial District Board comprised of judicial branch officials shall set district boundaries. *Id.* art. V § 7a(e).

- Although courts have the power to assign criminal sentences, the Governor may alter those sentences through "reprieves and commutations of punishment and pardons." *Id.* art. IV § 11.
- Although the Governor determines whether legislation becomes law, the legislature may override a veto by two-thirds vote and both pass and approve legislation. *Id.* art IV § 14.
- The Governor may exercise the power to alter legislation through line-item veto authority. *Id.* art IV § 14; *see Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (noting that Line Item Veto Act violated separation of powers between President and Congress).
- Although county and district attorneys represent the state in all cases in trial and inferior courts, the attorney general shall "take such action in the courts as may be proper and necessary to prevent any private corporation from . . . exercising any powers . . . not authorized by law." TEX. CONST. art. IV § 22.
- "The legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such [ ] rules as may be prescribed by law or this Constitution " *Id.* art V §31(c).

These are all instances of cross-branch powers "expressly permitted by the Constitution itself." *Norwood*, 418 S.W.3d at 570. The "other duties" clause is nothing like these express provisions. It merely permits the legislature to assign duties beyond those specifically enumerated—but those duties must comply with the constitutional command that the attorney general only exercise powers belonging to the executive branch of government. The only express permission in the Constitution for the attorney general to act outside an executive role is to represent the state in suits against private corporations and in suits before the Supreme Court. *See I&G Northern*, 89 Tex. at 566. Election law prosecutions—including this one—do not fall within the scope of that express permission, and thus must be brought by the county and district attorneys, not

the attorney general.[3]

Fourth, the majority erred in concluding that the legislature's delegation of election law prosecution to the attorney general does not unduly interfere with the district and county attorneys' effective handling of their duties. The majority reasoned that "some duties of county and district attorneys are more accurately described as executive and some duties imposed upon the Attorney General are both executive and judicial." Op. at 18. But as Judge Goodman explained in dissent, this is "less an argument than a non-sequitur." Dissent at 9. The Constitution's assignment to the attorney general of the judicial task of suing corporations, for example, does not mean that the legislature can assign the attorney general *any* judicial task.[4] Rather, it is an example of the separation-of-powers mandate at work: the Constitution itself expressly provides for that non-Executive duty. This illustrates the flaw with the majority's

[3] The majority cited this Court's dictum in *Saldano* that the Constitution "authorizes the legislature to give the attorney general duties which, presumably, could include criminal prosecution." Op. at 18 (quoting *Saldano*, 70 S.W.3d at 880). As Judge Goodman explained in dissent, this dictum, unaccompanied by any analysis, is not binding. Dissent at 9. Moreover, the *Saldano* Court did not say that such delegated authority could be of any scope, regardless of the separation-of-powers mandate. As *amici* county and district attorneys have explained, a number of statutes authorize the attorney general to represent the state in criminal matters *if* he obtains the consent of the county or district attorney. The *Saldano* Court's dictum, however, cannot be read as authorizing what the Constitution expressly forbids—a statute, like Section 273.021, that facially excludes the officials tasked by the Constitution with *all* criminal prosecutions.

[4] The majority notes that the *Medrano* court cited *Brady v. Brooks*, 89 S.W. 1052 (Tex. 1905), in which the Supreme Court held that the attorney general could file a civil suit against railroad companies to collect unpaid taxes. *Id.* at 373-74; *see* Op. at 18. *Brady* is inapposite; it is a civil case that falls within the express authority of the attorney general to sue corporations. Moreover, to the extent the *Brady* court concludes that the Framers' placement of the attorney general in the judicial department rather than the executive department is unimportant, that reasoning was rejected by this Court in *Saldano*.

decision, rather than an argument in support of it.

Moreover, Section 273.021 unduly interferes with the county and district attorneys' ability to "*effectively* exercise [their] constitutionally assigned powers." *Jones v. State*, 803 S.W.2d 712, 715 (Tex. Crim. App. 1991) (quoting *Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Crim. App. 1990) (emphasis in original). As this Court emphasized in *Meshell*, exercise of prosecutorial discretion is among the chief responsibilities assigned to county and district attorneys. 739 S.W.2d at 252-58 (holding that Speedy Trial Act violated separation of powers by infringing on prosecutorial discretion). But the district and county attorneys cannot effectively exercise their discretion not to seek an indictment in a particular case if the attorney general acts contrary to their decision. Likewise, a county or district attorney who chooses to prosecute a case might find the attorney general bringing overlapping or contradictory charges and evidence in a prosecution in a neighboring county, *see* Tex. Election Code § 273.024, with the possibility of inconsistent evidentiary rulings or verdicts.

Indeed, Section 273 actually authorizes the attorney general to *compel* the district or county attorneys to either prosecute a particular case or assist the attorney general in doing so. Under Section 273.022, "[t]he attorney general may direct the county or district attorney serving the county in which the offense is to be prosecuted to prosecute an offense that the attorney general is authorized to prosecute under Section 273.021 or to assist the attorney general in the prosecution." This entire scheme turns the constitutional order upside down, and illustrates why, as *amici* explain, the legislature

may only empower the attorney general to participate in criminal proceedings if the statute requires the consent of the county or district attorney.

Fifth, the majority erred by concluding that Stephens had waived her argument that the attorney general lacked authority to prosecute Counts II and III of the indictment. The court reasoned that because a header in Stephens's trial court brief mentioned "Count I," she could not raise this argument with respect to the remaining two counts. Op. at 15. This was error. As this Court has explained, "[t]he complaining party must let the trial judge know what she wants and why she thinks she is entitled to it, and do so clearly enough for the judge to understand and at a time when the trial court is in a position to do something about it." *Bekendam v. State*, 441 S.W.3d 295, 299 (Tex. Crim. App. 2014). But this Court emphasized that courts should "not [be] hyper-technical in examination of whether error was preserved" and that an argument cannot be forfeited if it was "raised, discussed, and ruled upon by the trial court." *Id.* at 301; *see id.* (concluding that an objection to the reliability of an expert report was preserved despite the absence of a specific objection in light of trial court's consideration of issue). Even a "general or imprecise objection" will suffice if "the legal basis for the objection is obvious to the court and to opposing counsel." *Vasquez v. State*, 483 S.W.3d 550, 554 (Tex. Crim. App. 2016).

The majority's conclusion that Stephens only raised her constitutional separation-of-powers argument with respect to Count I and not Counts II and III is exactly the type of "hyper-technical" parsing Texas courts are warned to avoid.

Although the header for her separation of powers argument mentioned Count I, Stephens argued that "[t]he duty of criminal prosecution in the trial courts of record is on the county attorney and the district attorney . . . . Every constitution of Texas, as a republic and as a state, has provided for *district attorneys* to represent Texas in criminal prosecutions." CR.146 (emphasis in original). She further argued that the attorney general had no constitutional authority to prosecute "criminal cases" and that the Constitution's separation of powers provision expressly reserved that power for district and county attorneys. CR.147. Stephens's separation of powers argument necessarily applies to *all* election law prosecutions by the attorney general—it is a facial challenge to the validity of the statute upon which the attorney general claims he derives the power to engage in election law prosecutions. This is why Stephens claimed in her trial court briefing that "the Attorney General's conduct in bringing the indictment is inseverable from the remaining Counts." CR.146.[5] The "legal basis for the objection" to all Counts of the indictment was "obvious to the court and to opposing counsel." *Vasquez*, 483 S.W.3d at 554. It makes no sense to conclude that Stephens meant to argue that although the attorney general had no constitutional power to prosecute criminal cases, he somehow retained that power with respect to Counts II and III but not Count I. The majority's hyper-technical parsing of a header typo in Stephens's trial

[5] The fact that Stephens acknowledged the attorney general's *statutory* authority to prosecute Counts II and III in her trial court brief is irrelevant. Stephens challenged the constitutionality of that statute—an argument that would invalidate the entire indictment.

brief was in error. The issue was plainly before the trial court, and plainly applied to all Counts of the indictment.[6]

* * *

The Texas Constitution's separation of powers requirement—and its diffusion of prosecutorial authority among hundreds of county and district attorneys—is "the absolutely central guarantee of a just Government." *Norwood*, 418 S.W.3d at 569 (quotation marks omitted). This separation of powers, and limitation on executive power, is part of the defining core of our state. If the legislature wishes to alter that centuries-long defining feature of Texas and shift prosecutorial power from county officials to the attorney general, then there is a mechanism for it to do so: constitutional amendment approved by two-thirds of the members of each house of the legislature and by majority vote of the citizens of this state. TEX. CONST. art XVII § 1. No matter how wise the legislature might think it is to accumulate prosecutorial power with the attorney general, it may not alter the constitutional separation of powers limitation by enacting mere legislation. There is no express permission in the Constitution for the attorney general to exercise the powers the Constitution itself assigns exclusively to the county and district attorneys.

[6] In any event, a challenge to the prosecuting official's constitutional authority to issue the indictment is akin to a jurisdictional argument, which can be raised at any time. *See, e.g.*, *Rusk State Hosp. v. Black*, 392 S.W.3d 88. 93 (Tex. 2012) (noting that subject matter jurisdiction "cannot be waived and may be raised for the first time on appeal").

III. The Attorney General Has No Statutory Authority to Prosecute the Alleged Violation of Penal Code Section 37.10.

The attorney general has no statutory authority to prosecute the alleged violation of Penal Code § 37.10 in Count I of the indictment, and thus the majority erred in reversing the trial court's order granting Stephens' motion to quash. The plain text of both the Election Code and the Penal Code provide that only the Jefferson County district attorney — and not the attorney general — has the authority to prosecute the violation alleged in Count I.

The attorney general's authority to prosecute alleged criminal violations is narrow. "The attorney general has very limited authority to represent the state in criminal cases in trial courts." *Ex parte Lo*, 424 S.W. 3d 10, 30 n.2 (Tex. Crim. App. 2014); *see id.* ("[T]he attorney general is, with a few exceptions . . . not authorized to represent the State in criminal cases."). Given that general rule, statutes authorizing the attorney general to act in a prosecutorial role should be narrowly construed in accordance with the rules of statutory construction and in light of the separation-of powers-requirements of the Texas Constitution. *See supra* Part II. "[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, we ordinarily give effect to that plain meaning." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). Thus, "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." *Id.* (quoting *Coit v.* State,

808 S.W.2d 473, 475 (Tex. Crim. App. 1991). In construing statutes, courts must "consider statutes as a whole rather than their isolated provisions," *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

In addition, the court should consider the statute "contextually, giving effect to every word, clause, and sentence." *In re Office of Attorney Gen.*, 422 S.W.3d 623, 629 (Tex. 2013); *see also Baird v. State*, 398 S.W.3d 220, 228 (Tex. Crim. App. 2013) ("We assume that every word was meant to serve a discrete purpose that should be given effect."). In particular, "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *See DeWitt v. Harris Cty.*, 904 S.W.2d 650, 653 (Tex. 1995) (quotations marks omitted). This is so because "every word of a statute must be presumed to have been used for a purpose," and "every word *excluded* from a statute must also be presumed to have been excluded for a purpose." *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) (emphasis added); *see also Travis Cty., Tex. v. Rylander Inv. Co.*, 108 F.3d 70, 72-73 (5th Cir. 1997) (noting "general rule of statutory construction, followed in Texas, that presumes that every word in a statute is used for a purpose and every word excluded is excluded for a purpose").

When statutes conflict, courts employ two rules of statutory construction to determine the controlling statute. "When two statutes conflict, the specific controls over the general. In addition, the more recent statutory enactment prevails over an earlier statute." *City of Dallas v. Mitchell*, 870 S.W.2d 21, 23 (Tex. 1994) (citations

omitted); *see also In re Sosa*, 370 S.W.3d 79, 81 (Tex. App.—Houston [14th Dist.] 2012); TEX. GOV'T CODE Ann. §§ 311.025(a), .026(b); *see also Oakley v. State*, 830 S.W.2d 107, 110 (Tex. Crim. App. 1992) (noting that "specific provisions control general provisions" and "the provision adopted later in time will be given controlling effect").

These rules compel the conclusion that only the Jefferson County district attorney, and not the attorney general, has the authority to prosecute the alleged violations of Penal Code § 37.10.

A. The Majority Created a Direct Statutory Conflict that Must Be Resolved by Limiting the Attorney General's § 37.10 Prosecutorial Power.

The majority created a direct statutory conflict that must be resolved by limiting the attorney general's § 37.10 prosecutorial power. Section 37.10 provides: "With the consent of the appropriate local county or district attorney, the Attorney General has concurrent jurisdiction with the consenting local prosecutor to prosecute an offense under this section *that involves the state Medicaid program*." TEX. PENAL CODE § 37.10(i) (emphasis added). The legislature thus specifically contemplated whether the attorney general should have prosecutorial authority under § 37.10, and granted that authority in only a narrow class of cases, and even then only with the consent of the local district or county attorney. The legislature, having created a narrow exception to the rule that the attorney general does not prosecute crimes, must be presumed to have intended for Medicaid cases to be the *only* § 37.10 prosecutions within the jurisdiction of the attorney general. *See Dallas v. State*, 983 S.W.2d 276, 278 (Tex. Crim. App. 1998) (*en banc*) ("[I]f

[a] statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." (quoting *Black's Law Dictionary* 692, 4th ed. (1951)).

The majority ignored this express limitation on the attorney general's prosecutorial authority under § 37.10, and instead concluded that Election Code § 273.021 authorized the attorney general to prosecute campaign finance violations under § 37.10. Section 273.021 provides that "the Attorney General may prosecute a criminal offense prescribed by the election laws of this state." TEX. ELEC. CODE § 273.021(a). But even if § 273.021's text permitted the conclusion that it authorized attorney general prosecutions under § 37.10, the majority's interpretation creates a direct conflict between the two statutes: it permits the attorney general to prosecute a category of § 37.10 violations that § 37.10 itself precludes the attorney general from prosecuting. The majority entirely ignored this conflict. But the rules of statutory construction compel the conclusion that the attorney general may not prosecute campaign finance record violations under § 37.10.

First, Section 37.10(i) applies specifically to "an offense under this section," including the offense alleged in Count I of the indictment in this case, whereas Election Code § 273.021 applies more generally to "election laws." The subject matter of § 273.021 is more general, and it is located in an entirely different *Code*. Because § 37.10(i) applies specifically to the offense alleged by Count I, it prevails over § 273.021(a). Second, § 37.10(i) is also the later-enacted statute. It was enacted by the

legislature in 2003. *See* Act of June 18, 2003, 78th Leg. R.S., ch. 257, § 16. By contrast, Election Code § 273.021 was last amended in 1997. *See* Acts 1997, 75th Leg., ch. 864, § 255, eff. Sept. 1, 1997. "[W]hen statutes are in conflict, the more specific, and later, enactment controls," *In re Allcat Claims Serv. L.P.*, 356 S.W.3d 455, 473 (Tex. 2011); *Oakley*, 830 S.W.2d at 110, and thus the attorney general may only prosecute Medicaid related cases under Penal Code § 37.10.

B. The Attorney General's Statutory Prosecutorial Authority is Limited to Election Code Statutes.

The attorney general's statutory authority to prosecute election law violations is limited to Election Code statutes. The legislature knew how to grant statewide officials jurisdictional authority over matters outside the Election Code, yet did not do so with respect to the attorney general's prosecutorial authority. *See* TEX. ELEC. CODE § 31.003 (obligating the secretary of state to ensure uniform application of "election laws outside this code"); *id.* § 31.004 (obligating the secretary of state to advise election authorities regarding "election laws outside this code"). Had the legislature intended to grant the attorney general authority to prosecute "election laws outside this code," it would have said so. It did not, and the rules of statutory construction require the court to presume that choice was intentional. *See DeWitt v. Harris Cty.*, 904 S.W.2d 650, 653 (Tex. 1995) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (quotation marks omitted); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex.

1981) ("[E]very word excluded from a statute must [ ] be presumed to have been excluded for a purpose.").

The majority relied upon the secretary's power to administer election laws "outside this code" to conclude that "if the Legislature wished to limit section 273.021 to only those laws within the Election Code, it could have done so." *See Texas v. Stephens*, No. 01-19-00209-CR, at 9-10. But this turns the rules of construction on their head. If, as the majority reasoned, the default rule in the Election Code is that "election laws" refers to those both inside and outside the Election Code, and any limitation must be expressly stated, then why did the legislature expressly *expand* the secretary's power to include administration of election laws "outside this code"? The majority's interpretation not only violates the principle that courts should interpret different statutory text as having intentionally different meanings, *see DeWitt*, 904 S.W.2d at 653; *Cameron*, 618 S.W.2d at 540, but it also unnecessarily adopted a construction that renders statutory text meaningless, *see Badgett v. State*, 42 S.W.3d 136, 149 (Tex. Crim. App. 2001) ("[S]tatutes are to be construed, if at all possible, so as to give effect to all of its parts, and so that no part is to be construed as void or redundant.").

C. Section 37.10 Is Not an "Election Law" within the Attorney General's Statutory Authority.

Penal Code § 37.10 is not an "election law," and thus the attorney general could not prosecute violations of that statute even if Election Code § 273.021's grant of authority extended beyond the Election Code's criminal provisions. In *Lightbourn v.*

County of El Paso, 118 F.3d 421 (5th Cir. 1997), the Fifth Circuit held that the phrase "election laws" in the Election Code "only encompasses laws that specifically govern elections, not generally applicable laws that might cover some aspect of elections." *Id.* at 430. In *Lightbourn*, the plaintiffs alleged that the Secretary of State had a duty to ensure uniform compliance with the Americans with Disabilities Act ("ADA") at polling stations, *id.* at 427-28, citing the Secretary's obligation to "obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code," TEX. ELEC. CODE § 31.003.

The court rejected plaintiffs' argument for three reasons. First, the court noted that the ADA only mentioned voting once—expressing that its purpose was to prevent discrimination against individuals with disabilities in "such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, *voting*, and access to public services." *Lightbourn*, 118 F.3d at 430 (quoting 42 U.S.C. § 12101(a)(3)) (emphasis added). Second, the court reasoned that the ADA was "a general civil rights statute" that "involves every area of law." *Id.* The court explained that

> [i]f the ADA is construed as an 'election law,' then it presumably could also be called an employment law, housing law, transportation law, and so on. However, we do not think that the common, ordinary meaning of 'election laws' includes a law that can be characterized in so many different ways.

Id. Third, the court noted that if the ADA were an election law, then that term could apply to "every other general civil rights statute that could touch on elections" as well

as "other generally applicable laws which could pertain to elections, such as statutes dealing with littering, zoning, fire safety, and so on." *Id.*

The same is true here. Chapter 37 of the Penal Code is entitled "Perjury and Other Falsification" and § 37.10 is entitled "Tampering with Governmental Record." Section 37.10(a)(2)—the provision at issue here—provides that one 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." TEX. PENAL CODE § 37.10(a)(2). Nothing about Chapter 37, its home *outside* the Election Code, or the specific offense at issue suggests it is an "election law." The only reference to elections comes in the "Definitions" section. A "governmental record" is to defined to include court records of Texas courts, other states' courts, federal courts, and tribal courts; motor vehicle insurance forms; health and safety forms maintained by food trucks; an "official ballot or other election record"; "anything belonging to, received by, or kept by government for information"; or "anything required by law to be kept by others for information of government." TEX. PENAL CODE § 37.01(2)(A)-(F).

This single reference to elections—like the ADA's single reference to voting—does not transform § 37.10 into an "election law." And even if that single reference is somewhat less tangential than the ADA's voting reference, *see* Br. at 11, the *Lightbourn* court's other two justifications for declining to call the ADA an "election law" apply with even greater force to § 37.10. Section 37.10 "involves every area of law." *Lightbourn*, 118 F.3d at 430. It applies to "anything belonging to, received by, or kept by

government for information" and "anything required by law to be kept by others for information of government." TEX. PENAL CODE § 37.01(2)(A) & (B). It thus applies to *every piece of paper* that passes through the hands of any governmental official, or that is kept by private parties for the benefit of the government. If § 37.10 is an "election law," then it is also an agricultural law, an alcohol and beverage law, a water law, a business law, an education law, a family law, a finance law, a health and safety law, a judicial records law, an insurance law, a labor law, a parks and wildlife law, a property law, a tax law, and so on. As the Fifth Circuit reasoned in *Lightbourn*, "we do not think that the common, ordinary meaning of 'election laws' includes a law that can be characterized in so many different way." 118 F.3d at 430. Section 37.10 does not "specifically govern elections," but rather is a "generally applicable law[ ] that might cover some aspect of elections," and thus is not an "election law" prosecutable by the attorney general. *Id.*

Moreover, if the attorney general had jurisdiction to prosecute alleged § 37.10 offenses, then he would also have the authority to prosecute violations of "every other general . . . statute that could touch on elections." *Id.* For example, sometimes candidates exaggerate their educational pedigree to bolster voters' perceptions of their qualifications. Section 32.52(b)(2)(B)(v) of the Penal Code makes it a crime to claim a fictitious degree "in a written or oral advertisement" or to "gain a position in government with authority over another person." Under the state's theory, this provision would be an "election law" under the attorney general's jurisdiction where

the offender is a candidate running for office. So too would be "other generally applicable laws which could pertain to elections, such as statutes dealing with littering, zoning, fire safety, and so on." *Lightbourn*, 118 F.3d at 430. The Fifth Circuit concluded that the legislature had not intended "to require the Secretary to provide 'detailed and comprehensive written directives and instructions relating to and based on' these statutes." *Id.* (citing Election Code § 31.003). Nor did it intend for the attorney general to gain roving prosecutorial authority over any statute pertaining in some way to elections.

Indeed, this is a clearer case than *Lightbourn*, where the question was about the scope of the secretary of state's duties. The Election Code makes the secretary "the chief election officer of the state," TEX. ELEC. CODE Ann. § 31.001(a), with responsibilities over "election laws outside this code," *id.* § 31.003. The attorney general is not the chief prosecutor of the state. Indeed, the attorney general is "with a few exceptions . . . not authorized to represent the State in criminal cases." *Ex parte Lo*, 424 S.W. 3d at 30 n.2. And the legislature did not extend the attorney general's limited prosecutorial authority to "election laws outside this code," as it did with respect to the secretary of state. The Fifth Circuit's rejection of the plaintiff's argument in *Lightbourn* compels the rejection of the state's position here.[7]

[7] The majority concluded otherwise, reasoning that the ADA did not refer to election matters while § 37.10 does. Op. at 11. This is wrong; the ADA referred to voting—that was the entire reason for the *Lightbourn* case. 118 F.3d at 430.

IV. Campaign Finance Records Are Not "Election Records" Under Chapter 37 of the Penal Code.

Even if the attorney general could prosecute violations of § 37.10 involving "election records," he still lacks prosecutorial authority in this case because a campaign finance report is not an "election record" as that phrase is used in the Chapter 37. Several rules of statutory construction compel this conclusion. Under the rule of *ejusdem generis*, when "general words [ ] follow an enumeration of particular or specific things, the meaning of those general words should be confined to things of the same kind." *Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000). Moreover, "the meaning of particular words in a statute may be ascertained by reference to other words associated with them in the same statute." *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003). Where a term or phrase is specifically defined, courts "will not extend a definition beyond the chapter or article to which it is expressly limited." *Ex parte Ruthart*, 980 S.W.2d 469, 472 (Tex. Crim. App. 1998). This rule is at its apex where the legislature *contemporaneously* employs the same term in a separate code while limiting a particular definition to another code. *Cf. Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 175 (Tex. 1980) (noting that "the Legislature's exclusion of these terms from [one statute], in light of its contemporaneous inclusion of the same terms in [another statute], evidences a clear legislative intent" for the terms not to apply to the second statute). These principles take on even more importance when the state seeks to levy criminal penalties for certain actions because clarity of the rules is necessary to give citizens notice of what

criminal process they are in jeopardy from.

Campaign finance reports are not "election records" as that phrase is used in the Penal Code. In 2003, the legislature amended Chapter 37 to specify that a "government record" could 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. But the legislature did not define the phrase "other election records" in the Penal Code. In its briefing below, the state contended that, in the absence of a Penal Code definition, the Court should apply the Election Code's broad definition of "election record." *See* Br. at 2. The Election Code provides that "*[i]n this code*, 'election records' includes . . . a . . . report received by government under this code." Tex. Election Code § 1.012(d) (emphasis added). The state's position is wrong.

The legislature expressly confined this broad definition of "election record" to its use in the Election Code, and thus that definition cannot be extended to uses of the phrase "election record" *outside* the Election Code. *See Ex parte Ruthart*, 980 S.W.2d at 472 (explaining that courts "will not extend a definition beyond the chapter or article to which it is expressly limited," where definition was preceded by phrase "in this chapter"). That principle applies with special force here, because the legislature added the confined definition of "election record" in the Election Code in the *same* 2003 bill in which it added the phrase "official ballot or other election record" to the "Definitions" section of Chapter 37. *See* Act of May 31, 2003, 78th Leg., R.S. ch. 393, § 1 (adding confined definition to Election Code) *id.* § 21 (adding phrase "official ballot

or other election record" to Penal Code Chapter 37). The legislature's choice to limit its expansive use of the phrase "election record" to its appearance in the Election Code while *simultaneously* adding the phrase to the Penal Code "evidences a clear legislative intent" for the Election Code's definition not to apply to the Penal Code. *Lewis*, 603 S.W.2d at 175. The legislature's choice makes sense. The Election Code uses the phrase "election record" 187 times after the provision defining it, covering every type of record related to campaigns, balloting, campaign finance, election administration, voting, vote tallying, *etc.* and regulating a bevy of activities. The legislature had good reason not to export this one-size-fits-all definition to the Penal Code.

In the Penal Code, the phrase "election record" must be understood based upon the company it keeps. The legislature referred to an "official ballot or other election record." TEX. PENAL CODE § 37.01(2)(E). Under the principle of *ejusdem generis*, the general phrase "other election record" is limited to "things of the same kind," *Perez*, 11 S.W.3d at 221, as the specifically enumerated example of an "official ballot." This would include election records used in the actual *voting* process, such as ballots, voting machine tabulation records, and vote canvass records. A campaign finance report is quite different in character and purpose than an "official ballot," and thus falls outside the scope of "other election record[s]" under the Penal Code. This makes sense in light of the legislature's purpose in adding the provision, which the state explains was "aimed

at reducing *voting* fraud." State's Court of Appeals Br. at 10 (emphasis added).[8] If the Legislature wanted to make a heightened felony offense out of the filing of an erroneous campaign finance report, if could and would have done so.

The majority did not address this argument at all, focusing instead on the broad definition of "government record" and "government" to cover any documents received by a county for information. Op. at 11-12. But even if a campaign finance report would have been covered under the preexisting general definition of "government record" absent the legislature's addition of § 37.01(2)(E), the State relies upon the "official ballot or other election record" provision of § 37.01(2)(E) to support the *attorney general's* prosecutorial authority—under the State's theory, § 37.10 only became an "election law" once the legislature added that language. It does not suffice, therefore, to sustain the attorney general's prosecutorial authority to rely upon the *general* definition of "government record"—the State does not even contend that this general provision suffices to make § 37.10 an "election law" sufficient to trigger the attorney general's statutory prosecutorial authority. Because the principles of statutory construction dictate that § 37.01(2)(E) be interpreted to refer to balloting and voting records, and not campaign finance records, the attorney general has no authority to prosecute Count I.

[8] *See also* H.B. 54 Enrolled Bill Summary, https://capitol.texas.gov/BillLookup/BillSummary.aspx?LegSess=78R&Bill=HB54 (last visiting May 18, 2019) (noting that H.B. 54 was aimed at "the prevention of voting fraud").

* * *

The attorney general has neither the constitutional nor statutory authority to prosecute this case. The Framers of Texas's Constitution "deliberately 'fractured'" the structure of Texas government and "chose to decentralize executive authority." *Saldano*, 70 S.W. 3d at 877. They sought to ensure the durability of this choice by mandating a strict separation of powers, with exceptions only if *expressly* stated in the Constitution itself. It does not take a reader learned in law to conclude that "other duties" is not an *express* exception to the separation-of-powers requirement, but rather an authorization for further duties *consistent* with the required separation. The State asks this Court to "interpret" the Constitution contrary to its plain text in order to effectuate the State's preferred policy outcome. That is not this Court's role. No matter how wise anyone thinks § 273.021's grant of prosecutorial authority is, it is a plain constitutional violation, and to conclude otherwise would require disregarding the Constitution's plain words, its structure, the Framers' intent, and a host of rules of construction—just to give the legislature a pass on having to secure two-thirds agreement and voter support for a constitutional amendment. The people, not a bare majority of the legislature, and not the judiciary, have the right to amend their Constitution. This Court must protect that right, reverse the Court of Appeals, and grant Stephens's petition for pretrial habeas.

PRAYER

Ms. Stephens respectfully prays that this Court reverse the decision of the Court of Appeals by (a) affirming the trial court's quashing of count I of the indictment, and

(b) reversing the trial court's denial of a writ of habeas corpus and holding that the statute delegating prosecutorial authority of election laws to the attorney general is unconstitutional, thereby effectuating Stephens's immediate release from the State's criminal process.

March 12, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this brief contains 9,889 words, excluding the portions of the brief exempted by Rule T.R.A.P. 9.4(i)(2)(B).

/s/ Chad W. Dunn
Chad W. Dunn

CERTIFICATE OF SERVICE

On March 12, 2021, this document was served electronically on Judd Stone II, lead counsel for the State of Texas, via judd.stone@oag.texas.gov.

/s/ Chad W. Dunn
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