THE STATE OF TEXAS
v.
ZENA COLLINS STEPHENS, Appellee

EX PARTE ZENA COLLINS STEPHENS

Nos. PD-1032-20, PD-1033-20

Court of Criminal Appeals of Texas

December 15, 2021

ON APPELLEE'S PETITIONS FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS CHAMBERS COUNTY

McClure, J., delivered the opinion of the Court in which Keller, P.J., and Hervey, Richardson, Newell, Keel, Walker, and Slaughter JJ., joined. Yeary, J., filed a dissenting opinion.

OPINION

Zena Collins Stephens appeals both the court of appeals' denial of a pretrial writ of habeas corpus and its reversal of the district court's decision to quash Count I of the indictment. She presents the following question: May the Texas Legislature delegate to the

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Attorney General, a member of the executive department, the prosecution of election-law violations in district and inferior courts? No. Because Texas Election Code section 273.021 delegates to the Attorney General a power more properly assigned to the judicial department, we conclude that the statute is unconstitutional. Therefore, we reverse the decision of the court of appeals and remand the case to the trial court to dismiss the indictment.

PROCEDURAL BACKGROUND

Zena Collins Stephens was elected to the position of sheriff of Jefferson County in 2016. While investigating someone else, the FBI uncovered information regarding potential campaign-finance violations concerning Stephens. The FBI then turned this information over to the Texas Rangers. The Rangers' investigation concluded that Stephens received individual cash campaign contributions in excess of $100. The Rangers presented their findings to the Jefferson County District Attorney, who declined to prosecute, referring the Rangers to the Attorney General. The Rangers then presented the results of their investigation to the Attorney General, who presented the case to the grand jury in Chambers County, a county adjoining Jefferson County. *See* Tex. Elec. Code § 273.024. The Attorney General relied on Texas Election Code section 273.021 to prosecute a criminal offense "prescribed by the election laws of this state."

In April of 2018, the Chambers County grand jury indicted Stephens on three counts. In Count I, Stephens was charged with tampering with a government record in violation of Texas Penal Code section 37.10 "by reporting a $5, 000.00 individual cash contribution in the political contributions of $50.00 or less section of said Report." In

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Counts II and III, Stephens was charged with unlawfully making or accepting a contribution in violation of Texas Election Code section 253.033(a) by accepting cash contributions in excess of $100 from two different individuals.

Stephens filed a motion to quash the indictment, arguing the Attorney General did not have authority to prosecute a violation of the Penal Code, and an application for a pretrial writ of habeas corpus, challenging the constitutionality of Texas Election Code section 273.021. The trial court granted Stephens's motion to quash Count I, finding that the Attorney General lacked authority to prosecute an offense outside the Election Code. However, the trial court denied Stephens's motion to quash Counts II and III. The trial court also denied Stephens's pretrial habeas corpus writ without comment.

Both Stephens and the Attorney General appealed. The State argued that the trial court erred in two ways: (1) by quashing the

tampering count (Count I), because Election Code section 273.021(a) authorizes the Attorney General to prosecute violations of election laws, and (2) by concluding that the Attorney General's prosecutorial authority was limited to election laws found within the Election Code.

Stephens appealed the denial of her application for a pretrial writ for Counts II and III on the ground that Election Code section 273.021's delegation of authority to prosecute election laws to the Attorney General violates the separation of powers doctrine in the Texas Constitution. Stephens argues that the offices of county and district attorneys are in the judicial branch of government and the Attorney General is in the executive branch. *See* Tex. Const. art. V, § 21; *id*. art IV, § 22. According to Stephens, the judicial branch has

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exclusive jurisdiction in the trial courts and allowing the Attorney General to prosecute penal code violations unduly interferes with the functioning of that branch.

In a divided opinion, the First Court of Appeals agreed with the State and found that Election Code section 273.021(a) "clearly and unambiguously gives the Attorney General power to prosecute criminal laws prescribed by election laws generally whether those laws are inside or outside the Code." *State v. Stephens*, 608 S.W.3d 245, 251 (Tex. App.- Houston [1st Dist.] 2020). The court of appeals further held that "[t]he phrase 'election laws' is not synonymous with 'Election Code,' and if the Legislature intended to limit the Attorney General's prosecutorial authority to laws found only in the Election Code, it could have done so." *Id*. at 251-52.

The court of appeals reversed the district court's decision to quash Count I, holding that section 273.021 of the Election Code gives the Attorney General power to prosecute election law violations both inside and outside the Election Code. *Id*. at 252. The court of appeals affirmed the trial court's denial of Stephens's pre-trial habeas application, focusing on the last clause of the section of the Constitution describing the authority of the Attorney General: "perform such other duties as may be required by law." *Id*. at 255-56; Tex. Const. art. IV, § 22. The court relied on the doctrine of *ejusdem generis* ("of the same kind") by applying the following logic: 1) the Constitution authorizes the Attorney General to represent the State, advise the State, and act on behalf of the State against corporations; 2) corporations, like elections and elected offices, are wholly creatures of state action; 3) therefore, the Attorney General has authority to prosecute election law violations. *Stephens*, 608 S.W.3d at 255. The court of appeals also found that Election Code Chapter

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273 gives the Attorney General concurrent jurisdiction with county and district attorneys and does not take away their ability to prosecute election law violations. *Id*.

In his dissent, Justice Goodman writes that the Attorney General's prosecution of Stephens violates the Constitution's separation of powers mandate. *Id*. at 261. Specifically, Justice Goodman disagrees that the Legislature can authorize the Attorney General, a member of the executive department, to prosecute election-law violations because that is a power more properly assigned to the judicial department. *Id*. at 259.

Stephens petitioned this Court for discretionary review to determine: (1) if the Attorney General has the authority to prosecute this case under Election Code section 273.021, whether such grant of prosecutorial authority violates the separation of powers requirement in 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 Tex. Penal Code section 37.10 is an "election law" within the meaning of the Election Code; and (3) whether campaign finance reports are "election records" within the meaning of Tex. Penal Code section 37.10. By declaring Texas Election Code section 273.021 unconstitutional, we need not address Stephens's second and third grounds.

TEXAS CONSTITUTIONAL HISTORY

In *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002), this Court reviewed the history of the powers of the Attorney General and noted that "[t]he office of the Attorney General of Texas has never had authority to institute a criminal prosecution. Before 1876 it had constitutional authority to represent the State in appeals of criminal cases, and it had

statutory authority to do so until 1923."[1] *Id*. at 878. The 1876 Texas Constitution completely eliminated the specific constitutional authority of the Attorney General to represent the State in appeals of criminal cases in a deliberate response to the "despotic control of the reconstruction governor." *Id. at* 877, 880. Since then, it has had no authority to represent the State in a criminal case in any court, except when a county or district attorney requests it to assist. *Id*. at 880.

OUR CURRENT CONSTITUTION &SEPARATION OF POWERS

The Constitution of 1876, which our state still operates under, expressly divides the powers of government into three distinct departments-legislative, executive, and judicial-and prohibits the exercise of any power "properly attached to either of the others," unless that power is grounded in a constitutional provision. Tex. Const. art. II, § 1; *see also Ex parte Giles*, 502 S.W.2d 774, 780 (Tex. Crim. App. 1974). "This separation of powers 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). It has the incidental effect of "promoting effective government by assigning functions to the branches that are best suited to discharge them." *Id*.

The Texas Constitution contains this explicit separation of powers provision unlike the federal Constitution which contains no express separation of powers provision. Instead, separation of powers is implied through the federal constitution's structure, dividing government into three branches, and through vesting into each branch its particular power, legislative, executive, or judicial. U.S. Const., Arts. I, § 1, II, § 1, III, § 1. We have previously held that this textual difference between the United States and Texas constitutions suggests that Texas would "more aggressively enforce separation of powers between its governmental branches than would the federal government." *See State v. Rhine*, 297 S.W.3d 301, 309 (Tex. Crim. App. 2009).

The 1876 Texas Constitution provides that the office of the Attorney General is in the executive branch. *Id*. at 879. The constitutional duties of the office are as follows:

> 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, 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 offices of county and district attorney, on the other hand, are in the judicial branch of

government. Tex. Const. art. V, § 21. The constitutional duties of the county and district attorneys are as follows:

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> The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature."

Tex. Const. art. V, § 21.

Although the duties of the county and district attorney are not enumerated in article V, section 21, our courts have long recognized that, along with various civil duties, their 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); *see also Saldano*, 70 S.W.3d at 877 (holding that the express provision conferring on the county and district attorneys the authority to represent the State in "the District and inferior courts," Tex. Const. art. V, § 21, mandates a vertical separation of powers between the Attorney General and the district attorneys in matters of criminal prosecution); *see also Baker v. Wade*, 743 F.2d 236, 242 n. 28 (5th Cir. 1984) (county and district attorneys have been bestowed with the "exclusive responsibility and control of criminal prosecutions").

The separation of powers doctrine requires that "any attempt by one department of government to interfere with the powers of another is null and void." *Meshell,* 739 S.W.2d at 252. Although one department has occasionally exercised a power that would otherwise seem to fit within the power of another department, courts have approved those actions only when authorized by an express provision of the constitution. *Id*. "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 Tex v. Norwood*, 418 S.W.3d 566, 570 (Tex. 2014) (quoting Tex. Const. art. II, § 1).

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The separation of powers provision may be violated in one of two ways. First, it is violated when one branch of government assumes, or is delegated, to whatever degree, a power that is more "properly attached" to another branch. *Armadillo Bail Bonds*, 802 S.W.2d at 239. Second, it is violated when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers. *Id*. at 239 (citing *Rose v. State*, 752 S.W.2d 529, 535 (Tex. Crim. App. 1987)).

Relying on this history, Stephens claims that the Attorney General's authority to prosecute an election law offense under Texas Election Code section 273.021 is unconstitutional because the Texas Constitution prohibits the legislature from granting independent criminal prosecution power to the Attorney General in district and inferior courts.

STANDARD OF REVIEW

We review *de novo* a challenge to the constitutionality of a statute. *Salinas v. State*, 464 S.W.3d 363, 366 (Tex. Crim. App. 2015). We afford great deference to the Legislature and presume that the statute is constitutional and that the Legislature has not acted unreasonably or arbitrarily. *Ex parte Lo*, 424 S.W.3d 10, 14-15 (Tex. Crim. App. 2013). The party challenging the statute normally bears the burden of establishing its unconstitutionality. *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978).

ANALYSIS OF TEXAS ELECTION CODE § 273.021

1. "Other duties" must be executive branch duties.

The Attorney General argues that the

Texas Constitution provides legislative authority to empower the Attorney General with "other duties" and that the Legislature, by enacting

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Election Code section 273.021, has conferred upon the Attorney General the authority to prosecute this case.[2]

Section 273.021 of the Texas Election Code was enacted in 1985 and is titled "Prosecution by Attorney General Authorized." Act of May 13, 1985, 69th Leg., R.S., ch. 211, § 1, 1985 Tex. Gen. Laws 1054. The statute, in its entirety is as follows:

> (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).
>
> (c) The authority to prosecute prescribed by this subchapter does not affect the authority derived from other law to prosecute the same offenses.

Tex. Elec. Code § 273.021. The court below, in agreement with the Attorney General, concluded that, by enacting section 273.021, the Legislature properly authorized the Attorney General, a member of the executive department, to represent the State in district and inferior courts to prosecute election-law violations. Against this, Stephens argues that the lower court broadened the Attorney General's power in a manner violative of the separation of powers requirement in the Texas Constitution. We agree with Stephens.

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As applied to this case, the Texas Constitution contains no provision that expressly permits the Attorney General to prosecute election law violations in district courts. However, the court of appeals interprets the constitutional clause "perform such other duties as may be required by law," Tex. Const. art. IV, § 22, to provide the requisite express permission for statewide prosecutorial power. *Stephens*, 608 S.W.3d at 255. For this, the court of appeals relied upon the rule of construction known as *ejusdem generis*. *Id*. The *ejusdem generis* rule is that, when interpreting general words that follow an enumeration of specific things, the meaning of those general words should be confined to things of the same kind. *Black's Law Dictionary* (11th ed. 2019); *Lefevers v. State*, 20 S.W.3d 707, 711 (Tex. Crim. App. 2000); *Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000).

As previously discussed, the enumerated duties of the Attorney General, as specified by the Constitution, are limited to inquiring into charter rights of private corporations, suing in state court to prevent private corporations from exercising powers not authorized by law, seeking judicial forfeiture of charters, and providing legal advice to the governor and other executive officers. Tex. Const. art. IV, § 22.

Notably absent from these enumerations is a specific grant of authority to the Attorney General concerning the prosecution of criminal proceedings. Undeterred by this omission, the court of appeals applied an expansive interpretation of the ejusdem generis doctrine, holding that, because the Attorney General may act on behalf of the State against corporations, and because corporations, like elections and elected officials, are wholly

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creatures of state actions, it follows that the Attorney General has authority to prosecute election law violations.

This is a misapplication of the *ejusdem generis* doctrine. The court of appeals disregarded the doctrine's fundamental point: that "the principle of ejusdem generis warns against the *expansive interpretation* of broad language that immediately follows narrow and

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) (emphasis added); *see also* Antonin Scalia &Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) ("Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned."). Representing the state in a criminal prosecution for election law violations is not of the same character as representing the state in suits to prevent corporations from exercising authority not authorized by law.

Further, the Constitution already grants this authority to county and district attorneys. *See* Tex. Const. art. V, § 21. Because this is already the specific duty of county and district attorneys, the court of appeals erred by misconstruing the "other duties" clause to encompass judicial branch duties.

To elucidate the absurd results that such an interpretation of "other duties" would render, Stephens notes that 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 &*id*. 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.

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If we were to adopt the reasoning of the court below, then the Legislature could grant the Water Development Board with prosecutorial authority. Perhaps this example is extreme, but it certainly emphasizes how relying on "other duties" would render meaningless the separation of powers. Since the "other duties" clause says nothing about the governmental branch from which those duties may derive, this silence must be interpreted to mean that the Attorney General's "other duties" must be executive branch duties.

The Attorney General relies on the Texas Supreme Court's opinion in *Brady v. Brooks,* 89 S.W. 1052 (Tex. 1905), to support his argument that the constitutional grant of authority to district and county attorneys does not prevent the legislature from empowering the Attorney General to represent the State in district court. In *Brady,* the Attorney General, under the authority of two separative legislative acts (the "Love Tax Bill" and the "Kennedy Bill"), brought suit in district court to recover taxes, penalties, and forfeitures from a railroad company and an oil and fuel company. 89 S.W. at 1053. The county and district attorneys filed motions to be permitted to bring the suits without the participation of the Attorney General. *Id*. They cited section 21 of article V of the Texas Constitution, which grants the authority to represent the State in all cases to the county and district attorneys. *Id*. The Supreme Court of Texas ultimately refused the county and district attorneys' writs. *Id*. at 1057. It held that that article V, section 21 of the Texas Constitution does not preclude the Legislature, pursuant to the authority of the attorney general to

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"perform such other duties as may be required by law," from empowering the attorney general to represent the State in district court. *Id*.; Tex. Const. art. IV, § 22.

We find *Brady* distinguishable from the facts of the instant case for three reasons. First, *Brady* involved a civil matter, namely, suits to recover tax money. That dispute was of the same class and character as the cases that fall within the express constitutional authority of the attorney general to sue corporations:

> 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, 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.

Tex. Const. art. IV, § 22.

The present case involves the criminal prosecution of an individual. Even the Supreme Court in *Brady* recognized that the Texas Constitution, in the judiciary article, grants the authority to represent the State in criminal matters to county and district attorneys. 89 S.W. at 1053, 1056. Further, the Supreme Court "gravely doubted" whether "it was within the power of the legislature to deprive them of that function." *Id.* at 105657 (holding that "the main function" county and district attorneys "are called upon to perform [is], namely, to prosecute the pleas of the state in criminal cases"). Therefore, any reliance on *Brady* for the proposition that the AG has independent authority to prosecute *criminal* cases is erroneous.

Second, *Brady* appears to misstate the standard of review as to when one branch of government may exercise powers of another branch. In *Brady*, the Texas Supreme Court

held that the "other duties" clause[3] does not encompass every duty, no matter where it lies in the Texas Constitution, but instead, opined that the line is crossed if the Legislature "t[ook] away from the county attorneys as much of their duties as to practically destroy their office." 89 S.W. at 1056. This is an incorrect standard to apply when analyzing a separation of powers violation. The standard for whether this is a violation of the separation of powers is not whether a legislative grant of authority to the attorney general would "destroy" the county or district attorney's office. Instead, as discussed *supra*, 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 explicit separation of powers provision does not say that another branch can abridge a duty from another branch so long as he does not "destroy" that branch.

Third, the *Brady* Court erroneously held that the "other duties" clause somehow authorizes the Legislature to extend the constitutionally granted duties of the judicial branch to the AG in the executive branch. As discussed above, article V, section 21 of the Texas Constitution provides that county and district attorneys are judicial officers who "shall" represent the state in "all cases" in the district courts. Likewise, article IV, section

22 of the Texas Constitution provides that the attorney general is an executive officer with certain enumerated duties and to whom the legislature may assign "other duties." However, the "other duties" clause does not permit the Legislature to assign to the attorney general any duty without regard to the branch of government to which it attaches. Simply put, the "other duties" clause may not transform the judicial duty of prosecutorial power into an executive duty. Such an interpretation would exempt the attorney general from the explicit separation-of-powers limitation. Therefore, we find that *Brady* is distinguishable.[4]

2. Concurrent Jurisdiction

a) The Attorney General is not "required by law" to prosecute election law violations.

Art. IV, section 22 of the Texas Constitution states that the Attorney General shall perform such other duties "*as may be required by law*." But nothing in Texas Election Code section 273.021 *requires* the Attorney General to initiate prosecution for an election code violation. A plain reading of the statute reveals that the Legislature drafted the statute using the words "*may* prosecute" and "*may* appear." Under the ordinary meaning of words, "may" is permissive while "shall" is mandatory.

See Black's Law Dictionary (11th ed. 2019). This is also true under the Code Construction Act- "may" creates discretionary authority or grants permission or a power while "shall" imposes a duty. Tex. Gov't Code

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§ 311.016. Therefore, nothing in this statute "requires" the Attorney General to prosecute election cases. Based on a plain reading of this statute, combined with the plain meaning of "as required by law" in the Texas Constitution, the Attorney General can prosecute with the permission of the local prosecutor but cannot initiate prosecution unilaterally.

b) The Texas Constitution requires county and district attorney consent.

The above notwithstanding, the court of appeals held that the Attorney General should be allowed to initiate criminal prosecutions because "some duties imposed upon the Attorney General are both executive and judicial" in nature. Citing our opinion in *Saldano v. State* as controlling authority, the court below bases the concept of permissible overlapping executive and judicial duties of the Attorney General on our comment that the legislature's ability to assign other duties to the Attorney General, "presumably, could include criminal prosecution." *Saldano*, 70 S.W.3d at 880.

Relying on this passing comment is problematic for three reasons. First, this remark is dictum, which is not controlling authority. *See Wilson v. State*, 448 S.W.3d 418, 422 (Tex. Crim. App. 2014); *Tong v. State*, 25 S.W.3d 707, 711 (Tex. Crim. App. 2000) (noting that a conclusion not necessary to the holding of a case is dicta); *State v. Brabson*, 976 S.W.2d 182, 186 (Tex. Crim. App. 1998) (referring to dicta as "unnecessary to [the Court's] ultimate disposition of" the case).

Second, it is taken out of context. This passing remark was made during the following discussion of the history of the constitutional authority and history of the Attorney General:

> The same [1876] 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.

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> The Constitution gives the county attorneys and district attorneys authority to represent the State in criminal cases. It authorizes the legislature to give the attorney general duties which, presumably, *could* include criminal prosecution.
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> From 1876 to 1923, the attorney general had one, statewide responsibility in criminal cases: to represent the State in the Court of Appeals and its successor, the Court of Criminal Appeals. That responsibility was taken away by a legislative act in 1923 that created a special office to represent the State before the Court of Criminal Appeals.

Saldano, 70 S.W.3d at 880 (citations omitted; emphasis added).

We resolutely concluded at the end of this discussion that the Attorney General has no independent criminal prosecution authority: "The attorney general . . . has no criminal prosecution authority. Rather, he is limited to representing the State in civil litigation." *Id*. at 880.

Third, we further limited the statement "presumably, could include criminal prosecution" by stating that the authority of the Attorney General is limited to assisting the district or county attorney *upon request*. *Id*. at 880. Such a request is a prerequisite for Attorney General participation in county and district criminal prosecutions. Concurrent jurisdiction certainly may exist, but the Attorney General lacks constitutional authority to

independently prosecute a crime in a district or inferior court without the consent of the appropriate local county or district attorney by a deputization order.

By requiring deputization, the Legislature made clear its intent to limit the Attorney General's authority to assistance "upon request":

> • "Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely." Tex. Code Crim. Proc. art. 2.01.

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> • A district attorney may employ, hire, or retain any assistant prosecuting attorneys, or any other personnel, that he deems necessary for the proper operation and administration of his office. Tex. Gov't Code § 41.102.
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> • These assistant prosecuting attorneys, whether they be permanent or temporary members of his staff, are bound to the same prescribed duty "to see that justice is done." Tex. Code Crim. Proc. art. 2.01. They must be licensed to practice law in this State and serve *at the will of the district attorney*. Tex. Gov't Code §§ 41.103, 41.105 (emphasis added).

In addition, the Legislature has expressly permitted the Attorney General to assist, upon request of the local prosecutor, in the prosecution of the following types of cases:

> • Thefts involving the state Medicaid program, Tex. Penal Code § 31.03(j);
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> • False statements involving mortgage loans, Tex. Penal Code § 32.32;
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> • Offenses under Chapter 35A, Health Care Fraud, Tex. Penal Code § 35A.02(f);
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> • Insurance fraud, Tex. Penal Code § 35.04; and
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> • Offenses under Chapter 39, Abuse of Office. Tex. Penal Code § 39.015.

Absent the consent and deputization order of a local prosecutor or the request of a district or county attorney for assistance, the Attorney General has no authority to independently prosecute criminal cases in trial courts. *See Saldano*, 70 S.W.3d at 880-81. Therefore, while there are some permissible overlapping duties, the Constitution specifically separates the powers of the branches. Any attempt to overlap the Attorney General's constitutional duties with county and district attorneys' constitutional duties in the sense of a Venn diagram of sorts is unconstitutional. Practically speaking, any overlap is necessarily invitational, consensual, and by request: a county or district attorney must request the assistance of the Attorney General. Under the current Constitution, overlap in

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the constitutional duties of the Attorney General and those of county and district attorneys occurs, if at all, on a case-by-case basis.

Therefore, Justice Goodman's dissent rightly characterized as a "non-sequitur" the court of appeals' conclusion, because even though ". . . the Constitution expressly gives the Attorney General duties that are both executive and judicial in function despite his status as an officer of the executive department, it does not follow that the Legislature may give him any additional judicial duty it desires." *Stephens*, 608 S.W.3d at 260. Absent a request from the district attorney, and without the district attorney's supervisory authority, the Attorney General violates the separation of powers provision by assuming a power that is more "properly attached" to a member of the judicial branch of government. *See State ex rel. Hill v. Pirtle*, 887

S.W.2d 921, 928 (Tex. Crim. App. 1994). Since none of the Attorney General's enumerated duties concern criminal or electoral matters, Election Code section 273.021 is unconstitutional.

c) The court of appeals holding creates a statutory conflict.

Closer consideration of the statute that the State alleges Stephens violated in Count I further highlights the limitation on the Attorney General's prosecutorial authority. Stephens was charged with tampering with a governmental record in violation of section 37.10 of the Texas Penal Code. In this same statute, subsection (i) reads: "*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).

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The Legislature did not grant the authority of the Attorney General to prosecute just any tampering offense, only a small class of cases involving the state Medicaid program. And even in that subset of cases, the consent (through a deputization order) of the local district or county attorney is required. The court of appeals below overlooked this express limitation on the Attorney General's prosecutorial authority under section 37.10. By holding that Election Code section 273.021 authorized the Attorney General to prosecute campaign finance violations under Penal Code section 37.10, the court of appeals created a conflict between the two statutes: it allowed the Attorney General to prosecute a class of tampering violations that the statute does not contemplate the Attorney General prosecuting.

Two rules of statutory construction prohibit this conclusion. First, the "general versus the specific" canon of statutory construction stands for the proposition that "[i]f there is a conflict between a general provision and a specific provision, the specific provision prevails" as an exception to the general provision. *See* Scalia &Garner, *Reading Law*, at 183. Penal Code 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. Election Code section 273.021 applies more generally to "election laws" and is in a different code. Therefore, we harmonize these two statutes and conclude that the specific provision in Penal Code section 37.10(i) prevails over the general provision in Chapter 273 of the Election Code.

Second, when statutes are in conflict, the more specific and later enacted statute controls. *See Clapp v. State*, 639 S.W.2d 949, 952 (Tex. Crim. App. 1982). Subsection

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37.10(i) of the Penal Code was enacted by the legislature in 2003. Act of May 30, 2003, 78th Leg. R.S., ch. 257, § 16, 2003 Tex. Gen. Laws 1169. Contrast this with the Election Code section 273.021, which was last amended in 1997. Act of May 26, 1997, 75th Leg. R.S., ch. 864, § 255, 1997 Tex. Gen. Laws 2780. Therefore, subsection 37.10(i) is the more recent enactment. Therefore, the Attorney General may prosecute only Medicaid fraud, and not election law related cases under Penal Code section 37.10.

CONCLUSION

We hold that the grant of prosecutorial authority in section 273.021 of the Texas Election Code violates article II, section 1 of the Texas Constitution, the Separation of Powers Clause. We reverse the decision of the court of appeals and remand the case to the trial court to dismiss the indictment.

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DISSENTING OPINION

Yeary, J., filed a dissenting opinion.

As the Court today readily acknowledges, in considering whether the Legislature has rendered an unconstitutional statute, we must

first indulge every reasonable presumption that it has not. Majority Opinion at 9. An argument for upholding the constitutionality of the statute at issue in this case is readily available, based upon at least persuasive, if not binding, authority from the Texas Supreme Court. Because the Court

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nevertheless concludes that the statute is unconstitutional, I respectfully dissent.

THE SEPARATION OF POWERS ISSUE IN THIS CASE

The separation of powers provision of the Texas Constitution has remained essentially unchanged since 1845. The major change that occurred within the 1845 version was its "recognition that the doctrine of separation, however rigid in principle, was subject to exceptions 'expressly provided' in the constitution." George D. Braden, et al., 1 THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS, at 89 (1977). Article II, Section 1 of the Texas Constitution divides the government of the state into "three distinct departments": the "Legislative," the "Executive," and the "Judicial." TEX. CONST. art. II, § 1. It then explicitly declares that "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*." *Id*. (emphasis added).

The Texas Constitution establishes the offices of County and District Attorneys under the "Judicial" department of government, and it provides that those officers "shall represent the State in all cases in the District and inferior courts in their respective counties . . ." TEX. CONST. art. V, § 21. The Attorney General (hereinafter, "AG") is a "person" established within the "Executive" department. Notwithstanding this arrangement, Section 273.021(a) of the Election Code, which was first enacted in 1985, expressly provides that "[t]he Attorney General may prosecute a criminal offense prescribed by the election laws of this state." TEX. ELECTION CODE § 273.021(a).[1] Subsection (b) of this provision likewise

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authorizes the AG to appear before a grand jury in connection with prosecuting such offenses, and Subsection (c) provides that the AG's authority in these regards is not exclusive; that is to say, it "does not affect the authority derived from other law to prosecute the same offenses." *Id*, (b) &(c).

The question in this case, then, is whether the Constitution has elsewhere "expressly permitted" the AG to "exercise" a power more "properly attached" to local prosecuting authorities. Absent some "express" language in the Texas Constitution-beyond Article II, Section 1-that "permits" the Legislature to authorize the AG to exercise a power otherwise assigned to officers established within the Judicial department, it would seem that Section 273.021 of the Election Code might violate separation of powers.

But there *is* such express language. It appears in the very provision that pertains to the office of the AG, Article IV, Section 22 of the Texas Constitution. TEX. CONST. art. IV, § 22. Among the "duties" specifically set out in this provision is a catch-all: "and perform such other duties as may be required by law." *Id*.

It was long ago held, in *Brady v. Brooks*, that this catch-all provision authorizes the "Legislative" department to pass statutes authorizing even *exclusive* authority in the AG to initiate civil lawsuits on behalf of the State in certain kinds of cases, notwithstanding what would otherwise constitute an unconstitutional encroachment upon a "power" otherwise residing in the "Judicial" department. 99 Tex. 366, 89 S.W. 1052 (Tex. 1905). Then, in 2014, the Fifth Court of Appeals relied on the Texas Supreme Court's decision in *Brady* to

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resolve the very issue the Court addresses today in this case, holding that the statute does not

violate separation of powers. *Medrano v. State,* 421 S.W.3d 869, 878-80 (Tex. App.-Dallas 2014, pet. ref'd). When I examine these cases, they persuade me that Section 273.021(a) does not violate the principle of separation of powers embodied in Article II, Section 1, of our state constitution.

BRADY

When *Brady* was decided, in 1905, the relevant constitutional provisions-Article II, §1, and Article IV, § 22-read in all essential respects the same as they do today.[2] The AG brought civil suits in two cases pursuant to Legislative enactments that specifically and exclusively authorized him to do so in the type of suits involved. 99 Tex. at 373-74, 89 S.W. at 1053. In a mandamus action, it was argued that to implement that legislation would violate Article V, Section 21 of the Texas Constitution, which vests the authority to represent the State "in all cases in the district and inferior courts in their respective counties" with the local county attorney (or, in some circumstances, the district attorney). *Id*., 99 Tex. at 374, 89 S.W. at 1053 (quoting TEX. CONST. art. V, § 21). The Texas Supreme

Court denied mandamus relief.

In doing so, the Supreme Court explained in detail why it found no separation of powers problem with the legislative enactments. I quote liberally from the opinion in *Brady* to emphasize its relevance to the issue before us today:

> [W]e do not controvert the proposition . . . that if section 21 of article 5 should be construed as conferring upon county and district attorneys the exclusive power to represent the state in all cases except those in which the Attorney General is expressly authorized to act, then the Legislature would be prohibited from subtracting from or abridging the powers so conferred. But in our opinion that article does not necessarily control the section which defines the powers and duties of the Attorney General. The words, 'he shall perform such other duties as may be defined by law,' are as broad as those employed in section 21 of article 5; and if unrestricted would empower the Legislature to authorize him to make it his duty to represent the state in any case in any court. That section 21 of article 5 does place an important restriction upon that language we do not doubt; for example, in our opinion, the Legislature could not take away from county attorneys as much of their duties as practically to destroy their office.
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> Now it is not unreasonable to presume that when the framers of the Constitution came to formulate the section which defines the duties of county and district attorneys, if the objection had been urged that the powers conferred were too broad and would deprive the state of having suits of the greatest importance prosecuted by its Attorney General, the reply would have been that the power expressly given to the Legislature to impose upon the Attorney General duties in addition to those expressly defined was sufficient to enable that body to provide that that officer should represent the state in any class of cases where his services should be deemed requisite. So as to voters who adopted the Constitution. If the same objection had been interposed by them to the Constitution was submitted for their ratification, namely, that section 21 of article 5 gave too much authority to the officers therein named, they would in all probability have been satisfied upon that matter, by having it pointed out to them, that section 22 of article 4 authorized the

> Legislature to restrict the powers given by section 21 [of article 5], by conferring them in part upon the Attorney General. * * * All provisions of the Constitution in relation to the same subject-matter must be construed together. We attach no importance to the fact that the definition of the duties and powers of the Attorney General are placed in article 4, which is the article devoted to the executive department of the state government. The duties imposed upon him 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

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> courts. The very name imports, even in ordinary language, that he is the chief law officer of the state and is that in use in all common-law statutes to designate such officer. So article 5, the judiciary article, embraces the definition of duties of the sheriffs and clerks of the courts whose powers and duties are executive. Section 22 of article 4 might appropriately have been placed in article 5, and we think it should be construed precisely as if it had been so placed.
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> * * *
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> To discover what was intended by section 21 of article 5, construed in light of section 22 of article 4, we must look to the reason of the provisions deductible from the interests of the state which were sought to be guarded, and that construction ought to be adopted which will best safeguard the varied and important rights to be affected. * * * Again, we cannot lose sight of the fact that the voters, especially in restricted localities, not infrequently are influenced by some improper motive, some sympathy for the candidate or some popular caprice which leads them to put incompetent men into office, a result by no means so probable in case of an important office like that of Attorney General in whose election all the voters of the state have the right to participate.

Id. 99 Tex. at 377-79, 89 S.W. at 1055-57.

I take this language in *Brady* to be an unequivocal acceptance of the proposition that the catch-all clause in Article IV, Section 22-"and perform such other duties as may be required by law"-satisfies the exception clause in Article II, Section 1. In other words, the Legislative department is constitutionally authorized, by the "other duties as required by law" language in that Article, to grant some responsibility to the AG for conducting litigation in the trial courts on the State's behalf, notwithstanding Article V, Section 21, at least so long as the grant does not invade the local county or district attorney's authority so pervasively "as practically to destroy their office."[3]

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The Court seeks to distinguish *Brady* on the ground that it is a civil case, and because the AG was empowered to prosecute those civil cases by the specific authorizing language in Article IV, Section 22, since it involved recovering delinquent taxes from corporations. Majority Opinion at 14. This is a revisionist reading of the Supreme Court's *Brady* opinion. From the extensive quote excerpted above, and from what seems to me to be an objective reading of that opinion as a whole, it is clear that *Brady*'s rationale was based upon an analysis of the catch-all "other duties" clause in Article IV, Section 22, and decidedly *not* upon the corporations-related authority it specifically confers. The Court thus construes *Brady* according to what it thinks the opinion *could* have decided rather than what it, in fact, did decide.[4]

The Court concludes: "Simply put, the

'other duties' clause may not transform the judicial duty of prosecutorial power into an executive duty." Majority Opinion at 16. But as a categorical statement, I believe this conclusion to be mistaken. *Brady* stands for the proposition that the "other duties" clause in Article IV, Section 22, may indeed authorize the Legislative department to consign a limited authority upon the AG that might ordinarily be regarded as the bailiwick of the Judicial department, so long as that authority is not extravagantly invasive. According to my reading of *Brady*, nothing about this separation-of-powers principle is limited to the realm of civil cases.

Brady and *Medrano* are the closest authorities on point. The Court nevertheless that the Attorney General shall 'perform such other duties as may be required by law.' Tex. Const., Art. IV, § 22; see *Brady*, supra, 89 S.W. at 1055-56."

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declares that *Brady* is "distinguishable." Majority Opinion at 14 &16. But what the Court seems to really mean by that is that *Brady* was wrong *on the law*: (1) It used the wrong standard. *Id*. at 15. (2) And it "erroneously held that the 'other duties' clause somehow authorized the Legislature to extend the constitutionally granted duties of the judicial branch to the AG in the executive branch." *Id*. at 16. But it concerns me that the Court would so readily declare that our sister court has applied the wrong legal standard or that its construction of the same provision of our Texas Constitution is plainly "erroneous." At the very least, the Court should first try to harmonize its understanding with that Court's. The *Brady* construction of Article IV, Section 22, counsels in favor of recognizing the AG's authority to prosecute election law violations, just as the Fifth Court believed it did in *Medrano*. The Court should adhere to it.

MEDRANO

The Fifth Court of Appeals' 2014 opinion in *Medrano* relied heavily upon *Brady* to explain why it did not violate Article II, Section 1, for the Legislature to give litigation authority to the AG to "prosecute a criminal offense prescribed by the election laws of this state" pursuant to Section 273.021(a) of the Election Code-the very issue before this Court today. Along the way, the Fifth Court observed:

> Our courts have long recognized the legislature may have sound reasons for having a statewide agency pursue some claims in place of the district or county attorney. *See Brady*, 89 S.W. at 1056. Generally speaking, as the State argues here, this statute allows the AG to "step in" when election violation cases may be "politically sensitive" at the local level, which could discourage local prosecutors from acting. We conclude the [L]egislature's enactment of [the statute] does not delegate a power to one branch that is more properly attached to another nor does it allow one branch to unduly interfere with another.

Medrano, 421 S.W.3d at 880. Citing *Brady* for the proposition that the Legislature was

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authorized to empower the AG to prosecute cases in the trial court under the catch-all clause of Article IV, Section 22, the Fifth Court concluded that Section 273.021(a) of the Election Code "does not violate the separation of powers doctrine[.]" *Id*. at 878-80. Eight years ago, this Court refused discretionary review of *Medrano*, [5] and the court of appeals in this case cited it as a primary authority for its holding. *State v. Stephens*, 608 S.W.3d 245, 255 (Tex. App.-Houston [1st. Dist.] 2020). Nevertheless, today the Court holds, contrary to both *Brady* and *Medrano*, that Section 273.021(a) *does* violate the separation of powers provision in our Texas Constitution.

EJUSDEM GENERIS

The court of appeals in this case, in addition to relying on *Medrano*, incorporated an analysis of Article IV, Section 22, that involved

the canon of construction known as *ejusdem generis*, which literally means "of the same kind." *Shipp v. State*, 331 S.W.3d 433, 437 (Tex. Crim. App. 2011) (plurality opinion). This doctrine provides that, "[w]here general words follow specific words in an enumeration describing a statute's legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Norman J. Singer &Shambie Singer, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:17 at 364-68 (7th ed. rev. 2014). The court of appeals believed that the catch-all phrase in Article IV, Section 22 ("and perform such other duties as may be required by law") was "in keeping with" the specific delegations of

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constitutional power to the AG, "which allows the Attorney General to represent the State [in the Supreme Court of the State], to advise the State, and to act on behalf of the State against corporations." *Stephens*, 608 S.W.3d at 255. The court of appeals reasoned: "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." *Id*.

The Court today understandably takes issue with this (to me, at least, confusing) application of *ejusdem generis*, characterizing it as a "misapplication." Majority Opinion at 12. The Court observes: "Representing the state in a criminal prosecution for election law violations is not of the same character as representing the state in suits to prevent corporations from exercising authority not authorized by law." *Id*. I do not disagree with this observation. But in fact, it seems to me a mistake to suppose that *ejusdem generis* should have any application *at all* in construing Article IV, Section 22.

The list of duties enumerated in Article IV, Section 22, do not exemplify specific examples of the same sorts of duty to begin with, so there is nothing about them to inform how broadly or narrowly to construe the "other duties" catch-all phrase that follows them. Instead, those enumerated duties are quite variable: (1) represent the State in all civil suits at the level of the Supreme Court; (2) take "proper and necessary" "action in the courts" to regulate corporate behavior; and (3) provide legal advice to other executive branch officers as requested. Though specific, these duties share no particular characteristics that rationally serve to inform whether the "other duties as may be required by law" must necessarily be limited to duties ordinarily thought to be exclusive to the Executive department.[6]

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Indeed, two of these duties have even been characterized as at least quasi-judicial: (1) representing the State in all appellate matters before the Supreme Court, and (2) taking appropriate "action in the courts" (presumably even trial-level courts) to curb unlawful corporate activity. This is exactly what the *Brady* opinion was talking about when it described the duties of the AG as hybrid in nature.[7] *See Brady*, 99 Tex. at 378, 89 S.W. at 1056 ("The duties imposed upon him 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."). In my view, *ejusdem generis* is of no use at all in this inquiry, and it only seems to lead the Court to a conclusion that is at odds with *Brady*.[8]

That the Texas Constitution also permits legislative assignment of "other duties" to governmental entities other than the AG, such as the Texas Water Development Board,

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does not render the holding of *Brady* absurd. Majority Opinion at 12-13. In the first place, even the Court recognizes the "extreme" nature of its hypothetical. *Id*. at 13. In any event, even if the Legislature did deem it appropriate to permit lawyers from the Texas Water Development Board to prosecute criminal offenses that involve its particular area of expertise, the Court has not shown that its participation in those prosecutions would "destroy" the offices of local prosecutors.

THE AG IS NOT "REQUIRED" TO PROSECUTE

Article IV, Section 22, permits the Legislature to prescribe "other duties as may be required by law." TEX. CONST. art. IV, § 22. It is true that Section 273.021(a) does not "require" the AG to prosecute criminal offenses prescribed by the election laws. Majority Opinion at 16-17. Rather, it *permits* him to, at his discretion, as circumstances warrant. This should not give us pause. Section 273.021(a) manifestly "requires" the AG to *exercise* that discretion to decide *whether* to prosecute election law violations, as appropriate. I believe that this constitutes enough of a "require[ment]" to avoid any conflict with Article II, Section 1's prohibition of one governmental department unduly encroaching upon the prerogative of another. And the fact that the AG may ultimately choose not to exercise his discretion in this regard actually contributes to the conclusion that the limited Legislative grant of discretion embodied in Section 273.021(a) does not "destroy" the office of the local prosecuting authority. *Brady*, 99 Tex. at 378, 89 S.W. at 1056.

SALDANO

Speaking of Article V, Section 21 and Article IV, Section 22, this Court in *Saldano v. State*, 70 S.W.3d 873, 880 (Tex. Crim. App. 2002), unanimously observed:

> The [Texas] Constitution gives county attorneys and district attorneys

> authority to represent the State in criminal cases. It authorizes the [L]egislature to give the attorney general duties which, presumably, could include criminal prosecution.

The Court today characterizes this statement as dicta. Majority Opinion at 17. But it is dicta that is consistent with the Texas Supreme Court's holding in *Brady*. Still, the Court insists, we went on in *Saldano* to recognize that the AG categorically "has no criminal prosecution authority." Majority Opinion at 18 (citing *Saldano*, 70 S.W.3d at 880, which in turn cites to the plurality opinion in *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 930 (Tex. Crim. App. 1994)). The Court also contends that any ability that the AG may have to become involved in criminal litigation "is limited to assisting the district or county attorney *upon request*." Majority opinion at 18 (citing *Saldano*, 70 S.W.3d at 880, which in turn cites TEX. GOV'T CODE § 402.028). But the Court today is mistaken to rely on *Saldano* for these propositions, because *Saldano* (albeit unanimously decided) was demonstrably mistaken in two important respects.

First, *Saldano* was simply incorrect as a matter of fact to assert that the AG had no criminal prosecutorial authority-if for no other reason than that Section 273.021(a) of the Election Code, itself, had been enacted in 1985, some seventeen years before *Saldano* was decided. Only by presuming that Section 273.021(a) could not provide any legitimate authority to the AG to prosecute a criminal case could the Court have properly claimed, as *Saldano* did, that the AG had absolutely *no* criminal prosecutorial authority. And that, of course, would beg the question entirely.

Second, the Court also observed in *Saldano* that "[t]he authority of the attorney general is limited to assisting the district or county attorney, upon request." 70 S.W.3d at 880. For this proposition, the Court cited only Section 402.028 of the Texas Government

Code. *Id*. at 880 n.30 (quoting TEX. GOV'T CODE § 402.028). It is true that this provision of the Government Code explicitly says that, upon "request[,]" the AG "may provide assistance" to local prosecutors "in the prosecution of all manner of criminal cases[.]" TEX. GOV'T CODE § 402.028(a).[9] But to conclude from this provision that the AG may *only* prosecute criminal cases upon request is faulty logic.

Even the legislative provision that the AG

may participate "in all manner of criminal cases," albeit only at the invitation of the district or county attorney, is dependent on some constitutional authorization.[10] The "other duties" provision is the only thing that seems to be available to justify such legislative action. In any event, the existence of § 402.028(a)

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does not mean that the Legislature itself may not *also* provide that, with respect to *particular* types of criminal cases, the AG may participate whether he is invited to or *not*. That the Legislature has generally authorized the AG to participate in criminal prosecutions, but only upon request, does not preclude it from otherwise explicitly authorizing more direct and specific AG exercises of prosecutorial power.

Indeed, the Court today makes the same mistake of logic in its reliance upon the plurality opinion of this Court in *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921 (Tex. Crim. App. 1994). Majority Opinion at 20. *Hill* held that it did not violate separation of powers for the AG to participate in criminal prosecutions at the request of the district attorney. But, as is true of Section 402.028 of the Government Code, *Hill* does not say that the AG can *only* prosecute by invitation of the local prosecutor. That the AG is always *permitted* to prosecute under these circumstances does not mean that he is categorically *prohibited* from prosecuting in their *absence*. Once again, it begs the question entirely to declare that Section 273.021(a) must be unconstitutional under this lapse in logic.

COUNT I: THE TAMPERING PROSECUTION

Because I disagree that Section 273.021(a) of the Election Code is unconstitutional, I must address the State's second and third grounds for review: whether the court of appeals erred to reverse the trial court's decision to quash the tampering allegation in Count I of the indictment. Majority Opinion at 5. I would hold that the court of appeals correctly reversed the trial court's ruling in this regard, and I would affirm its judgment in full.

Section 273.021(a) permits the AG to "prosecute a criminal offense prescribed by the election laws of this state." TEX. ELECTION CODE § 273.021(a). It does not require the consent, permission, or request of the local prosecuting authority. Nor does it seem on its

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face necessarily to limit the AG's authority to the prosecution of offenses "prescribed by the election laws" in the Election Code itself.

Moreover, Section 37.01(2)(E) of the Texas Penal Code defines "governmental record" to include "an official ballot or other election record[.]" TEX. PENAL CODE § 37.01(2)(E). A person who "tampers" with such a governmental record violates Section 37.10 of the Penal Code. TEX. PENAL CODE § 37.10. It would certainly seem that tampering with "an official ballot or other election record" is "a criminal offense prescribed by the election laws of this state" in contemplation of Section 273.021(a) of the Election Code. The AG should therefore be able to prosecute such an offense with or without the local prosecutor's permission.

Section 402.028 of the Government Code, on its face, would also seem to permit the AG to participate in the prosecution of such a tampering case, in any event, at the request of the local prosecutor.[11] However, there is a provision in the tampering statute itself that might yet be read to prohibit the AG from assisting the local prosecutor in all but one category of tampering offense. Section 37.10(i) expressly provides for the AG's assistance-in fact, "concurring jurisdiction"-to prosecute a tampering offense "that involves the state Medicaid program." TEX. PENAL CODE § 37.10(i).[12] It might be argued

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that, by providing explicitly for those types of tampering offenses that the AG *may* participate in, with the local prosecutor's consent, Section 37.10 has, by necessary negative implication, has excluded the AG from consensual participation in *any other* type of tampering

prosecution-*expressio unius est exclusio alterius*.[13] This would make Section 37.10(i) of the Penal Code the more specific provision, which should control over the more general, but conflicting, provision of Section 402.028(a) of the Government Code, according to the Code Construction Act.[14]

But this argument cannot prevail to make Section 273.021(a) of the Election Code inapplicable to the prosecution of a tampering case that involves "an official ballot or other election record." This is so for two reasons. First, Section 273.021(a) is not a provision about *consensual* participation by the AG; instead, it permits the AG to prosecute whether or not the local prosecutor requests it or consents to it. Second, to the extent that the AG's participation is limited to the violation of "election laws," the canon of *expressio unius est exclusio alterius* simply does not apply. The reason is that Section 273.021(a) constitutes another *specific* statute-not a general statute like Section 402.028(a) of the Government Code. Penal Code Section 37.10(i) cannot be invoked to preclude the operation, by

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necessary implication, of another *specific* statute.

In any event, the Court should endeavor to harmonize statutes whenever they seem on the surface to conflict.[15] Here, assuming that they even require it, I would harmonize the two provisions-Section 37.10 of the Penal Code and Section 273.021(a) of the Election Code-by concluding that each governs a discretely specific scenario: The AG may, whenever he has the consent of the local prosecutor, prosecute tampering cases that involve Medicaid, under Section 37.10(i); and he also may always prosecute tampering cases, at his own discretion, whenever they involve "an official ballot or other election record[,]" under Section 273.021(a). Whether the AG ultimately may also prosecute *other* types of tampering offenses, at least with the local prosecutor's consent, I would not resolve today.

CONCLUSION

In summation, I would conclude that Section 273.021(a) of the Election Code does not violate separation of powers, and that it is therefore constitutional. Having so decided, I would also conclude that the court of appeals correctly held that the AG may exercise its discretion under that provision to prosecute Stephens under its theory of tampering with a governmental record (that is, tampering with "an official ballot or other election record"). Accordingly, I would affirm the judgment of the court of appeals in whole. Because the Court does not, I respectfully dissent.

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Notes:

[1] Relevant to our jurisdiction in this matter, the 1876 Texas Constitution took away the Supreme Court's jurisdiction in criminal cases, thereby creating the Court of Appeals (after 1891 the Court of Criminal Appeals). Tex. Const. art. V, §§ 1, 5.

[2] It is worth noting here that, in addition to the implied versus explicit separation of powers provision distinction between the federal and Texas constitutions, the Texas constitution constrains government power in another distinctive way: It lacks a Necessary and Proper Clause or “Sweeping Clause, ” often invoked to expand Congress's powers beyond those specifically enumerated. See U.S. CONST. art. I, § 8, cl. 18 (“To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”)

[3] It is worth mentioning in passing that the *Brady* court appears to misstate the language in the "other duties" clause. The Supreme Court held: "The words, 'he [the attorney general] shall . . . perform such other duties as may be *defined* by law,' are as broad as those employed in section 21 of article 5; and if unrestricted would empower the Legislature to authorize him and to make it his duty to represent the state in any case in any court." 89 S.W. at 1055-56. However, the correct language in the clause is "he shall . . . perform such other duties as may be *required* by law." Whether the distinction between the words "defined" and "required" was dispositive in *Brady* does not impact *Brady*'s inapplicability to this case.

[4] The dissent takes umbrage with this Court's refusal in 2014 to resolve these identical grounds in *Medrano v.*

State, 421 S.W.3d 869, 878-80 (Tex. App.-Dallas 2014, pet. refd). In *Medrano*, the Fifth Court of Appeals relied on *Brady* and held that the same statute presented in the instant PDR did not violate separation of powers. However, we note that Medrano did not adequately brief this issue, and therefore, presented nothing for review. *See* Tex.R.App.P. 68.4(h), 68.6; *see also Lucio v. State*, 351 S.W.3d 878, 898 (Tex. Crim. App. 2011) (holding that this Court is under no obligation to make Appellant's arguments for her).

[1] As originally enacted in 1985, Section 273.021(a) permitted the AG to prosecute only those election law violations that occurred "in connection with an election covering territory in more than one county." Acts 1985, 69th Leg., ch. 211, § 1, p. 1054, eff. Jan. 1, 1986. This limitation was removed by a revision to Section 273.021(a) in 1993. Acts 1993, 73rd Leg., ch. 728, § 79, p. 2859, eff. Sept. 1, 1993.

[2] Article IV, Section 22, as it presently reads, is quoted in full by the Court. Majority Opinion at 7. For convenience's sake, I will reiterate it here:

> Sec. 22. 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, 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 corporations 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.

[3] In describing *Brady*'s holding in *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987), this Court explained that "[t]his apparent encroachment upon the power of the district and county attorneys was permissible because an express provision of the Texas Constitution provides

[4] That the Supreme Court *could* have ruled the same way in *Brady* on the rationale that the AG was authorized to prosecute them under the specific authority that Article IV, Section 22, confers, rather than under the catch-all "other duties" provision, does not strike me as a foregone conclusion.

[5] The Court points out that *Medrano* failed to fashion a sufficiently detailed argument in his petition for discretionary review, permitting this Court to summarily refuse his petition. Majority Opinion at 16 n.4. But this Court is also authorized to grant discretionary review "on its own initiative[,]" which it could well have done had the Court thought at that time that the Fifth Court of Appeals had mishandled this important issue. TEX. R. APP. P. 66.1, 67.1.

[6] As Justice Scalia and Professor Garner have observed: "When the initial terms all belong to an obvious and readily identifiable genus, one presumes the speaker or writer has that category in mind for the entire passage." Antonin Scalia &Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS at 199 (2012).

[7] Personally, I am inclined more toward the view that the duties of county and district attorneys are quasi-executive than that the duties of the AG are quasi-judicial. As spelled out in Article V, Section 21 of the Texas Constitution, local prosecutors "shall represent the State in all cases in the District and inferior courts in their respective counties[.]" TEX. CONST. ART. V, § 21. I REGARD REPRESENTING THE INTERESTS OF THE STATE IN JUDICIAL PROCEEDINGS TO BE MORE OF AN EXECUTIVE FUNCTION THAN A JUDICIAL ONE. BE THAT AS IT MAY, THE BOTTOM LINE HERE, AS *Brady* establishes, is that there is an inherent degree of crossover between the duties of what are technically judicialdepartment functionaries (county and district attorneys) and the duties that are spelled out for the executive-department AG.

[8] In any event, since Section 273.021(a) was enacted in 1985, another provision in the Texas Constitution has been amended that would have provided authority for the Legislature to do so-without the impediment of a faulty *ejusdem generis* analysis. In November of 1999, the electorate of Texas adopted an amendment to Article IV, Section 23, so that it now applies to the AG as well as other state-wide elected officers. Without enumerating any other duties, this constitutional provision also now provides that such officers, including the AG, "shall . . . perform such duties as are or may be required by law." Acts 1999, 76th Leg., H.J.R. 62, § 27, p. 6632, adopted Nov. 2, 1999. Presumably the Legislature could currently pass the equivalent of Section 273.021(a) of the Election Code on authority of *this* constitutional provision without violating separation of powers, even if it arguably could not have in 1985.

[9] This provision reads:

> At the request of a district attorney, criminal district attorney, or county attorney, the attorney general may provide assistance in the prosecution of all manner of criminal cases, including participation by an assistant attorney general as an assistant prosecutor when so appointed by the district attorney,

> criminal district attorney, or county attorney.

TEX. GOV'T CODE § 402.028(a). Subsection (b) of this statute permits (but does not require) the local prosecutor to "appoint and deputize an assistant attorney general as assistant prosecutor" to provide such prosecutorial assistance. TEX. GOV'T CODE § 402.028(a).

[10] Art. II, § 1, explicitly provides that provides that "no person . . . being of one of these departments . . . shall exercise any power attached to . . . others, *except as herein expressly permitted*." TEX. CONST. art. II, § 1 (emphasis added). The Court does not identify where the Constitution "expressly permit[s]" the exercise of a power of the judicial department by a member of the executive department so long as an officer within the judicial department invites him to do so. Does the Court mean to suggest that, upon invitation by a judicial department official, an executive department official sheds his or her membership in the executive department and reappears within the judicial department? I cannot agree. The only reason the Legislature is authorized to provide for the AG to participate in criminal prosecutions upon invitation by a county or district attorney is the fact that the Constitution provides that the AG may exercise "other duties as may be required by law." TEX. CONST. art. IV, § 22. *Cf. Board of Water Engineers v. McKnight*, 111 Tex. 82, 92, 229 S.W. 301, 304 (1921) ("The Constitution, in its prohibition against conferring on persons in one governmental department power belonging to another, contains no exception of instances wherein the latter department may review the acts of the former. The Constitution making no such exception, the courts should not make it.").

[11] *See* note 9, *ante*.

[12] This provision reads:

> 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).

[13] *See* Norman J. Singer & Shambie Singer, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:23 at 406-13 (7th ed. rev. 2014) ("*Expressio unius* instructs that, where a statute designates a form of conduct, the manner of its performance and operation, and the persons and things to which it refers, courts should infer that all omissions were intentional exclusions.") (footnotes omitted). Justice Scalia and Professor Garner have called it the "negative-implication canon." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS at 107 (2012).

[14] *See* TEX. GOV'T CODE § 311.026(b) ("If the conflict between the general provision and the special . . . provision is irreconcilable, the special . . . provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.").

[15] *See* TEX. GOV'T CODE § 311.026(a) ("If a general provision conflicts with a special . . . provision, the provisions shall be construed, if possible, so that effect is given to both.").
