

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

ANNE GANNON, in her capacity as
PALM BEACH COUNTY TAX
COLLECTOR, on behalf of PALM
BEACH COUNTY,

Petitioner,

Case No. SC20-957

v.

AIRBNB, INC.; AIRBNB PAY-
MENTS, INC.; HOMEAWAY.COM,
INC.; HOMEAWAY, INC.; and
TRIPADVISOR, LLC,

Respondents.

BRIEF OF PETITIONER ON JURISDICTION

On review from the Fourth District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

This is a case about taxes. Specifically, the Tourist Development Tax on the transient rental of rooms, commonly known as a “bed tax,” that Florida Statutes § 125.0104 authorizes counties to levy and impose.

Ann Gannon, in her capacity as Palm Beach County Tax Collector, on behalf of Palm Beach County, filed a declaratory-judgment action against Airbnb Inc., Airbnb Payments Inc., Homeaway.com Inc., HomeAway Inc., and TripAdvisor LLC. *Gannon v. Airbnb Inc.*, No. 4D19-541, slip op. at 1 (Fla. 4th DCA Mar. 25, 2020) (at A4).

Airbnb, Homaway.com, and TripAdvisor (“the Companies”) each manage online travel platforms that allow property owners to list their properties on the platforms, which guests can then rent. A5. While the Companies control many aspects of the transaction and provide services to both sides of the transaction, it was undisputed that the Companies did not have possessory rights in the properties. *See* A5, 8.

In the lawsuit, Gannon asserted that the Companies’ conduct and activities demonstrated that they were in fact dealers, required to register as such, and to collect and remit the TDT to Gannon under sections 125.0104 and 212.0305. A5. The trial court “conclud[ed] that the Owners were responsible to collect and pay the tax because ‘dealers are limited to those engaged in the business of renting, not the

business of servicing those in the business of renting.” A5-6. The court, therefore, granted summary judgment for the Companies.

Gannon appealed to the Fourth District Court of Appeal and argued that the Companies were required to register as dealers and collect and remit taxes on behalf of owners for two reasons: 1) the Companies, through their respective platform services, exercised a taxable privilege by engaging in the business of renting, leasing, or letting short-term accommodations;¹ or 2) they received payment on the owners’ behalf.² A6. A majority of the panel of the Fourth District disagreed with those arguments and affirmed, with one judge dissenting.

The majority relied on *Alachua County v. Expedia Inc. (Alachua II)*, 175 So. 3d 730 (Fla. 2015) (plurality), and *Alachua County v. Expedia Inc. (Alachua I)*,

¹ § 125.0104(3)(a)1. (“It is declared to be the intent of the Legislature that every person who rents, leases, or lets for consideration any living quarters or accommodations in any hotel, apartment hotel, motel, resort motel, apartment, apartment motel, roominghouse, mobile home park, recreational vehicle park, condominium, or timeshare resort for a term of 6 months or less is exercising a privilege which is subject to taxation under this section....”).

² § 125.0104(3)(f) (“The tourist development tax shall be charged by the person receiving the consideration for the lease or rental, and it shall be collected from the lessee, tenant, or customer at the time of payment of the consideration for such lease or rental.”); § 125.0104(3)(g) (“The person receiving the consideration for such rental or lease shall receive, account for, and remit the tax to the Department of Revenue at the time and in the manner provided for persons who collect and remit taxes under s. 212.03. The same duties and privileges imposed by chapter 212 upon dealers in tangible property, respecting the collection and remission of tax ... in the administration of that chapter shall apply to and be binding upon all persons who are subject to the provisions of this section. ...”).

110 So. 3d 941 (Fla. 1st DCA 2013). A6-8. On Gannon’s first argument, the majority held the Companies were not exercising the taxable privilege of engaging in the business of renting because they did “not own, possess, or have a leasehold interest to convey any of the properties listed on their online platforms,” that they were “simply conduits.” A8.

On Gannon’s second argument, the majority held that the Companies were not dealers under the relevant statutes because, again, they did not have possessory interests in the properties. A8-10. “Rather,” the majority concluded, “a ‘dealer’ is the owner of the property, or the owner’s agent, who ultimately receives the consideration.” A9. The majority rejected Gannon’s argument that, based on the Companies’ terms of service, they were agents, limiting “dealer” to someone who has a possessory interest. A9-10. And the majority rejected a plain reading of the statutes, which Judge Gross urged in dissent, by invoking the absurdity doctrine. A10.

Judge Gross dissented in part and concurred in part. Judge Gross concurred with the majority’s rejection of Gannon’s first argument. A16. Based on the plain language of the statutes, however, Judge Gross concluded that Airbnb and TripAdvisor “receiv[ed] the consideration,” §§ 125.0104(3)(f)-(g), and thus had the same statutory obligations as dealers under chapter 212 to collect and remit taxes. A11. Judge Gross wrote that the majority had rewritten the plain language of the statutes (A16) rather than apply the “supremacy of the text” doctrine (A11 (citing *Advisory*

Opinion to Governor re: Implementation of Amendment 4, the Voting Restoration Amendment, 288 So. 3d 1070, 1078 (Fla. 2020))).

The appellate court denied Gannon’s motion for panel or en banc rehearing and, over Judge Gross’s dissent, certification of a question of great public importance to this Court.

Gannon filed a notice to invoke this Court’s discretionary jurisdiction. She asserted two grounds: 1) the decision expressly affects a class of constitutional officers, Fla. Const. art. V, § 3(b)(3); and 2) it conflicts with the decision of this Court or of another district court, *id.* However, after a careful review, Gannon has decided to proceed under only the first ground.

SUMMARY OF THE ARGUMENT

The Court has discretionary jurisdiction to review the Fourth District’s decision. Under article V, subsection 3(b)(3), of the Florida Constitution, the Court “[m]ay review any decision of a district court of appeal ... that expressly affects a class of constitutional or state officers.”

The district court’s decision satisfies each requirement of that jurisdictional basis. First, a county tax collector is a constitutional officer. Second, a county tax collector is a member of a class of like constitutional officers—her fellow tax collectors. Third, the Fourth District’s decision expressly affects this class in the ful-

fillment of its legal obligation to ensure that a county receives all the tax revenue it is entitled to.

The Court should exercise its discretion and accept review of this case. This case presents a significant issue of statutory interpretation that has far-reaching effects on a large number of people, on every county government, and on one of the largest industries in Florida—tourism.

ARGUMENT

THE COURT HAS JURISDICTION UNDER ARTICLE V, SUBSECTION 3(b)(3), OF THE FLORIDA CONSTITUTION BECAUSE THE DECISION AFFECTS A CLASS OF CONSTITUTIONAL OFFICERS.

A. The Court has jurisdiction.

Article V, subsection 3(b)(3), of the Florida Constitution vests this Court with discretionary jurisdiction to “review any decision of a district court of appeal ... that expressly affects a class of constitutional or state officers.”

There are three requirements for this basis of jurisdiction: 1) the affected officer must qualify as a constitutional or state officer; 2) the officer must be a member of a class of like constitutional or state officers; and 3) the district court’s decision must expressly affect the class. *See Philip J. Padovano, Florida Appellate Practice* § 3:9 (2019 ed.). This case satisfies each requirement.

1. A county tax collector is a constitutional officer.

A county tax collector is a constitutional officer. Article VIII, subsection 1(d) (“County officers”), of the Florida Constitution states in part: “There shall be elected by the electors of each county, for terms of four years, a sheriff, *a tax collector*, a property appraiser, a supervisor of elections, and a clerk of the circuit court.” (Emphasis added.)

The Court has already held that three of these officers are constitutional officers within the meaning of article V, subsection 3(b)(3). *See Ramer v. State*, 530 So. 2d 915 (Fla. 1988) (sheriffs); *Bystrom v. Whitman*, 488 So. 2d 520 (Fla. 1986) (property appraisers); *Ludlow v. Brinker*, 403 So. 2d 969 (Fla. 1981) (court clerks). The same result should follow for tax collectors.

2. A county tax collector is a member of a class of like constitutional officers.

A county tax collector is a member of a class of like constitutional officers. Interpreting a prior constitutional provision, this Court held that “class” with respect to supreme court jurisdiction “means two or more constitutional or state officers who separately and independently exercise identical powers of government.” *Fla. State Bd. of Health v. Lewis*, 149 So. 2d 41, 43 (Fla. 1963).

Like the constitutional officers in *Ramer*, *Bystrom*, and *Ludlow*, tax collectors satisfy this standard. There are 67 tax collectors, one for each county, *see* Fla. Tax Collectors Ass’n, Your Tax Collector, <https://floridatxcollectors.com/your->

[tax-collector/](#) (last visited July 23, 2020), and clearly they separately and independently exercise identical powers of government within their jurisdictions.

3. The Fourth District’s decision expressly affects the class.

The Fourth District’s decision expressly affects the class of tax collectors. “The term ‘expressly,’ in this context, means within the written district court opinion.” *Sch. Bd. of Pinellas Cnty. v. Dist. Court of Appeal*, 467 So. 2d 985, 986 (Fla. 1985) (citation omitted). The district court’s holding that the Companies were not required to collect and remit the TDT to the Palm Beach County Tax Collector is “within the written district court opinion.” *Id.*

This decision substantially restricts tax collectors’ ability to collect tax revenue to which the taxing authority is entitled. Tax collectors have a legal duty to ensure they collect all the tax revenue their jurisdictions are entitled to; they have authority to, and must have the ability to, audit the records of those responsible for collecting and remitting the tax. *See Fla. Stat. § 125.0104(10)(c).*

This Court considered a similar situation in *Bystrom*. There, the property appraiser, which has a legal responsibility to assess properties and arrive at just valuations, filed a lawsuit against property owners after a property appraisal adjustment board reduced the appraiser’s tax assessment on the property. *Bystrom*, 488 So. 2d at 521. The appraiser sought discovery of the owners’ financial documents related to the property; the trial court compelled production and the district court quashed

that order. *Id.* The Court held it had jurisdiction under article V, subsection 3(b)(3), because the district court’s decision “expressly affects a class of constitutional officers.”³ *Id.* at 520.

Just as the district court’s decision in *Bystrom* affected the class of property appraisers in their responsibility to arrive at the just valuation of property, the Fourth District’s decision here affects tax collectors in their responsibility to collect tax revenue to which taxing authorities are entitled, and to audit to ensure that the taxes are correctly paid. And the decision affects *all* tax collectors—the entire class. The decision is also one in which a member of the class is directly involved as a party. *See Spradley v. State*, 293 So. 2d 697, 701 (Fla. 1974) (interpreting the prior version of the constitutional provision).

Because the Fourth District’s decision “expressly affects a class of constitutional or state officers,” Fla. Const. art. V, § 3(b)(3), the Court has jurisdiction.

B. The Court should exercise its discretion and accept jurisdiction.

The Court should exercise its discretion and accept jurisdiction of the case.

All but four of Florida’s 67 counties impose the TDT. *See* Fla. Dep’t of Revenue, Local Option Transient Rental Tax Rates (rev. Feb. 2020), https://floridarevenue.com/Forms_library/current/dr15tdt.pdf. Those counties are

³ Ultimately, the Court quashed the district court’s decision, holding the documents were relevant to determine the taxable value of the property, and specifically the appraiser’s defense of its valuation. *See id.* at 522.

entitled to that tax revenue. The majority of the counties collect the TDT directly (as opposed to having the Department of Revenue do it). *See id.* As stated above, tax collectors have a legal responsibility to ensure they collect all tax revenue and the authority to audit taxpayer records to carry out that responsibility.

This case touches upon one of the most important industries in Florida—tourism. The home-sharing industry in Florida is vast. In 2019, *just* Airbnb had 60,000 hosts who earned \$1.2 billion through the platform. Veronica Brezina-Smith, *Here's how much Airbnb brought in for Tampa Bay counties in 2019*, Tampa Bay Bus. J., Feb. 18, 2020, <https://www.bizjournals.com/tampabay/news/2020/02/18/heres-how-much-airbnb-brought-in-for-tampa-bay.html>. Under agreements Airbnb had with 44 counties, Airbnb turned over \$39.7 million in TDT revenue. *Id.*

The problem with those agreements is that they essentially nullify a county's ability to audit records. The agreements rely on the honor system, and they lack accountability. *See* Michael J. Bologna, *Airbnb Targeted by States Suspecting Tax-Collection Shortfalls*, Bloomberg Tax, Mar. 24, 2020, <https://news.bloombergtax.com/daily-tax-report-state/airbnb-targeted-by-states-suspecting-tax-collection-shortfalls>. If the Companies do have the same duties as Chapter 212 dealers, counties must be able to ensure they collect the full TDT rev-

enue. If the Companies do not have those duties, counties have to enter into agreements with the Companies and hope they give them the full amount.

Moreover, as said above, tourism is one of the most important industries in Florida. While the coronavirus pandemic has shut down the industry along with most of the state's economy, we should be confident that the industry will recover as the state's economy opens back up. At the same time, local governments will have a pressing need for tax revenue. The issues of statutory interpretation presented by this case—in short, do the Companies have the obligation to collect and remit the TDT to taxing authorities?—will become all the more important.

As is clear, this case has far-reaching effects on a large number of people across the state, on every county government in it, and on the tourism industry that is so important to our state. The Court should exercise its discretion to review the Fourth District's decision.

CONCLUSION

For the above reasons, this Court has jurisdiction under article V, subsection 3(b)(3), of the Florida Constitution. It should exercise its discretion and grant review of the Fourth District's decision.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list by e-mail on July 23, 2020.

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Brief of Petitioner on Jurisdiction is Times New Roman 14pt.

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