IN THE SUPREME COURT OF FLORIDA

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Case No.: SC20-957
L.T. Nos.: 4D19-0541; 50-2014-CA-000428

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

Petitioner,

v.

AIRBNB, INC., AIRBNB PAYMENTS, INC., HOMEAWAY.COM, INC., HOMEAWAY, INC., AND TRIPADVISOR, LLC,

Respondents.

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# RESPONDENTS' AMENDED[1] BRIEF ON JURISDICTION

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KENNETH BELL
Fla. Bar No. 347035
NICOLE K. ATKINSON
Fla. Bar No. 167150
AMY S. L. TERWILLEGER
Fla. Bar No. 98658
GUNSTER, YOAKLEY & STEWART, P.A.
777 S. Flagler Dr. Suite 500 E
West Palm Beach, FL 33401
(561) 655-1980
kbell@gunster.com
natkinson@gunster.com
aterwilleger@gunster.com
eservice@gunster.com

[1] Amended to remove "Citation to Record" section.

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## STATEMENT OF CASE AND FACTS

Respondents incorporate and rely on the statement of case and facts as stated in the Fourth District Court of Appeal's decision.

## SUMMARY OF ARGUMENT

This Court lacks jurisdiction because the Fourth District's decision does not "*expressly affect* a class of constitutional officers." Art. V, § 3(b)(3), Fla. Const. (emphasis added). The Palm Beach Tax Collector did not seek a determination of her ability, duty, or power to collect Tourist Development Taxes ("TDT"). Instead, the Tax Collector sought only a determination of the obligations of others to collect and remit the tax, namely the Companies who operate online platforms. In affirming the trial court's holding that the Companies are not statutorily obligated to collect and remit TDT because they are not exercising the taxable privilege of renting properties, the Fourth District was not asked to—and did not—opine on the Tax Collector's ability, duty, or power to collect the TDT. Because nothing in the Fourth District's written opinion expressly affects the class of Florida tax collectors, this Court does not have discretionary jurisdiction under Art. V, § (3)(b)(3).

Even if this case satisfied the jurisdictional requirements, this Court should decline review. The Fourth District applied well-settled principles of law and adhered to this Court's analysis of the same statutory provisions in *Alachua County v. Expedia, Inc.*, 175 So. 3d 730 (Fla. 2015) ("*Alachua II*"). Further review by this

Court is unnecessary. The Tax Collector's reference to voluntary collection agreements between the Companies and other tax collectors throughout Florida establishes why further review is not warranted. The Tax Collector asserts that the decision inhibits tax collectors' ability to collect the full TDT revenue. That issue was not before the Fourth District and nothing in the Fourth District's decision inhibits the ability of the Tax Collector to collect TDT from those with TDT obligations. The Fourth District simply held—correctly—that the Companies did not fall within the class of persons who had TDT obligations. If the legislature wants to attach TDT liability to platforms like those operated by the Companies, it is free to make that choice.

## ARGUMENT

### I. THIS COURT DOES NOT HAVE DISCRETIONARY JURISDICTION BECAUSE THE DECISION DOES NOT EXPRESSLY AFFECT A CLASS OF CONSTITUTIONAL OFFICERS.

To satisfy Art. V, § (3)(b)(3) of the Florida Constitution, a district court decision "must *directly* and, in some way, *exclusively* affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers." *Spradley v. State*, 293 So. 2d 697, 701 (Fla. 1974) (emphasis added). It is not enough for the decision to "simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state"—the decision must speak specifically to the rights and obligations of a class

of constitutional officers. *Id.* And it must do so *expressly*. *See Wheeler v. State*, -- So. 3d --, Case No. SC19-1916, 2020 WL 3119073, at *1 (Fla. Jun. 11, 2020) (reiterating that "expressly" means within the four corners of the opinion itself). The term "expressly" was added to § (3)(b)(3) shortly after *Spradley*, and inclusion of this term "plainly requires a written opinion explaining the impact of the decision on the class of officers in question." Philip J. Padovano, *Florida Appellate Practice* § 3:9 (2019 ed.).[2] "Thus, a decision that inherently affects a class of constitutional or state officers without expressing an intention to do so, is not subject to review" by the Florida Supreme Court. *Id.* (citing *Spradley*).

Therefore, to satisfy § (3)(b)(3), the effect on the class of officers must "expressly" appear within the four corners of the decision and must explain the impact on the class of officers. A decision that only inherently or impliedly affects a class of constitutional officers without expressing an intention to do so does not give this Court discretionary jurisdiction. Otherwise, any decision construing a statute or law that involves constitutional officers would always give rise to jurisdiction, which this Court has rejected. *See Spradley*, 293 So. 2d at 701.

[2] *See also Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) ("The dictionary definitions of the term 'express' include: 'to represent in words'; 'to give expression to.' 'Expressly' is defined: 'in an express manner.'"); BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "express" as "[clearly and unmistakably communicated; stated with directness and clarity").

Here, the Fourth District's decision does not "expressly affect" a class of constitutional officers. The opinion frames the issues decided as follows:

> On appeal, the Tax Collector presents two arguments why the Companies are required to collect and remit the TDT: (1) the Companies, through their respective platform services, exercise a taxable privilege by engaging in the business of renting, leasing, or letting short-term accommodations; and (2) even if the Companies are not exercising a taxable privilege, they are still required to register as dealers because they receive payment on the Owners' behalf. We disagree.

App. A6. Applying a plain reading of the statutes and case law, the Fourth District decided those issues by holding that the Companies are not legally obligated to collect and remit TDT. Nothing within the four corners of the opinion addresses any impact on tax collectors or expresses an effect on the rights or obligations of tax collectors. The opinion does not address whether the Tax Collector here (or other tax collectors) has the duty or power to collect TDT under the applicable statutes. It addresses only the narrow question of the Companies' alleged obligations.

Unable to find any statement in the written opinion[3] that expressly affects a class of constitutional officers, the Tax Collector states 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,'" so the decision

[3] The Tax Collector cannot rely upon the dissenting opinion as a basis for jurisdiction. *Jenkins*, 385 So. 2d at 1359 (citations omitted).

"affects tax collectors in their ability to collect tax revenue." Petitioner's Brief, at 7, 8. This argument fails because the Tax Collector has not and cannot point to any express discussion of the rights or duties of Florida's tax collectors. At best, the Tax Collector is asserting the decision inherently and impliedly affects the ability of tax collectors "to ensure that a county receives all the tax revenue it is entitled to," which is insufficient to invoke this Court's jurisdiction under § (3)(b)(3). *See id.*, at 5. Nothing in the decision *expressly* affects the class of Florida tax collectors' ability, duty, or power to collect and enforce the TDT.[4] As such, this Court does not have discretionary jurisdiction to review the Fourth District's decision.

The cases the Tax Collector cites are easily distinguishable. In each case, the rights or duties of a constitutional officer were expressly addressed by the district court's decision. *See Bystrom v. Whitman*, 488 So. 2d 520, 521 (Fla. 1986) (could property appraiser compel production of tax records from taxpayers); *Ramer v. State*, 530 So. 2d 915, 915–16 (Fla. 1988) (authority of a municipal police officer to conduct a search and seizure outside the city limits without knowledge or specific direction by the sheriff); *Ludlow v. Brinker*, 403 So. 2d 969, 970 (Fla. 1981) (rights

[4] It is not clear how the decision even impliedly affects the class of tax collectors throughout the State. The Tax Collector notes that out of 67 counties in Florida, 63 have TDT ordinances. Of those, 23 or 34% are administered by the Florida Department of Revenue and not by the counties. Of the remaining 40 counties that self-administer TDT, many counties place enforcement of TDT on other county officials, not tax collectors (e.g., Indian River, Lee, Orange, and Volusia counties).

and duties of county clerks regarding certified copies of a judgment under the forma pauperis statute). Unlike those decisions, the Fourth District's decision in this case does not directly address any tax collector's duty to collect TDT; it simply says Florida law does not obligate the Companies to collect and remit it.

## II. THIS COURT SHOULD DECLINE REVIEW.

### A. Further Review of the Fourth District's Application of Well-Settled Principles of Law Is Unwarranted.

Even if this case met the requirements for discretionary jurisdiction, the Court should decline to exercise its discretion. The Fourth District's decision reflects a straightforward application of statutory text and case precedent. This case involves a question of pure statutory interpretation, namely, whether the Companies are liable for collecting and remitting TDT. § 125.0104(3)(a)(1), Fla. Stat. The answer is "no."

Consistent with this Court's direction that the "words of a governing text are of paramount concern, and what they convey, in their context, is what the text means," *Advisory Opinion to Governor re Implementation of Amendment 4*, 288 So. 3d 1070, 1078 (Fla. 2020), the Fourth District found that to "'rent, lease or let' in ordinary meaning denotes the granting of possessory or use rights in property." App.A7; *see also Alachua Cty. v. Expedia, Inc.*, 110 So. 3d 941, 946 (Fla. 1st DCA 2013) (same conclusion in similar case involving online intermediaries). The Fourth District correctly concluded the Companies do not "rent" accommodations under any reasonable interpretation of that word. It is undisputed that the Companies do

not own the properties in question, have no physical control over the properties, are not parties to the rental arrangement, do not set the terms of the rentals, and are not compensated for providing accommodations. Nor could the Companies be "dealers," as the statute defines a "dealer" as "any person who leases, or grants a license to use, occupy, or enter upon" various short-term accommodations. § 212.06(2)(j), Fla. Stat.; App.A6–11.[5]

The Fourth District aligned its textual analysis with this Court's analysis of the same provisions in *Alachua II*, where this Court held that websites which facilitate hotel room reservations do not have to collect and pay TDT on their services. 175 So. 3d 730, 733-35 (plurality op.); *id.* at 737-39 (Pariente, J., concurring). This Court explained that only property owners (there, the hotels) exercise the taxable privilege of renting, leasing, or letting accommodations. *Id.* at 735. Here, the trial court and Fourth District found that the Companies do not exercise the taxable privilege because, like the websites in *Alachua*, they facilitate reservations, but do not own or grant a possessory interest in the properties. App.A8.

The Fourth District's determination also aligns with Florida's requirement that tax laws must "be construed in the light most favorable to the taxpayer," *Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc.*, 497 So. 2d 630, 632 (Fla.

[5] The Tax Collector's supposed plain meaning construction of the TDT Statute is anything but. Under any reasonable meaning of the term, a person that does not rent, lease, or let an accommodation cannot "receive" the consideration for doing so.

1986), with all ambiguities resolved "in favor of the person on whom the tax is imposed," *Cunningham v. Stefanidi*, 197 So. 722, 722 (Fla. 1940). Although the Fourth District correctly found the Tax Collector's proposed interpretation impossible to square with the statutory text or precedent, to the extent the TDT statute is susceptible to competing constructions, any ambiguity must be resolved in favor of the Companies. *See, e.g.*, *Alachua*, 175 So. 3d at 738–39 (Pariente, J., concurring).

The Fourth District's conclusion was hardly unique. Every other Florida court to have considered this question has held that entities like the Companies do not have TDT obligations.[6] Finding review by this Court unnecessary, the Fourth District denied the Tax Collector's motion for certification. *See* June 3, 2020 Order. That decision was correct. Further review would serve no useful purpose.

### B. The Existence of Voluntary Collection Agreements Does Not Provide a Basis to Exercise Discretionary Jurisdiction.

The Tax Collector relies heavily on the reported existence of "voluntary collection agreements" between each of the Companies and other Florida counties

[6] *See Manatee County Tax Collector v. Airbnb, Inc. & Airbnb Payments, Inc.*, Case No. 2018-CA-001917, Motion to Dismiss Order (Fla. 12th Cir. Ct., Oct. 22, 2019); *Orbitz LLC v. Broward County*, Case No. 2009-CA-126, Summary Judgment Order (Fla. 2d. Cir. Ct., July 13, 2012), *aff'd, Broward County v. Orbitz, LLC*, 135 So. 3d 415 (Fla. 1st DCA 2014); *Orange County v. Expedia, Inc.*, 2011 WL 7657975 (Fla. 9th Cir. Ct., Jan. 20, 2011); *Orange County v. Expedia, Inc.*, Case No. 2006-CA-2104, Motion for Rehr'g Order (Fla. 9th Cir. Ct., Aug. 30, 2012).

as a reason this case warrants the exercise of this Court's discretionary jurisdiction. While Respondents believe these agreements are irrelevant,[7] if anything, the existence of such "voluntary" agreements establishes that the terms of the TDT statute (and the plain meaning interpretation of that statute by this Court in *Alachua*) do not expressly impose TDT obligations and liability on the Companies. There would be no need for a "voluntary" agreement if the statutory scheme captured them. Moreover, these agreements demonstrate that even though the Companies are not required to collect and remit the TDT under well-settled law, they are still cooperating with Florida county tax collectors to ensure that collection and remittance occurs, which only further confirms review is unnecessary.

The Tax Collector asserts these agreements impair the ability of other counties to conduct audits, yet she cites no evidence in support (inside or outside of the record) and cannot explain how or why that is the case. The Palm Beach Tax Collector does not and cannot assert that agreements with other counties somehow impair her ability to collect and administer TDT from those obligated to remit it.

### C. The Tax Collector Improperly Suggests the Decision Impacts Tax Revenue to Florida Counties.

To entice this Court to accept jurisdiction, the Tax Collector improperly suggests the decision impacts tax revenue to which Florida counties are entitled. PJB,

[7] The majority of the agreements are not of record, and the two cited news articles regarding such agreements certainly are not.

at 8-9. There is nothing in the record to establish the ruling here decreases the amount of tax owed on the exercise of the privilege of renting, leasing, and letting accommodations. The Fourth District's opinion was limited to answering whether the Companies are obligated to collect and remit that tax. Neither in arguing this case below nor in asking this Court to exercise jurisdiction did the Tax Collector assert that the issue of whether the Companies are obligated to collect and remit tax somehow lowers the amount of tax required to be paid. No one disputes that the individual homeowners who use the Companies' platforms are responsible for TDT, and indeed the record below was that every homeowner the Tax Collector deposed was already paying the tax.

## CONCLUSION

Nothing within the four corners of the Fourth District's decision expressly affects a class of constitutional officers as required for jurisdiction under Art. V., § (3)(b)(3). The Fourth District's decision does not impact the ability of the Tax Collector to collect the full amount of TDT due from those with TDT obligations. Instead, the Fourth District correctly held that the Companies did not fall within the class of persons who had TDT obligations under the applicable statutes. If the legislature wants to make the Companies liable for TDT, it is free to do so. To date, it has not done so. The Tax Collector's petition to invoke this Court's discretionary jurisdiction should be denied.

Respectfully submitted,

GUNSTER, YOAKLEY & STEWART, P.A.

/s/ *Kenneth B. Bell*

KENNETH BELL
Fla. Bar No. 347035
NICOLE K. ATKINSON
Fla. Bar No. 167150
AMY S. L. TERWILLEGER
Fla. Bar No. 98658
GUNSTER, YOAKLEY & STEWART, P.A.
777 S. Flagler Dr. Suite 500 E
West Palm Beach, FL 33401
(561) 655-1980
kbell@gunster.com
natkinson@gunster.com
aterwilleger@gunster.com
eservice@gunster.com

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of Court on this 26th day of August, 2020 using the Florida E-Portal system which will send notification of such filing to the following:

| | |
|---|---|
| Louis M. Silber, Esq.<br>SILBER & DAVIS<br>1806 Old Okeechobee Road<br>West Palm Beach, FL 33409<br>lsilber@silberdavis.com<br>sfeaman@silberdavis.com | Jeffrey M. Liggio, Esq.<br>Olivia D. Liggio, Esq.<br>LIGGIO LAW, P.A.<br>The Barristers Bldg.<br>1615 Forum Place, Suite 3B<br>West Palm Beach, FL 33401<br>emailservice@liggiolaw.com<br>jliggio@liggiolaw.com<br>oliggio@liggiolaw.com |

| | |
|---|---|
| Philip M. Burlington, Esq.<br>Adam Richardson, Esq.<br>BURLINGTON & ROCKENBACH, P.A.<br>Courthouse Commons/Suite 350<br>444 West Railroad Avenue<br>West Palm Beach, FL 33401<br>pmb@FLAppellateLaw.com<br>ajr@FLAppellateLaw.com<br>kbt@FLAppellateLaw.com | |

/s/ *Kenneth B. Bell*
KENNETH B. BELL, ESQ.
Florida Bar No. 0347035

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ *Kenneth B. Bell*
KENNETH B. BELL, ESQ.
Florida Bar No. 0347035

ACTIVE:12364248.1