IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC16-1976
LOWER TRIBUNAL NOS.:
3D15-2303; 3D15-2271; 14-TR-A369OZE

LUIS TORRES JIMENEZ,

Petitioner,

v.

STATE OF FLORIDA, ex rel. CITY OF AVENTURA, and THE ATTORNEY GENERAL OF FLORIDA,

Respondents.

ANSWER BRIEF ON JURISDICTION OF RESPONDENT, CITY OF AVENTURA

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
THIRD DISTRICT COURT OF APPEAL

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INTRODUCTION

The State of Florida, by and through the City of Aventura ("City"), files its answer brief on jurisdiction and urges the Court to decline review where, as here, there is no express and direct conflict and the law on the subject is developing in the courts of this state on varying factual records.

STATEMENT OF THE CASE AND FACTS

The Third District Court of Appeal examined below a fully developed record regarding the operation of the City's red light camera program and concluded that the program was lawful under the Mark Wandall Traffic Safety Act, section 316.0083, Florida Statutes ("Wandall Act"). The court expressly determined that its decision was *not* in conflict with the Fourth District Court of Appeal's decision in *City of Hollywood v. Arem*, 154 So. 3d 359 (Fla. 4th DCA 2014).[1] A. 3.

In arguing in favor of express and direct conflict, petitioner ignores that the Third District had the entire *Arem* record before it, the parties having agreed to its submission in the trial court.[2] Thus, the Third District repeatedly draws *factual* distinctions between the trial record in the *Jimenez* proceeding and the one in *Arem*. *See, e.g.*, A. 22 ("While the vendor in *Arem* was the same[,] any similarity

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[1] Judge Wells in her concurring opinion believed *Arem* was in conflict, but did not believe the issues warranted further review. Pet. App. ("A.") 36.

[2] Petitioner continues to perpetuate the misimpression that the *Arem* record contained *any* evidence of Hollywood having a business rules questionnaire ("BRQ"). Pet. Br. at 9 (suggesting that *Arem*'s reference to "standards" is a reference to the BRQ). Petitioner is fully aware that the *Arem* trial court record contained no reference to any BRQ.

between the facts of the two cases ends there. In particular, *Arem* is distinguished from the instant case because … there were no standards or guidelines promulgated by the municipality, the Vendor determined probable cause, and the City officer merely acquiesced in the Vendor's determination."); 23 ("In … *Arem*[,] there is a total absence of any consideration of guidelines promulgated by the [c]ity. In contrast, the record in this case includes guidelines and extensive testimony regarding how the specific City-established guidelines cabin the Vendor's tasks and limit the Vendor to purely ministerial, non-discretionary decisions."); 23-24 ("[T]he facts in *Arem* reflected that 'the vendor unilaterally determines in its own discretion that either a violation did not occur or that the City would not be able to sustain its burden of proof.' [citation omitted]. The Fourth District repeatedly noted that, in the record before it, the Vendor not only had the authority to make the decision whether a violation occurred but that the Vendor had the authority to do so 'unilaterally,' based on 'unfettered discretion,' "its own discretion,' and 'in its sole discretion.'"); 24 ("[U]nlike the Vendor's decisions in *Arem* which involved "unfettered discretion" to decide whether a violation occurred, the Vendor's decisions here were ministerial and non-discretionary."). Ultimately, the Third District concluded: "[W]e agree *Arem* was properly decided given the record as reflected in the *Arem* opinion. Because of the vastly different record in this case, however, we find *Arem* clearly distinguishable."[3] A. 25.

[3] Despite petitioner's assertion to the contrary (Pet. Br. at 7-8) there is no indication in *Arem* that Hollywood's camera vendor would preview events and categorize them into accessible working or non-working queues. A. 5.

On the remaining issue addressed in *Arem* – the printing and mailing of the uniform traffic citation ("UTC") – the Fourth District had concluded that the camera vendor "decides" to issue the UTC. 154 So. 3d at 365 ("As the trial court found, the TIEO, merely acquiesces in the *vendor's decision* to issue the citation.") (emphasis added). In contrast, the Third District here noted the trial court's finding that, "once the *officer decides* the citation will issue, 'a *fully automated computer program* is triggered to print and mail the [notice and citation] …. [The Vendor] only acts as an *electronic apparatus to print and mail* [the notice and citation]." A. 26 (emphasis added).

SUMMARY OF ARGUMENT

The City does not dispute that, because of the questions certified below, the Court has a jurisdictional basis to review the Third District's decision in this case. However, the Court should decline to exercise jurisdiction in this instance because (i) there is no express and direct conflict between *Jimenez* and *Arem*, and (ii) the law governing red light camera programs is developing as it should through the trial courts, circuit courts and district courts of appeal of this state. Multiple cases are postured for potential review by the Fourth District on records comparable to the one in *Jimenez.*

Whether a particular program is lawful is largely dependent on the *factual* record created as to the program's operations. Petitioner simply *disagrees* with the Third District's interpretation of the terms "review" and "issuance" in section 316.0083(1)(a), and the substantially identical interpretation of the Second District

in *City of Oldsmar v. Trinh*, --- So. 3d ---, 2016 WL 6352509 (Fla. 2d DCA Oct. 28, 2016), but that is no basis for Supreme Court review.[4] Absent a finding that the holdings in *Jimenez* are premised on substantially the same facts as *Arem*, there is no express and direct conflict.

ARGUMENT

I. THERE IS NO EXPRESS AND DIRECT CONFLICT WITH *AREM*.

A. The standard for express and direct conflict.

How a particular governmental red light camera program operates is largely a factually intensive determination. Unlike the situation in *Arem*, where there was virtually no discussion of the specific operations of Hollywood's program – because there was virtually no testimony establishing those operations – the Third District here discussed at length the precise parameters of Aventura's program and the roles of the various participants in that program. This fully developed factual record differentiates the decision below from *Arem* and precludes the conclusion that the two decisions expressly and directly conflict.

This Court has emphasized that express and direct conflict does not exist when the factual records underlying the decisions at issue differ. *See, e.g., Blue Cross and Blue Shield of Florida, Inc. v. Steck*, 818 So. 2d 465, 465-66 (Fla. 2002) (dismissing appeal for lack of jurisdiction, even though "both cases concern the

[4] The Second District certified conflict with *Arem*, but only "to the extent it conflicts with our decision." *Id.* at **7, 16. *Trinh* is the subject of a petition for review before this Court. *Trinh v. City of Oldsmar*, Case No. SC16-1978.

applicability of an intoxication exclusion in an insurance policy," where the "factual underpinnings" of the cases differed and one policy was a health insurance policy and the other was a life insurance policy); *Wilson v. Southern Bell Te. & Tel. Co.*, 327 So. 2d 220, 221 (Fla. 1976) (finding no express and direct conflict where the cases "patently varie[d] as to the operative facts"). The decisions must be "irreconcilable" for there to be express and direct conflict, and that determination is dependent on the similar facts being "controlling." *Aravena v. Miami-Dade Cty.*, 928 So. 2d 1163, 1167 (Fla. 2006). *See also Williams v. Dugan*, 153 So. 2d 726, 727 (Fla. 1963) (holding conflict jurisdiction arises when there is a "collision on a point of law" and where "two decisions are wholly irreconcilable").

B. *Jimenez* and *Arem* facially demonstrate that they were decided on different records, and therefore, do not conflict.

The *Arem* decision was decided on a different contract and on an undeveloped record, where there was no information before the Fourth District as to the existence of a municipal BRQ or the automated operation for printing and mailing of UTCs after an officer determines probable cause exists for its issuance. For this reason, the Third District acknowledged that *Arem* was *correctly* decided given its limited factual record. Although the Second District in *Trinh* did not, as the Third District did, have the benefit of the *Arem* record when rendering its recent decision upholding Oldsmar's program, it too hinted at the limited nature of the *Arem* record. *Trinh*, at *7 ("[I]t is unclear whether an ATS representative provided testimony in *Arem* about how the parties operated under their contract. Further, although it appears that the *Arem* court was aware that processors

functioned under standards or guidelines, it is unclear to what extent the court reviewed any business rules between … Hollywood and ATS in reaching its decision.");[5] *11 ("[W]e note that the county and district courts in *Arem* apparently did not have the benefit of the testimony of a representative from ATS to explain how … Hollywood's red light camera program worked. Instead, it appears that the court's conclusions about ATS's review procedure in actual practice may have been drawn from certain language in the contract before it.").

The absence of any discussion in *Arem* of a BRQ or of an automated printing and mailing function in *Arem* is a critical distinction between *Arem* and the decision below. This is especially true given that the Third District's reasoning on the unlawful delegation issue is tethered to this Court's own precedents on the subject. *See* A. 16 (citing *St. Johns Cty. v. N.E. Fla. Builders Ass'n, Inc.*, 583 So. 2d 635, 642 (Fla. 1991) (upholding a county impact fee for school infrastructure

[5] *Arem*'s reference to "standards" is a reference to Hollywood's authorizing ordinance and contract, not a BRQ comparable to Aventura's and Oldsmar's. *See* 154 So. 3d at 364-65. The Fourth District relied on the following *contract* language for its ruling: "The Vendor [ATS] shall make the initial determination that the image *meets the requirements of the Ordinance and this Agreement*, and is otherwise sufficient to enable the City to meet its burden of Demonstrat[ing] a *violation of the Ordinance*. If the Vendor determines that *the standards* are not met, the image shall not be processed any further." *Id.* (original emphasis deleted; current emphasis added). The court then concluded, "Therefore, the contract requires ATS to send images and information … only if ATS determines in its sole discretion that *certain standards* have been met, and ATS may withhold sending information if it determines that *those standards* were not met." *Id.* at 365 (emphasis added).

that authorized the School Board to spend the fees collected "because the fundamental policy decisions have been made by the county, and the discretion of the school board has been sufficiently limited"); *Citizens of State of Fla. v. Wilson*, 567 So. 2d 889, 892 (Fla. 1990) (upholding delegation of the authority to grant a rate increase to staff because "[t]he Commission specified the conditions for approval, and the staff merely carried out the ministerial task of seeing whether these conditions were met")).

On the *central* issue in this appeal – whether Aventura unlawfully delegated its authority to its camera vendor – the Third District's decision below is wholly consistent with the conclusion in *Arem* that Hollywood was not allowed to confer on its camera vendor the "unfettered discretion to decide which images are sent to the TIEO, and which ones are not." *Arem*, 154 So. 3d at 365. On this key issue, *Jimenez* and *Arem* are not "irreconcilable," and therefore, are not in express and direct conflict.

II. EVEN IF THERE IS TENSION BETWEEN *AREM* AND *JIMENEZ*, THE COURT SHOULD DECLINE TO EXERCISE ITS JURISDICTION NOW AND ALLOW THE COURTS TO APPLY THESE PRECEDENTS TO THE RECORDS BEFORE THEM.

Even if there are aspects of *Jimenez* that give rise to tension with *Arem*, the courts of this state should be allowed to apply the existing precedents to the specific facts of programs brought before them. The red light camera field is

presently governed by two paradigms.[6] The first, governed by *Arem*, involves a situation where (i) the municipality ostensibly delegates "unfettered discretion" to its camera vendor to review captured events and, "in its sole discretion," issue UTCs, and (ii) the TIEO "merely acquiesces" in the camera vendor's decision to issue a UTC. The second model is one where (i) the camera vendor's role in previewing and categorizing captured events into accessible working or non-working queues is circumscribed by a municipal BRQ; (ii) the TIEO conducts an independent review and makes a probable cause determination as to which events warrant the issuance of a UTC; and (iii) the process of printing and mailing UTCs is fully automated. This model is governed by the reasoning in *Jimenez* (and *Trinh*).

Courts in Florida have begun to recognize the distinctions between these models and have cogently applied these precedents. Thus, in *City of Boyton Beach v. Boss*, Case No. 502015AP000053XXXXMB (Fla. 15th Jud. Cir. Sept. 30, 2016), the appellate division of the circuit court in Palm Beach County considered an appeal of a red light camera citation, originally dismissed under the authority of *Arem*.[7] While the appeal was pending, the Third District issued its decision below.

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[6] Notably, petitioner does not suggest that *Jimenez* conflicts with any decision of this Court.

[7] A copy of the decision is available at http://15thcircuit.co.palm-beach.fl.us/documents/19937/5659409/15-53_City-of-Boynton-Beach-v.-Boss_opinion.pdf.

The circuit court considered the factual record before it and concluded that *Jimenez*, rather than *Arem*, controlled:

> *Jimenez* – a case also involving ATS – distinguished *Arem* and upheld … Aventura's third-party camera system. *Id.* Critically, the Third District noted that, unlike in *Arem*, *Jimenez* involved the use of a "Business Rules Questionnaire" ("BRQ"), a series of guidelines that specifically establish "easily observable" standards for ATS employees to use when determining whether to forward an image to law enforcement. *Id.*
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> * * *
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> We find that *Arem* is distinguishable from the instant case for the reasons discussed in *Jimenez.* As in *Jimenez*, here the City's contract with ATS specifically establishes that ATS does not and cannot make any decisions regarding whether a violation occurred. ATS's discretion is similarly limited by the BRQ, which sets forth easily observable standards that dictate whether ATS should forward or otherwise discard images of potential infractions. Most critically, unlike in *Arem*, 154 So. 3d at 364, here ATS does not itself issue the UTC. These distinctions render *Arem* inapplicable to these facts. As *Jimenez* is the only district court decision to consider facts analogous to this case, we find that we are bound by its precedent.

While the process of reconciling and applying *Jimenez* and *Arem* is still in its infancy, it is already apparent that Florida courts understand the factual limitations of *Arem* and are capable of understanding the differences between the two paradigms.

Because of a pending motion to clarify, the *Boss* decision has not yet been "rendered," so it is possible that review will be sought and the Fourth District will be (and *should* be) afforded the opportunity to revisit *Arem* in a post-*Jimenez* and post-*Trinh* world, with a more fully developed record before it. In addition, the

following red light camera appeals are pending in Broward County and subject to possible review by the Fourth District on more fully developed records: *City of Fort Lauderdale et al v. Welsh-Wesolowski*, Case Nos. 15-24AC10A, 15-31AC10A, 15-32AC10A (17th Jud. Cir. App. Div.) (fully briefed; stayed pending issuance of *Jimenez* and *Trinh*);[8] *City of Sunrise v. Sandoval-Medina*, Case No. 15-84AC10A (17th Jud. Cir. App. Div.) (briefing stage); *City of Tamarac v. Avenando*, Case No. 16-52AC10A (17th Jud. Cir. App. Div.) (briefing stage).

This possibility of Fourth District review on a record comparable to the one in *Jimenez* further argues against exercising jurisdiction at this time. If and when the Fourth District reaffirms *Arem* on a fully developed record comparable to *Jimenez* or *Trinh*, review before this Court may then be appropriate.

CONCLUSION

The City respectfully suggests that it is unnecessary for this Court to exercise its jurisdiction and intercede in the evolution of the law in this particular field. There is no express and direct conflict between *Jimenez* and *Arem* that renders them irreconcilable, and there is no indication thus far that the courts of this state are incapable of discerning the factual distinctions between the two.

[8] In its stay order, the appellate division stated that "the holdings in *Jimenez* and *Trinh* will be determinative of the issues raised in the instant appeal." The order is available at https://www.browardclerk.org/Web2/CaseSearch/Index/.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this respondent's brief on jurisdiction was served via E-portal and e-mail this 7th day of December, 2016, on Robert Dietz, Esq. (Robert.Dietz@myfloridalegal.com), Office of the Attorney General, 501 E. Kennedy Boulevard, Suite 1100, Tampa, FL 33134; and Louis C. Arslanian, Esq. (arsgabriela@comcast.net), Gold & Associates, P.A., 5800 Sheridan Street, Hollywood, Florida 33021; Marc A. Wites, Esq. Wites & Kapetan, P.A.

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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.

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