2018

# Salt Lake County, Duchesne County, Uintah County, Washington County, and Weber County, Political Subdivisions of the State of Utah, Plaintiffs/Appellants, v. State of Utah, Delta Airlines, Inc. and Sky West, Inc., Defendants/Appellees : Reply Brief

Utah Supreme Court

**SUPREME COURT OF UTAH**

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| SALT LAKE COUNTY, DUCHESNE COUNTY, UINTAH COUNTY, WASHINGTON COUNTY, and WEBER COUNTY, political subdivisions of the State of Utah,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>STATE OF UTAH, DELTA AIRLINES, INC. AND SKY WEST, INC.,<br><br>Defendants/Appellees. | **APPELLANT'S REPLY BRIEF**<br><br>Appellate Case No. 20180586-SC<br><br>District Court Case No.: 170904525 |

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## ARGUMENT

### II. SCOPE OF APPEAL.

An appeal is a challenge to specific legal decisions made in the lower court. The choice of *which* claims to raise on appeal is left to the parties and counsel; it is not—as Appellees contend—an "all or none" proposition that requires the Counties to throw everything dismissed at the wall and hope something sticks. Rather, a party should raise on appeal only those claims that present a real likelihood of success based on the "examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf." *See, e.g., Jones v. Barnes*, 463 U.S. 745, 751, 754 (1983) (no right exists to compel appointed counsel to press nonfrivolous points requested by the client.); *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (stating "that appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.") (citing *Barnes*, supra).

This Court recently made clear that it is not a "general judicial prerogative" to require "parties to litigate claims that they have waived or otherwise chosen to forgo." *Utah Stream Access Coalition v. VR Acquisitions*, LLC, 2019 UT 7, ¶ 45. The Court held that precedent has "never endorsed a principle of constitutional avoidance that would allow [the Court] to force the parties to litigate claims" they have chosen to not pursue. *Id* at ¶ 44.

To this end, the court criticized the defense's reliance on only "one narrow circumstance—under the requirement of administrative exhaustion—in which a court may dismiss a constitutional claim on the ground that a non-constitutional claim should have

been pled first." *Id*. citing *W.E. B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309 (1967). But, like in *Stream Access,* even that narrow circumstance has no application here because, here, the non-appealed claims are not predicative of the facial question. But as shown below, because the claims on appeal posit that merely on their face the Challenged Laws violate the constitutional requirement for uniformity – those law are unconstitutional at the outset such that dismissed claims require no administrative exhaustion.

Here, the Counties have appealed the dismissal of the First, Third, Sixth, Eighth, Tenth, and Eleventh Claims for Relief and have forgone the remainder. (R. 1-30, 908-920); (Appellants' Opening Brief, p. 2-5.). The First, Third, and Sixth Claims for Relief challenge the constitutionality of Utah Code § 59-2-201(4) ("Valuation Law") for lack of uniformity and violation of separation of powers. (R. 20-21, 22, 25.) The Seventh and Eighth Claims for Relief challenge the constitutionality of Utah Code § 59-2-804 ("Allocation Law") for lack of uniformity and creating a de facto exemption to taxation. (R. 25-26.) The Tenth Claim for Relief challenges the constitutionality of Utah Code § 59-2-1007(2)(b) ("Review Threshold Law") for lack of uniformity. (R. 27.) The Eleventh Claim for Relief asserts the Valuation, Allocation, and Review Threshold Laws (collectively "The Challenged Laws") violate equal protection for their lack of uniformity. *Id*.

Importantly, the district court did not dismiss the Counties' Review Threshold Law based on administrative exhaustion. (R. 911-913). Additionally, the lower court did not dismiss the Valuation and Allocation Law challenges on the basis the Counties must first

bring a non-constitutional claim before the Commission. (R. 913-915). Rather, the district court found only that the "four administrative appeals that remain pending [before the Tax Commission] may obviate the need to reach *some* of the *as-applied* constitutional questions raised." (R. 914).[1] The Counties have not appealed any of the "as-applied" claims relied upon by the district court, thus whether the record developed in the Commission may be of use as to those claims is simply not germane.

Principles of constitutional avoidance "do[ ] not require parties to advance claims that they have forfeited" and the State and Airlines cite to no controlling law requiring the alternative in this case. That argument is foreclosed by *Utah Stream Access Coalition*, 2019 UT 7, ¶ 36.

## III. THE UNCONSTITUTIONALITY OF THE REVIEW THRESHOLD LAW WAS PROPERLY PLED AND IS RIPE FOR DETERMINATION.

"In a declaratory judgment action, the law itself is at issue." *Salt Lake County v. Bangerter*, 928 P.2d 384, 385 (Utah 1996). And the very purpose of the declaratory judgment is to "provide a means for resolving uncertainties and controversies before trouble has developed or harm has occurred, and in order to avoid future litigation." *Salt Lake County v. Salt Lake City*, 570 P.2d 119, 120-121 (Utah 1977) (citing *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404).

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1 Those four administrative cases involve only the Threshold Law jurisdictional question, not applicability of the Valuation and Allocation Laws. (R. 750-783, 803-809); (Appellees' (Airlines) Brief at p. 26). Additionally, the Court's ruling referencing those administrative cases speaks only to the Counties' Ninth Claim for Relief which is not the subject of this appeal. (R. 27, 914.), (Appellants' Opening Brief, p. 1-2.)

The State's and Airlines' ripeness arguments nullifies the declaratory judgment provision of Utah Code § 78B-6-404(1). In bringing an "'an action for declaratory relief, plaintiff must show that the *justiciable and jurisdictional elements requisite in ordinary actions are present*, for a judgment can be rendered only in a real controversy between adverse parties.'" *Bangerter*, 928 P.2d at 385 (quoting *Baird v. State*, 574 P.2d 713, 715 (Utah 1978). Contrary to the State's argument, there is not, nor has there been, an additional justiciable and jurisdictional element mandated by this Court in *every* action challenging the constitutionality of a tax law that a tax assessment must be produced "'with a resulting loss of revenue to the relevant county.'" (R. 912) (quoting *Bangerter*, 928 P.2d at 385.) To hold so, not only ignores that in *Bangerter*, this Court specifically applied its ruling concerning ripeness to the subject "Equalization Act" provision(s), because there, the provision may never be in play, it would also overrule controlling decisions that do not require exhaustion of purely constitutional claims. *See, e.g. TDM, Inc. v. Tax Comm'n*, 2004 UT App 433. This case is thus unlike *Bangerter*. In *Bangerte*r, the subject Act was not and may never be implicated. Here, the challenged laws apply every year to every assessment.

Although, courts are not a forum for hearing academic contentions or rendering advisory opinions; where a party seeking a declaration of the constitutionality of a statute possesses a special interest that is affected, a justiciable controversy exists. *Baird v. State*, 574 P.2d at 715 (Utah 1978). The lack of an adverse interest is generally found if the

harm is contingent on the occurrence of a future event that may not occur as anticipated, or indeed may not occur at all. *Texas v. United States*, 523 U.S. 296, 300 (1988).

Here the applications of the unconstitutional provisions are not contingent on some future event and, excepting the Review Threshold Law, were determined by the lower court as ripe. (R. 912.) With respect to the Review Threshold Law, it unequivocally deprives the counties of an administrative appeal unless the Commission's under valuation is more than 50% of fair market value of the property. This means that assessed values that fall below fair market value go unchallenged. This deprivation is ripe for challenge.

The operational effect of pre-requisite 50% bar- which exists on the face of the statute - creates two subclassifications of those who may challenge the assessed value: (1) the property owner and subject taxpayer; and (2) the Counties on behalf of all other taxpayers required to bear their proportional share of the tax burden. (R. 19-20 at ¶77-82, R. 27 at ¶¶ 123-124). The subclasses are then treated disparately, significantly diluting the Counties' ability to and/or insulating airline property assessments from review while heightening the owner/subject taxpayer's ability to challenge property assessments without any jurisdictional value requirements. (Id.) This statutory scheme thus deprives the Counties ab initio to challenge property assessments that fall short of the statute's 50% percentage prerequisite. (R. 27 at ¶¶123-124.)

Therefore, through this operation, "a county's ability to seek administrative review of an assessment by the State Tax Commission is limited, allowing an appeal only in those circumstances where the county reasonably believes fair market value is 50% greater than

assessment or prior year's assessment." (R. 20 at ¶ 80.) "If an assessment is below fair market value, but not below the 50% threshold of Section 59-2-1007(2)(b), only the taxpayer can seek administrative review." (R. 20 at ¶ 81.) "All other taxpayers . . . have no right to file for administrative or judicial review of those assessments." (R. 20 at ¶82.)

In sum, it is the Review Threshold Law alone that imposes legal consequences upon the Counties and the constitutionality of the Review Threshold Law is not any less reviewable because the 50% bar did not operate to deny or cancel a specifically *appealed* assessment brought before the Commission. Rather, it is enough that failing to meet the 50% threshold penalizes the Counties' right to seek redress with the Commission to assure [uniformity and equalization among tax payers]. (R. 27 at ¶¶123-124.) If a statute has that effect, it is ripe and does not cease to be so merely because it is not certain whether an assessment's taxable value is above the 50% threshold to enforce the penalty preventing review. (R. 913.)

It is the statutory bar regulating appeal proceedings that require the Commission to reject or authorize it to prevent an appeal on the grounds specified in the statute without more. (R. 27 at ¶¶ 123-124.) If the statutory bar is valid, it alters the status of the Counties' right to review and thus determines the validity of the appeal in advance of such administrative proceeding. (*Id*.) By striking the Counties' appeals by a determination proclaimed in advance, the statute itself imposes a penalty and sanction for noncompliance. (*Id*.) Under such circumstances, when the State has promulgated jurisdictional requirements and the expected conformity to those statutes causes injury (loss of the right

to appeal) it is a claim cognizable and appropriately the subject of attack making it ripe for review. *Baird v. State*, 574 P.2d at 716 (1978). It is not and cannot be, as Appellees' contend, grounded solely on whether there is a "reduced assessment" at issue. (Appellees' (State) Brief at p. 17.)

## IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES DOES NOT APPLY TO THE APPEALED CLAIMS.

The County's appealed claims directly challenge the constitutional standing of the Challenged Laws. The district court has jurisdiction to adjudicate these claims, not the Tax Commission. *Mack v. Utah State DOC*, 2009 UT 47, ¶ 3 ("A district court has subject matter jurisdiction over a legal claim unless adjudicative authority for that claim is specifically delegated to an administrative agency." Utah Code § 78a-5-102; *State Tax Comm'n v. Wright*, 596 P.2d 634, 636 (Utah 1979) (quoting *Shea v. State Tax Commission*, 101 Utah 209, 212, 120 P.2d 274, 275 (1941) (holding the Tax Commission lacks subject matter jurisdiction "to determine or resolve questions of legality or the constitutionality of legislative enactments."); *see also*, *Nebeker v. State Tax Comm'n*, 2001 UT 74, ¶23, 34 P.3d 180 (internal citations omitted.

Contrary to the Airline's argument, the doctrine of administrative exhaustion does not apply to all challenges simply because they involve "taxation." *TDM, Inc. v. Tax Comm'n*, 2004 UT App 433, ¶ 5 ("Exhaustion of administrative remedies is not required when the "legal questions involved are threshold questions, and their determination could not [be] avoided by any turn the case might have taken in [an administrative proceeding]") (quoting *Brumely v. Tax Comm'n*, 868 P.2d 796, 799 (Utah 1993)). Administrative

exhaustion remains an affirmative defense to certain causes of actions and "a court may mandate exhaustion of administrative claims that are viewed as necessary predicates to litigation of constitutional claims. *Stream Access Coalition*, 2019 UT 7, ¶ 47; *Nebeker*, 2001 UT 74, ¶ 14. However, exhaustion is not required where the claims are not "necessary predicates," "there is no administrative determination that could obviate the need to reach the constitutional issue" and "administrative remedies would serve no useful purpose." *Id.*; *TDM, Inc. v. Tax Comm'n*, 2004 UT App 433, ¶ 6.

### A. ADMINISTRATIVE EXHAUSTION IS NOT PRECEDENT, OBVIATES THE CONSTITUTIONAL CLAIMS OR ASSISTS IN FRAMING THE ISSUES.

At most, the Tax Commission, as a statutorily created agency, has only those powers expressly or impliedly granted by statute. Utah Code § 78A-5-1023. The adjudicative authority granted to the Tax Commission is to resolve challenges of property and fair market value taxation determinations a.k.a. tax assessment challenges. Utah Code § 59-2-1007(10-12).

The State Tax Commission has neither expressly or implicitly been granted authority to determine or resolve questions of legality or constitutionality of legislative enactments. *State Tax Comm'n v. Wright*, 596 P.2d 634, 636 (Utah 1979) (quoting *Shea*, 120 P.2d at 275 (Tax Commission lacks subject matter jurisdiction "to determine or resolve questions of legality or the constitutionality of legislative enactments.").[2] And, it is this

2 Appellees' concede that the Tax Commission cannot determine the question of legality or constitutionality of the Challenged Laws. (Appellees' (Airlines) Brief at p. 13); (State's Brief at p. 13, n. 2 (adopting Airline Appellees' arguments)).

absence of deferred authority to the Tax Commission that is determinative here; which contrary to Appellees' suggestive argument is not "illuminated or altered by the agency's expertise" or authority to determine "fair market value and . . . property subject to taxation." *Hurley v. Board of Review*, 767 P.2d 524, 527 (Utah 1988); (Appellees' (Airlines) Brief at pp. 8-12.)[3]. The fact the Tax Commission possesses adjudicative authority over property and value determinations does not and cannot make its lack of subject matter jurisdiction over the pure constitutional challenges at issue here deniable.

Subject matter jurisdiction is the fundamental competence of a body to resolve certain constitutional disputes and in this case, it would be axiomatic to require exhaustion through the Tax Commission who wholly lacks the ability to decide the controversy and is prohibited from doing "anything beyond dismissing the proceeding." *Blaine Hudson Printing v. Utah State Tax Commission*, 870 P.2d 291, 292 (Utah Ct. App. 1994); *SMP, Inc. v. Kirkham*, 843 P.2d 531, 533 (Utah Ct. App. 1992) (citing *Bevans v. Industrial Comm'n*, 790 P.2d 573, 576 (Utah Ct. App. 1990) (citing *Copper State Thrift and Loan v. Bruno*, 753 P.2d 387, 389 (Utah Ct. App. 1987)).[4]

## A. COUNTIES ARE NOT REQUIRED TO OBTAIN DISMISSAL FROM THE TAX COMMISSION AS A PRERQUISITE TO LITIGATION.

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3 The Counties do not dispute the general concept that the constitution grants the Commission authority to determine fair market value, but that is not the question raised by the Counties' appealed claims. (R. 1-30).

4 The State's opening brief criticizes the Counties' argument that district court's disregard of the four Tax Commission orders that dismiss the appeals at the outset for lack of jurisdiction was error. (State Appellees' (State) Brief at p. 19.) However, the district court considered those appeals, including ordering supplemental briefing and referencing them in its decision. (R. 787-788, 912). It is the courts decision to summarily regard them as unhelpful the Counties' contend was error. (Appellants' Opening Brief at p. 12.)

The District Court improperly applied an all-encompassing position (which the Airlines urge this Court to uphold) that prior to filing *any* judicial action involving the constitutionality of a tax statute, a party is mandated to bring and exhaust a preemptory challenge to "an actual tax assessment" before the Tax Commission. (Appellees' (Airlines) Brief at p. 12); (R. 913-915). To accept the Airlines' premise, there must be an "actual tax assessment" that gives rise or is connected to the constitutional deprivations—here there is not. It is the plain language and pre-assessment enforcement of the statutes in themselves that causes constitutional infirmities. (R. 1-30 at ¶¶ 83 - 125). Pointedly, there is no administrative claim or claims of an "actual tax assessment" that is a necessary predicate to the litigation of:

(1) Whether non-discretionary, statutory requirements imposing a higher and non-uniform assessment standard of "clear and convincing evidence" only for a specific industry and specific property under Utah Code § 2-201(4) are constitutional;

(2) Whether a non-discretionary, statutory requirement limiting the Commission's, exclusive subject matter jurisdiction to hear appeals of fair market value taxation determinations asserted by a County under Utah Code § 59-2-1007(2)(b) is constitutional; and

(3) Whether a non-discretionary, statutory allocation methodology that is mathematically flawed to not capture 100% of taxable value found in Utah Code § 59-2-804 is constitutional.

(R. 1-30).

The Counties acknowledge that the Complaint contains background facts that reference value and the Airlines have highlighted some. (Appellees' (Airlines) Brief at pp. 17-19.) However, adjudication of the referenced factual averments is not necessary for the court to adjudicate the appealed claims and as such were alleged to provide context and basis for standing. (R. 962:19-963:2). What is more, Airlines' justification for exhaustion that the Commission may ultimately find: (1) an assessment fairly determined fair market value of aircraft; (2) or that a different valuation methodology is warranted, because of "clear and convincing evidence," does not obviate the constitutional challenges to the Challenged Laws as made in the applied claims. (R. 13-20.)

### B. NONE OF THE COUNTIES' APPEALED CONSTITIONAL CLAIMS RELY ON FACTUAL FINDINGS WITHIN THE PROVINCE OF THE TAX COMMISSION.

Equally true here, is that there are no administrative factual findings that could conceivably assist in framing, developing, or extinguishing the appealed claims. The constitutional questions are straight forward. Can the Legislature require the Commission to use a "clear and convincing standard" while all other taxpayers are assessed using a preponderance standard? Can the Legislature require the Commission to use an interstate allocation factor that fails to allocate 100% of the property? Can the Legislature prevent administrative review of assessments that fall below fair market value? The uselessness of requiring administrative exhaustion of the appealed claims emerges when examining Appellees' asserted "likelihoods" of factual findings that they allege could be made at the administrative level.

The Airlines argue that the Commission "may conclude that . . . Utah Code § 59-2-201(4)(d) does not require the Commission to use clear and convincing evidence to determine fair market value." (Appellees' (Airlines) Brief at p. 15). But the Counties' claim of unconstitutionality found in § 59-2-201(4)(d) is the existence of a heightened standard (clear and convincing evidence) one must initially overcome to find fair market value while all other properties are valued using a preponderance standard. Utah Code § 59-2-201(4)(d) ("the commission may use an alternative value . . . if the commission (i) has clear and convincing evidence that the aircraft values reflected in the aircraft pricing guide do not reasonably reflect fair market value of the aircraft; . . .") Whether the Commission *may* overcome the clear and convincing standard allowing an aircraft's value to be determined by something other than the aircraft price guide value is irrelevant.[5] The statute itself contravenes constitutional uniformity mandates because its establishment of a different, separate, and higher standard for review for only a select type of personal property that favors these assessments over all other property valuations. All other types of taxable personal property require only a showing by a preponderance of evidence that the stated value falls short of fair market valuation. Put another way, to comport with constitutional standards of uniformity, reviewability of a fair market valuation of aircraft should be subject to the *same* uniform standard of review to ensure equal accountability of uniform and equal taxation under Article XIII, Section 2(1) of the Utah Constitution. Utah Utah

5 Ironically, if the heightened standard is met so that an alternative method can be used, then the Statute has no purpose. But that is not the County's challenge.

Code § 59-2-201(4)(d) fails to implement the same, uniform standard of review to aircraft valuation.

The Airlines also argue that "among other likelihoods" administrative adjudication "may conclude that the Counties do not have sufficient evidence of an undervaluation of airline property under any evidentiary standard." (Appellees' (Airlines) Brief at p. 15.) Similar to above, the Counties' claim under the Review Threshold Law is not contingent on any future determination of undervaluation. Rather, as discussed above, the Review Threshold Law, in its genesis and on its face, and in its practical operation, promulgates and implements a rule that operates ab initio to control the relationship between the Counties, the Utah State Tax Commission, and the subject tax-payers. It is the statutory jurisdictional prerequisite imposed upon only the Counties that deprive them of the *opportunity* to pursue an appeal of a specific airline assessment. (R. 27 at ¶ 123-124.)

Under similar circumstances as here, where an individual's right to appeal has been abridged and decisions insulated from review, this Court has noted that Utah's "constitutional requirements that assessments be both uniform and represent fair-market value would be undermined" because no one would be left to challenge the assessments to ensure constitutional compliance. *See, e.g. Kimball Condos. Owners Ass'n v. County Bd. of Equalization*, 943 P.2d 642, 647 (Utah 1997)[6]; see also, *Kennecott Corp., v. Salt Lake*

6 In *Kimball Condos. Owners Ass'n v. County Bd. of Equalization*, 943 P.2d 642, 647 (Utah 1997), this Court noted that "if the assessor had no right of appeal from board of equalization decisions, many decisions would be insulated from review altogether. Certainly, taxpayers who successfully contest an assessment would have no reason to appeal, if a board of equalization erred in construing constitutional or statutory provisions

*County*, 702 P.2d 451, 455 (Utah 1985) (stating that "[i]f counties do not have standing to challenge underassessments of state-assessed properties, then underassessments could be effectively insulated from challenges, which would not likely be made by either a state-assessed property owner, by the Tax Commission (which made the underassessment), or by any county-assessed taxpayer.")

Lastly, the Airlines argue that an evidentiary hearing before the Commission may validate the Allocation Law under a variety of theories by: identifying "what portion of airline property is not being taxed"; determining whether the State "has a sufficient nexus with any such property to subject it to taxation"; or if preemption pursuant to 49 U.S.C. § 40116 applies... (Appellees' (Airlines) Brief at 16.) Again, Appellees err.

The Legislature imposes a non-discretionary application of a mathematically flawed formula that fails to allocate 100% of fair market value of airline property. *Id*. The formula mandates the use of an allocation factor based upon revenue ton miles, but, through definition, includes miles in the numerator that will never be included in the denominator. This remains true no matter what the inputted values are or any subsequent identification or quantification of "what portion of airline property [in any given assessment] [] is [or is] not being taxed." (R. 575). The Allocation Law prevents the Commission from constructing an allocation factor that meets the federal law concerns raised by the Airlines but allocates 100% of the fair market value. Assuming *arguendo* the Airlines' hypothetical that the Commission could find such a method justified under federal law, it does not

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in the taxpayer's favor. In that case, the decision would stand because there would be no one who both would and could appeal."

remove the constitutional infirmity. Even if the Commission finds federal law preempts and thus mandatory, does not detract from the fact the Allocation Law precludes the Commission from utilizing an alternative, nonfederal-law-offending, allocation method based upon the number of flights. Utah Code § 59-2-804. Further, if the "flyover" aircraft is not taxable by federal law as the Airlines assert, the Allocation Law prevents the Commission from removing "flyover" miles from the denominator insuring an internally inconsistent formula.

Irrespective, however, the Court in addressing the Allocation Law's unconstitutionality does not have to reach a conclusion as to what allocation method would be proper. At most, it must only determine that the Legislature cannot require to the Commission to use a factor that results in less than 100% allocation of taxable property.

## CONCLUSION

For every statute being challenged, there is simply no administrative remedy the Tax Commission can provide that will resolve the constitutional challenges. In fact, the Commission lacks subject matter jurisdiction to address or determine any legality or constitutionality of the laws. Asking the Commission to address constitutional challenges respecting which it has no authority and cannot resolve serves no purpose.

All of the Challenged Laws, including the Review Threshold Law, are in force, have been applied, and have had real world effects on the Plaintiffs and taxpayers. The controversy over the application of the Review Threshold Law is anything but hypothetical and has sharpened into an actual clash of legal rights and obligations between the Counties

and State. For these reasons, and those submitted in the Counties' opening brief, the district court's Ruling and Order dismissing the Counties' First, Third, Sixth, Seventh, Eighth, Tenth, and Eleventh causes of action should be reversed and the matter remanded to the trial court for further proceedings.

Dated this 11th day of April 2019.

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**Certificate of Compliance with Rule Utah Rule of Appellate Procedure 24(a)(11)**

Certificate of Compliance with Page or Word Limitation, Typeface Requirements, and Addendum Requirements

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Dated this 11th day of April 2019.

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## CERTIFICATE OF SERVICE

I certify that on the 11th day of April 2019, a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF was sent via email to the following:

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